CROWN COURT OF CANADA

(ON APPEAL FROM THE FEDERAL COURT OF CANADA)

BETWEEN:

Helena KADARE

Halit KADARE

Appellants

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

RESPONDENT'S MEMORANDUM OF ARGUMENT

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Counsel for the Respondent

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OVERVIEW

1. This case is about protecting the integrity of Canada's immigration and refugee system by vacating the refugee status of individuals who do not require international protection. The Appellants, Helena and Halit Kadare, concede that they received refugee status because of their father's material misrepresentations. They should not be permitted to maintain their improperly obtained status merely due to the passage of time.

2. The vacation proceedings, brought by the Respondent pursuant to s. 109 of the *Immigration and Refugee Protection Act* ("*IRPA*"), do not constitute an abuse of process.[1] First, the delay was not inordinate. The delay should be recalculated starting from the initiation of the vacation proceedings. Regardless of how the delay is calculated, it was not inordinate when considered in light of the important nature and purpose of vacation.

3. Second, the delay did not impair hearing fairness. The Appellants had an effective summary of the lost record through the decision of the initial Refugee Protection Division ("RPD") panel that granted their status. All relevant evidence from the original record was either tainted by the misrepresentations or can be reconstructed in the present.

4. Third, the Appellants failed to provide evidence of significant personal prejudice beyond the consequences ordinarily attached to legal proceedings. The prejudices they raised related to their establishment in Canada were not caused by the delay and thus irrelevant to the analysis.

5. Even if an abuse of process were to be established, a stay of proceedings would not be the appropriate remedy. Other administrative remedies are available to address the prejudice without bypassing the vacation hearing. The Appellants have other legislative avenues to remedy the hardship of removal if their status is vacated, such as pursuing permanent residency ("PR") on

[1] *Immigration and Refugee Protection Act*, SC 2001, c 27, s 109 [*IRPA*].

humanitarian and compassionate ("H&C") grounds, pre-removal risk assessments ("PRRA"), temporary resident permits ("TRP"), or overseas sponsorship.

6. Finally, the Certified Question should be answered in the negative. In the context of vacation proceedings, an abuse of process should ***not*** be found where the only alleged prejudice is personal prejudice resulting from indirect material misrepresentations. This interpretation should be adopted to respect Canada's international law obligations and Parliament's exclusive authority to grant status under the *IRPA*.

PART I: FACTS

1) Background

7. The Appellants are citizens of Albania. They came to Canada in May 1998 as dependents of their father Resmi Kadare and their mother Alba Kadare.[2]

8. Resmi Kadare made a refugee claim on behalf of the family upon their arrival in Canada. His Personal Information Form ("PIF") alleged that the Kadare family was involved in a blood feud with the neighboring Taho family. The blood feud led to the deaths of extended Kadare family members between the end of 1997 and early 1998. The Committee of Nationwide Reconciliation ("CNR"), an organization tasked with resolving blood feud conflicts in Albania, advised Resmi Kadare's extended family in March 1998 that reconciliation was futile.[3]

9. Resmi Kadare falsely claimed that he was personally targeted by threats and attacks from the Taho family between February and March 1998. He alleged that he left Albania with his wife and children after hearing the CNR's advice, travelling directly to Toronto.[4]

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[2] Reasons of RPD Board Member E. Henrique, Moot Problem at paras 6, 9 [Vacate Member's Reasons].
[3] Vacate Member's Reasons, *supra* note 2 at paras 7-9.
[4] Vacate Member's Reasons, *supra* note 2 at paras 8-9; Reasons of Justice P. Sivakumar, Moot Problem at para 16 [Sivakumar J's Reasons].

10. In June 1999, the RPD determined the Kadare family to be persons in need of protection under s. 97(1) of the *IRPA*. The RPD Member found Resmi Kadare to be a credible witness. His oral testimony was consistent with his PIF and attached narrative, his supporting letters, and the country condition evidence found in the *National Documentation Package for Albania*. The Kadare family received PR status in August 2001.[5]

11. In 2005, Alba Kadare applied to renew her PR card. She disclosed to Immigration, Refugees and Citizenship Canada ("IRCC") that she had resided in Norway, not Albania, between January and April 1998. The IRCC and the Canada Border Services Agency conducted an investigation into the suspected misrepresentations. Norwegian authorities confirmed the Kadare family's residence in Norway later in 2005. The Appellants' citizenship applications were suspended pending the misrepresentation investigations.[6]

12. The Respondent Minister, the Minister of Public Safety and Emergency Preparedness ("Minister"), filed an application for vacation against the Kadare family on December 10, 2017. Only the Appellants responded to the application as Alba Kadare had passed away and Resmi Kadare's whereabouts are unknown. The Appellants filed an application to stay the vacation proceedings based on an alleged abuse of process on March 10, 2018. Both applications were decided by RPD Board Member Ellie Henrique ("Vacate Member") on September 14, 2020.[7]

2) Procedural History

13. The Vacate Member found that there was a *prima facie* case for vacation under s. 109(1) due to Resmi Kadare's material misrepresentations of the family's Norway residency.[8] In spite of this finding, she held that the Minister's delay in filing for vacation was abusive because it

[5] Vacate Member's Reasons, *supra* note 2 at paras 10-12.
[6] Vacate Member's Reasons, *supra* note 2 at paras 14-15.
[7] Vacate Member's Reasons, *supra* note 2 at paras 2-5, 19.
[8] Vacate Member's Reasons, *supra* note 2 at para 25.

caused hearing unfairness and personal prejudice. First, the Vacate Member could not conduct a s. 109(2) analysis because witnesses and records from the 1999 RPD hearing were lost over time.[9] Second, the Appellants were personally prejudiced by the delay due to their uncertainties about their futures in Canada.[10] As a result, the Vacate Member granted a stay of proceedings. She believed that it was not in the public interest to vacate the Appellants' status as they were innocent of their father's misrepresentations.[11]

14. Justice Sivakumar reversed the Vacate Member's decision on appeal, finding that she erred in relying on irrelevant factors outside of a strict vacation analysis. First, the Vacate Member could have fairly analyzed s. 109(2) based on the first RPD Member's decision rather than speculating on the contents of the original record.[12] Second, the Appellants did not suffer personal prejudice as they enjoyed the benefits of PR throughout the delay period.[13] Finally, the Vacate Member erred in granting a stay of proceedings as the Appellants' innocence is irrelevant to the test for vacation. It was in the public interest to vacate their status and maintain the integrity of the refugee and immigration system. Justice Sivakumar certified one question on appeal, which is reproduced in Part II below.[14]

[9] Vacate Member's Reasons, *supra* note 2 at para 28.
[10] Vacate Member's Reasons, *supra* note 2 at paras 63-65.
[11] Vacate Member's Reasons, *supra* note 2 at para 67.
[12] Sivakumar J's Reasons, *supra* note 4 at paras 15, 18.
[13] Sivakumar J's Reasons, *supra* note 4 at paras 24-25.
[14] Sivakumar J's Reasons, *supra* note 4 at paras 28-30.

PART II: POINTS IN ISSUE

15. This appeal raises the following issues:

1) Did the Federal Court err in finding that there was no abuse of process due to administrative delay?

A) Was the delay inordinate?

B) Did the delay compromise the fairness of the vacation hearing?

C) Did the delay cause significant personal prejudice at such a magnitude that the immigration and refugee system is brought into disrepute?

i) Certified Question: "[i]n the context of an application to vacate refugee status pursuant to s. 109 of the *Immigration and Refugee Protection Act*, can an abuse of process be found where a material, but indirect, misrepresentation has been conceded or otherwise established and where the only alleged prejudice is personal prejudice that is a direct result of this material misrepresentation?"

2) If an abuse of process were to be established, would a stay of proceedings be an appropriate remedy?

PART III: ARGUMENT

1) The Appellants failed to establish an abuse of process

16. The parties agree that the appropriate standard of review is correctness. The Federal Court's finding that there was no abuse of process is correct and should be upheld.

17. The Appellants have failed to establish an abuse of process, or that the current proceedings are "unfair to the point that they are contrary to the interests of justice."[15] They have

[15] *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at para 120 [*Blencoe*].

the onus of meeting the abuse of process test set out in *Blencoe v British Columbia (Human Rights Commission)* [*Blencoe*]. Under this test, they must first establish that the delay was inordinate.[16] They must then prove that inordinate delay caused at least one of two types of prejudice: hearing unfairness ("*Blencoe*'s first branch") and/or significant personal prejudice at a magnitude that puts the administrative process into disrepute ("*Blencoe*'s second branch").[17] The delay in this case was not inordinate and the Appellants do not meet the high bars under either branch of the *Blencoe* test.[18]

A. The delay was not inordinate

18. The Appellants cannot establish an abuse of process by pointing to the existence of the delay alone. The delay must be inordinate, meaning that it must be "unacceptable to the point of being so oppressive as to taint the proceedings."[19] The delay should be recalculated starting from the formal initiation of the vacation proceedings to reflect recent Federal Court jurisprudence. This recalculated delay of 2 years and 9 months was not inordinate. In the alternative, even if the length of the delay was 12 years, the delay was not inordinate when considered in light of the nature and purpose of the proceedings.

i. The length of the delay should be recalculated

19. The length of the delay is 2 years and 9 months. It should be recalculated in accordance with the Federal Court's recent guidance in *Torre v Canada (MCI)* [*Torre*]. For the delay to qualify as an abuse of process, the delay "must have been part of an administrative or legal proceeding that was already underway." The delay is calculated starting from when the administrative proceedings are formally initiated and ending when the administrative tribunal

[16] *Blencoe, supra* note 15 at para 101, 121.
[17] *Blencoe, supra* note 15 at paras 133, 102.
[18] *Blencoe, supra* note 15 at paras 104, 115, 120.
[19] *Blencoe, supra* note 15 at para 121.

renders its decision. *Torre* merely restated an existing legal trend: Justice Tremblay-Lamer relied on *Blencoe* and *Canada (MCI) v Katriuk* as examples of cases where the delay is calculated in this manner.[20] The *Torre* method has been applied by numerous Federal Court cases in the cessation and security inadmissibility contexts.[21]

20. Applying *Torre* to the current case, the delay should be calculated as the period between December 10, 2017 (when the Minister filed for vacation), and September 14, 2020 (when the Vacate Member rendered her decision). This is a timeframe of 2 years and 9 months.

21. The Respondent respectfully submits that this Court should follow the *Torre* line of cases for two policy reasons. First, the *Torre* method avoids imposing a judicial time limit on the Minister's investigations prior to formally initiating vacation proceedings. Parliament refrained from legislating time limitations on the filing of vacation applications, providing the Minister with significant discretion in their investigations. In addition to verifying the facts underlying the misrepresentation, the Minister must also consider the merits of seeking vacation. The Minister thus ought to be afforded deference and flexibility in his choice of investigative procedures as an administrative decision-maker.[22]

22. Second, the *Torre* method better reflects the minimal procedural fairness owed by the Minister prior to filing for vacation. Both cessation and vacation applications are filed by the

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[20] *Torre v Canada (Citizenship and Immigration)*, 2015 FC 591 at paras 30-32, aff'd 2016 FCA 48 on other grounds [*Torre* FC]; *Blencoe, supra* note 15 at para 132; *Canada (Minister of Citizenship and Immigration) v Katriuk*, [1999] 3 FC 143 at para 23, [1999] FCJ No 216.

[21] See e.g. *Seid v Canada (Citizenship and Immigration)*, 2018 FC 1167 at paras 30-31 [*Seid*] (in the context of cessation); *Cerna v Canada (Citizenship and Immigration)*, 2021 FC 973 at paras 37, 43 [*Cerna*] (in the context of cessation); *Ismaili v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 427 at paras 29-30 (in the context of security inadmissibility); *Ching v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 839 at para 79 [*Ching*] (in the context of security inadmissibility); *Canada (Public Safety and Emergency Preparedness) v Najafi*, 2019 FC 594 at para 40 [*Najafi* FC] (in the context of security inadmissibility).

[22] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 24; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 243 NR 22 at para 27.

relevant Minister to the RPD in accordance to r. 64 of the *Refugee Protection Division Rules.*[23] In the cessation context, the Federal Court of Appeal interpreted the duty of procedural fairness in r. 64 applications to be minimal because it is a preliminary decision where no rights are determined. The RPD only makes a final decision to cessate or vacate following a hearing, during which the protected person is afforded more procedural protections.[24]

23. In the present case, the Minister was under no duty to act in a more expeditious manner. They were not required to notify the Appellants that they were under investigation.[25] The Minister satisfied the requirements of r. 64(1) by providing the Appellants with a copy of their vacation application once it was filed. Calculating the delay starting from the investigative stage would impose an additional burden on the Minister beyond the scope of their procedural fairness obligations.

ii. The recharacterized delay was not inordinate

24. The delay in this proceeding should be treated like the analogous case of *Seid v Canada (MCI)* [*Seid*]. *Seid* was a cessation case that followed the *Torre* method of calculating delay. In *Seid,* the Minister of Citizenship and Immigration was aware of Mr. Seid's reavailment in 2009 but did not file the r. 64 application until 2016. The Federal Court calculated the delay starting from 2016 and found that the proceedings were settled in a reasonable timeframe of 2 years and 2 months. The Federal Court did not consider the 17-year period between 2009 and 2016 within its *Blencoe* analysis.[26]

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[23] *Refugee Protection Division Rules,* SOR/2012-256 at r 64; *IRPA, supra* note 1, s 108; *Canada (Public Safety and Emergency Preparedness) v Zaric,* 2015 FC 837 at para 24 (vacation and cessation are the two ways that protected persons could lose status under the *IRPA*).
[24] *Canada (Citizenship and Immigration) v Bermudez,* 2016 FCA 131 at paras 49-50.
[25] *Olvera Romero v Canada (Citizenship and Immigration),* 2014 FC 671 at para 77 (in the context of cessation).
[26] *Seid, supra* note 21 at paras 2, 30-31, citing *Torre* FC, *supra* note 20 at para 32.

25. Similarly, delay prior to the Minister's r. 64 application in 2017 should not be considered within the present *Blencoe* analysis. The vacation proceedings were settled in a reasonable timeframe of 2 years and 9 months, especially when considering the relevant contextual factors. Whether the delay was inordinate depends on contextual factors including: the purpose and nature of the proceedings; the nature of the case; the nature of the rights at stake; and whether the Appellants contributed to the delay.[27] This proceeding took time because it carried serious consequences and because the Appellants raised complex legal arguments.[28] The delay was therefore not oppressive or inordinate.

iii. In the alternative, the delay was not inordinate even as currently calculated

26. In the alternative, the delay was not inordinate even if it was characterized as the 12 years between 2005 and 2017. The Appellants submit that the delay should be calculated as the timeframe starting from when the Minister has sufficient information to initiate proceedings and ending when the proceedings are formally initiated.[29]

27. A proper application of the contextual factors shows that this delay was not inordinate. The length of the delay alone is not determinative of the contextual analysis. Dismissing a vacation application on the basis of delay alone would create a judicially-imposed limitation period.[30] The public's confidence in the immigration and refugee system would be undermined if Resmi Kadare's misrepresentations were left unaddressed merely due to the passage of time.

28. The nature and purpose of vacation proceedings outweigh the other contextual factors. Once it is determined that refugee protection was obtained due to material misrepresentations,

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[27] *Blencoe, supra* note 15 at para 122.
[28] *IRPA, supra* note 1, s 46(1)(d).
[29] Vacate Member's Reasons, *supra* note 2 at para 63.
[30] *Blencoe, supra* note 15 at paras 101, 122; *Ching, supra* note 21 at para 81; *Akthar v Canada (Minister of Employment and Immigration)*, [1991] 3 FC 32, 129 NR 71; *Canada (Minister of Citizenship and Immigration) v Cortez*, [2000] FCJ No 115 at para 19, 181 FTR 96.

vacation proceedings serve to reverse that erroneous grant of protection.[31] As recognized in *Logeswaren v Canada* (*MCI*), "[t]he importance of integrity in the refugee protection system is too important to permit undeserving persons from benefiting from the system where there is good reason for revocation of these benefits."[32] The Minister had to carefully balance the merits of the application and the impacts of misrepresentation on the integrity of Canada's refugee and immigration system. It was reasonable for the Minister to take more time given the serious consequences of vacation and the public interest factors at stake.[33] The delay was thus not so oppressive as to taint the proceedings.

B. There was no abuse of process under *Blencoe*'s first branch: the delay did not compromise the fairness of the vacation hearing

29. Even if the delay was inordinate, the delay did not cause hearing unfairness under *Blencoe*'s first branch. Delay may impair hearing fairness if it compromises the parties' ability to answer the allegations brought against them. Hearing unfairness must be "so obvious" that it amounts to a denial of natural justice.[34] In this case, this high standard was not met.

30. The Appellants have conceded that there was no hearing unfairness with respect to the s. 109(1) analysis: their refugee status was obtained as a result of Resmi Kadare's misrepresentation of material facts.[35]

31. Delay also did not compromise the fairness of the s. 109(2) analysis. Under s. 109(2), the Vacate Member may reject the vacation application if she is satisfied that there was other

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[31] *Mella v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 1587 at para 30 [*Mella*].
[32] *Logeswaren v Canada (Minister of Citizenship and Immigration)*, 2004 FC 886 at para 27.
[33] *X (Re)*, 2018 CanLII 72628 (CA IRB) at para 41.
[34] *Blencoe*, *supra* note 15 at paras 102, 104.
[35] Sivakumar J's Reasons, *supra* note 4 at para 14.

sufficient evidence from the time of the initial RPD determination to justify refugee protection.[36] She must conduct the s. 109(2) analysis after removing evidence tainted by the misrepresentations. At the vacation hearing, the Appellants may not submit additional evidence that was not in the original record to prove that their initial refugee claims were genuine.[37] The Vacate Member could have fairly assessed s. 109(2) without the full original record or witnesses.

i. The Vacate Member had sufficient evidence to make an informed decision

32. The Vacate Member could have fairly disposed of the s. 109(2) analysis using the evidence before her: the initial RPD decision, Resmi Kadare's PIF, and his PIF narrative. The full record and transcript from the initial RPD hearing was not necessary and its absence did not impair hearing fairness to a level that was abusive.

33. Mere absence of a transcript or recording does not, in itself, amount to a breach of procedural fairness within a vacation hearing. A party's rights to natural justice will only be infringed if the Vacate Member cannot properly dispose of the issues before her.[38] In addition, the Supreme Court of Canada stated in *Canada (MCI) v Harkat* that summaries of the original record are "sufficient to prevent significant prejudice to [the appellant]'s ability to know and meet the case against them."[39]

34. The Appellants knew the case against them because the surviving evidence provided a summary of the lost materials in the original record. From the initial RPD decision, the Appellants knew that the contents of Resmi Kadare's oral testimony, supporting letters, and

[36] *IRPA*, *supra* note 1, s 109(2).
[37] *Coomaraswamy v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 153 at para 15 [*Coomaraswamy*].
[38] *Hailu v Canada (Citizenship and Immigration)*, 2021 FC 15 at paras 28-29 [*Hailu*]; *Omar v Canada (Citizenship and Immigration)*, 2015 FC 602 at paras 29-30, citing *Canadian Union of Public Employees, Local 301 v Montreal (City)*, [1997] 1 SCR 793 at para 83, 210 NR 101.
[39] *Canada (Citizenship and Immigration) v Harkat*, 2014 SCC 37 at paras 97-98.

country condition evidence were consistent with Resmi Kadare's PIF and narrative.[40] Their father's PIF and narrative was available to them in full.[41] Despite the full record being unavailable, the Appellants' ability to respond to the vacation application was not prejudiced.

35. The Appellants' case is analogous to *Hailu v Canada (MCI)*, where the Federal Court found that the vacation application could be fairly disposed of without the transcript because the first RPD decision was clear and straightforward.[42] The Federal Court rejected Ms. Hailu's speculations that her initial RPD panel could have made its determination based on other evidence not mentioned in its decision. Like in *Hailu*, the initial RPD decision in the Appellants' case clearly laid out the RPD Member's reasoning: Resmi Kadare's oral testimony, which contained material misrepresentations, was crucial to the family receiving their refugee status.[43] Since Resmi Kadare's oral testimony was focused primarily on the attacks he allegedly experienced in 1998, it was speculative for the Appellants to argue that they could have been granted refugee status due to the 1997 events.[44] The Vacate Member had access to enough evidence to make an informed decision on the vacation hearing, and she erred in not doing so.

36. The Appellants cannot rely on *R v Carosella* [*Carosella*] to argue that a full record is necessary to reconstruct their claim.[45] *Carosella* cannot be applied in the immigration context because it is a criminal case. The Crown's failure to disclose a full record is sufficient to breach an accused's right to make full answer and defence under s. 7 of the *Canadian Charter of Rights and Freedom* [*Charter*]. The accused does not have to show that their defence was prejudiced by

[40] Vacate Member's Reasons, *supra* note 2 at paras 10.
[41] Vacate Member's Reasons, *supra* note 2 at paras 18.
[42] *Hailu*, *supra* note 38 at paras 28-29.
[43] Vacate Member's Reasons, *supra* note 2 at para 10.
[44] Sivakumar J's Reasons, *supra* note 4 at para 20.
[45] Vacate Member's Reasons, *supra* note 2 at para 45.

the loss of record.[46] In contrast, the Appellants' s. 7 rights are not engaged in the present vacation proceedings because vacation does not automatically result in their deportation.[47] In this immigration proceeding where s. 7 rights are not at issue, the Appellants bear an additional burden of proving that the lack of a record has in fact resulted in prejudice to hearing fairness.[48] The Appellants have not discharged this burden.

ii. The tainted evidence should not be considered in the s. 109(2) analysis.

37. The delay did not impair hearing fairness because the lost evidence was tainted by the misrepresentations and should have been irrelevant to the Vacate Member's s. 109(2) analysis. After confirming Resmi Kadare's misrepresentations, it was the Vacate Member's responsibility to reassess the credibility of the remaining evidence and exclude tainted evidence.[49] An individual's lack of credibility taints and undermines the weight of the other evidence submitted at the initial vacation hearing, especially if that other evidence was largely based on the individual's testimony.[50] Resmi Kadare's oral testimony was tainted and not credible because it contained material misrepresentations. The negative credibility of the oral testimony tainted the supporting letters, since the supporting letters corroborated the oral testimony.[51] Consequently, even if both pieces of evidence were available, they ought to have been excluded from the s. 109(2) analysis. The Vacate Member erred in finding the loss of this tainted evidence to be prejudicial.

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[46] *R v Carosella,* [1997] 1 SCR 80 at para 27, 207 NR 321 [*Carosella*]; *Canadian Charter of Rights and Freedoms,* s 7, 11, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].
[47] *Coomaraswamy, supra* note 37 at para 24.
[48] *Blencoe, supra* note 15 at para 104.
[49] *Naqvi v Canada (Minister of Citizenship and Immigration),* 2004 FC 1605 at para 10.
[50] *Waraich v Canada (Citizenship and Immigration),* 2010 FC 1257 at paras 41-42; *Oukacine v Canada (Citizenship and Immigration),* 2006 FC 1376 at paras 31-32.
[51] Vacate Member's Reasons, *supra* note 2 at para 10.

iii. The loss of witnesses did not impact hearing fairness

38. Hearing fairness was not impaired even though Resmi and Alba Kadare were not available as witnesses. The Appellants argued that their parents could assist the Vacate Member in her s. 109(2) analysis by testifying about the details of the blood feud and the evidence filed in support of their initial refugee claim.[52] In *Blencoe*, Mr. Blencoe similarly argued that hearing fairness was impaired because two of his witnesses died and memories of his other witnesses have faded. These arguments were rejected for being "vague assertions that fall far short of establishing an inability to prove facts necessary to respond to the complaints."[53]

39. The value of Resmi and Alba Kadare's lost testimony is limited and speculative. In the vacation hearing, Resmi and Alba Kadare would not be permitted to adduce new evidence about the blood feud that goes beyond what was already in the original record. As the Federal Court of Appeal emphasized in *Coomaraswamy v Canada (MCI)*, the s. 109(2) analysis is confined to the evidence from the first hearing. Claimants are not allowed "a second bite at the cherry" in proving their need for protection because that would award deception and remove the incentive to tell the truth.[54] Since Resmi Kadare's PIF and narrative were available in full, it would not be necessary for him to testify at the vacation hearing as he cannot elaborate on his initial narrative.[55] Alba Kadare received refugee status as her husband's dependent, so her testimony would be similar to Resmi Kadare's PIF and narrative.

40. Even if they were available, Resmi and Alba Kadare's testimonies about the contents of the lost evidence, such as the supporting letters, would be tainted. Resmi Kadare's misrepresentations significantly undermined their credibility, so both their potential testimonies

[52] Vacate Member's Reasons, *supra* note 2 at paras 36.
[53] *Blencoe, supra* note 15 at paras 103-104.
[54] *Coomaraswamy*, *supra* note 37 at para 15.
[55] Vacate Member's Reasons, *supra* note 2 at para 18.

would be excluded from the s. 109(2) analysis. The Appellants' ability to respond to the allegations against them has therefore not been affected by their parents' absence.

iv. The Appellants were entitled to reconstruct the record, but failed to do so

41. Any prejudice to hearing fairness could have been mitigated by reconstructing the record. In cases where the full record from the initial refugee determination is unavailable, the RPD has the discretion to allow the record to be reconstructed. Reconstruction may include compiling a package of documents that would represent a facsimile of the evidence at the original hearing.[56] The onus is on the Appellants to seek permission from the RPD to do so; they would also be responsible for reproducing the lost evidence from the first hearing. In *Selvakumaran v Canada (MCI)*, the Federal Court stated that while the absence of a full record made it more difficult for Ms. Selvakumaran to reconstruct the lost evidence, it ultimately did not prevent her from making a full defence in her vacation hearing.[57] If the Appellants were concerned about their ability to make a full defence, they should have sought permission and tried to reconstruct the record.

42. There is no evidence that the Appellants attempted to reconstruct the record for the purposes of the s. 109(2) analysis. They have not tried to reconstruct the country condition evidence on Albanian blood feuds. They have not tried to obtain copies of the supporting letters from their family in Albania. They have not tried to contact the CNR or their family in Albania to corroborate Resmi Kadare's PIF and narrative. The Vacate Member merely speculated that the Appellants may not find any useful information from their Albanian family members.[58]

43. The Vacate Member did not consider that the Appellants could have obtained usable evidence from the CNR. According to the Immigration and Refugee Board, the CNR is a nation-

[56] *Selvakumaran v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1445 at para 19.
[57] *Ibid* at para 21.
[58] Sivakumar J's Reasons, *supra* note 4 at para 21; Vacate Member's Reasons, *supra* note 2 at para 45.

wide non-governmental organization that mediates blood feuds in Albania. If the CNR verifies a blood feud and determines that it is difficult to reconcile, it issues an attestation letter. The CNR maintains and stores files for attested blood feuds, which includes information on the causes of the feud, contact information for the individuals involved, and notes on reconciliation attempts.[59] The Appellants could have contacted the CNR for the contact details of other Kadare members involved in the blood feud or an attestation letter, but they failed to do so.

v. The Appellants cannot justify their status even with the full record

44. The Appellants are not prejudiced by the delay as the availability of the full record would not have made a difference to the s. 109(2) analysis. The Appellants would not be able to justify their status under s. 97(1) after removing all the tainted evidence.

45. The full record, even if available, cannot prove that Resmi Kadare was personally at risk due to his misrepresentations. A person in need of protection under s. 97(1) is at risk of torture, cruel and unusual treatment or punishment, or loss of life. Crucially, s. 97(1) requires that the risk be personalized to the claimant.[60] Resmi Kadare's claims of being personally targeted in March 1998 turned out to be entirely false. Furthermore, there was no evidence indicating that he sought protection in Norway.

46. Resmi Kadare's failure to apply for refugee status in the four months he resided in Norway further impugned the overall credibility of his claim of personalized risk. The general presumption is that persons who flee persecution will seek protection at the first opportunity, and

[59] Canada, Immigration and Refugee Board, *Responses to Information Requests,* ALB103902.E (Canada: IRB, 1 February 2012), online: *Immigration and Refugee Board Canada* <https://irb.gc.ca/en/country-information/rir/Pages/index.aspx?doc=453797>.
[60] *IRPA*, *supra* note 1, s 97(1); *Raza v Canada (Citizenship and Immigration)*, 2006 FC 1385 at para 29.

a failure to do so may indicate that the claimant did not have a genuine fear of persecution.[61] While s. 97(1) does not require claimants to prove subjective fear, the RPD may evaluate a claimant's subjective fear in assessing credibility of personalized risk.[62] Resmi Kadare's inaction in Norway, therefore, suggests that he did not have a genuine fear. Hence, the Vacate Member should have found Resmi Kadare's allegations of personal risk not to be credible when reassessing the credibility of the remaining evidence.

47. Even if the remaining record could prove that some extended Kadare family members were killed in 1997, this would still be insufficient to establish that Resmi Kadare was personally at risk. Evidence of murdered relatives does not, without more, demonstrate risk to a specific claimant.[63] In addition, country condition evidence alone cannot establish personal risk or justify maintaining an individual's status under s. 109(2).[64] Since the Appellants are unlikely to establish personalized risk regardless of whether the record is lost, the Vacate Member erred in concluding that she was not able to conduct a s. 109(2) analysis.

48. In sum, the Appellants have failed to meet the first *Blencoe* branch. The Vacate Member could have made a decision under s. 109(2) based on the evidence before her, without needing the full record or the testimony of the Kadare parents. A majority of the lost evidence was tainted by misrepresentation and should have been deemed irrelevant. The Appellants could have reconstructed the record but made no attempts to do so. The Appellants are unlikely to justify their refugee status under s. 97(1) even with the full record. Consequently, hearing fairness was not impaired to such a degree that it was contrary to the interests of justice.

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[61] *Molano Fonnoll v Canada (Citizenship and Immigration)*, 2011 FC 1461 at para 50; *Ghotra v Canada (Immigration, Refugees and Citizenship)*, 2016 FC 1161 at para 18.
[62] *Sainnéus v Canada (Citizenship and Immigration)*, 2007 FC 249 at paras 8, 12.
[63] *Sarria v Canada (Citizenship and Immigration)*, 2007 FC 98 at para 20.
[64] *Canada (Public Safety and Emergency Preparedness) v Gunasingam*, 2008 FC 181 at para 18.

C. There was no abuse of process under *Blencoe's* second branch: the delay did not cause the Appellants significant personal prejudice

i. The Certified Question should be answered in the negative

49. In the context of vacation proceedings, abuse of process should not be found where the only prejudice alleged is personal prejudice resulting from indirect material misrepresentations. The Appellants alleged that they have experienced personal prejudice due to their establishment in Canada; this establishment was a result of their father's material misrepresentations.[65] If there was no hearing unfairness, an abuse of process determination should not maintain their unentitled status. Answering the Certified Question in the negative best respects Canada's international commitments and the government's division of powers.

50. First, it is contrary to public policy for Canada to provide individuals with the benefit of international protection if they are not entitled to it. An individual's refugee status is ordinarily nullified under s. 109(3) after a successful and fair vacation proceeding. This nullification recognizes that refugee status was erroneously granted and international protections were never needed in the first place.[66] If the doctrine of abuse of process was available as an avenue for relief, individuals would be able to circumvent a vacation proceeding on its merits. Consequently, they would be able to justify and maintain their unentitled refugee status on the basis of personal prejudice alone, even if there is no other underlying justification for it.

51. Improperly maintaining a person's refugee status deteriorates the integrity of the treaties that define the contours of international protection. As recognized by the United Nations High Commissioner for Refugees ("UNHCR"), erroneous grants of refugee protection must be rectified to preserve the integrity of the definition of "refugee" under the *Convention Relating to*

[65] Vacate Member's Reasons, *supra* note 2 at paras 60-62.
[66] *IRPA*, *supra* note 1, s 109(3); *Mella*, *supra* note 31 at para 30.

the Status of Refugees.[67] The UNHCR's statements equally apply to preserving the integrity of the definition of "person in need of protection" under s. 97 of the *IRPA*, as derived from the *Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*.[68] The abuse of process doctrine should not be applied in a manner that would erode Canada's commitments as a signatory to international treaties.

52. Second, using a common law doctrine to maintain or justify an individual's immigration status based solely on personal prejudice would violate Parliamentary supremacy. The doctrine of abuse of process is limited to challenging the adjudicative processes of the courts and quasi-judicial bodies. It is not intended to intercede in the legitimate activities of Parliament.[69] Courts should not use a common law doctrine to bypass Parliament's exclusive jurisdiction to grant and remove status under the *IRPA*.

53. Granting an abuse of process based on personal prejudice alone would be improper because Parliament has already designated proper mechanisms where individuals can obtain status in Canada based on their personal circumstances. The Respondent Minister and the Minister of Citizenship and Immigration have the delegated powers necessary to consider these personal circumstances. For example, the Ministers may consider personal circumstances prior to initiating formal inadmissibility proceedings under s. 44; grant equitable relief to PR requirements under s. 25(1), based on H&C factors such as establishment or undue hardships

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[67] United Nations High Commissioner for Refugees, *Note on the Cancellation of Refugee Status* (Geneva: United Nations, 2004) at 3; *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954, accession by Canada 4 June 1969). [*1951 Convention*]

[68] *Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987, accession by Canada 24 June 1987) [*Convention Against Torture*]; *IRPA, supra* note 1, 97(1).

[69] *J.P. v Plecas*, 2015 BCSC 1962 at para 47, citing *Toronto (City) v C.U.P.E., Local 79*, 2003 SCC 63.

upon deportation; grant PRRAs based on risks upon deportation under s. 112; or grant TRPs to inadmissible individuals if they have compelling reasons to stay in Canada under s. 24(1).[70] The personal prejudices raised by the Appellants should be properly addressed through these options.

54. It is contrary to the public interest to allow individuals to circumvent these legislated mechanisms through the abuse of process doctrine. Neither the courts nor the RPD have the authority to maintain immigration status within an abuse of process claim based on personal prejudices alone. The abuse of process analysis is not the proper mechanism to consider H&C factors.[71] It is not the proper mechanism to consider future risks or harms that may arise from deportation.[72] Answering the Certified Question in the negative ensures deference to Parliament's institutional designs and preserves the integrity of the immigration and refugee system, domestically and internationally.

ii. The Appellants are not significantly prejudiced by inordinate delay

55. If the Certified Question is answered in the negative, the Appellants cannot seek relief only on the basis of personal prejudice. Regardless, the inordinate delay did not cause the Appellants significant personal prejudice sufficient to meet the high bar under *Blencoe*'s second branch. Any prejudices the Appellants may have experienced due to their uncertain futures in Canada are irrelevant because these prejudices were not directly caused by the delay. The Appellants also provided no evidence of significant psychological harm other than the ordinary anxieties associated with every legal proceeding.

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[70] *IRPA*, *supra* note 1, ss 44, 25(1), 112, 24(1); Canada, Immigration, Refugees and Citizenship Canada, *ENF 5: Writing 44(1) Reports* (Canada: IRCC, 21 Nov 2019) at 27, online (pdf): *Government of Canada* <https://www.canada.ca/content/dam/ircc/migration/ircc/english/resources/manuals/enf/enf05-eng.pdf> [*ENF 5*]; *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61.

[71] *Najafi* FC, *supra* note 21 at para 46.

[72] *Montoya v Canada (Attorney General)*, 2016 FC 827 at para 44 [*Montoya*]; *Chabanov v Canada (Citizenship and Immigration)*, 2017 FC 73 at paras 61-62 [*Chabanov*]; *Ching*, *supra* note 21 at para 91.

a. Blencoe sets an appropriately high threshold for the second branch

56. The Appellants did not meet the high bar under *Blencoe*'s second branch. Inordinate delay must have directly caused significant prejudice of such a magnitude that the immigration and refugee system is brought into disrepute.[73] Cases of this nature are "extremely rare" and "few lengthy delays" are sufficient to meet this unambiguously high threshold.[74]

57. The high threshold set out in *Blencoe* should be maintained.[75] Setting aside an administrative proceeding on its merits based on personal prejudice alone is radical because it bypasses legislative intent. Institutional delays in the immigration system are more appropriately and effectively addressed through policy solutions rather than through adjusting the *Blencoe* test. For instance, the 2018 *Report of the Independent Review of the Immigration and Refugee Board* found that additional funding, faster procedural timelines, and improved systems coordination have significantly reduced backlog and delay. These systemic reforms are better tailored to the unique challenges faced by immigration administrative decision-makers.[76] It should be left to Parliament to address the impacts of administrative delay through the legislative process.

b. Disruption of the Appellants' lives in Canada is not prejudice caused by delay

58. The Appellants argued that they are prejudiced by the vacation proceedings because they feel uncertain about their futures and are anxious that they may lose the lives they have built in

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[73] *Blencoe*, *supra* note 15 at para 115.
[74] *Blencoe*, *supra* note 15 at para 120; *Abrametz v Law Society of Saskatchewan*, 2020 SKCA 81 at para 4, leave to appeal to SCC granted, 39340 (25 February 2021).
[75] *R v Jordan*, 2016 SCC 27 [*Jordan*]; *Hryniak v Mauldin*, 2014 SCC 7 [*Hryniak*] (the Respondent respectfully submits that the principles of *Jordan* and *Hryniak* cannot be applied to the administrative context).
[76] Canada, Immigration and Refugee Board, *Report of the Independent Review of the Immigration and Refugee Board: A Systems Management Approach to Asylum* (Canada: IRB, 2018), online: *Government of Canada* <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/report-independent-review-immigration-and-refugee-board.html>; Richard J. Pierce Jr., *Administrative Law Treatise*, 4th ed (New York: Aspen Law & Business, 2002) at 836, 859-860.

Canada.[77] These future prejudices are not relevant because they are not directly caused by the delay. *Blencoe*'s second branch requires a causal connection between the delay and the prejudice.[78]

59. The Federal Court has frequently found H&C factors to be irrelevant to the *Blencoe* analysis due to the lack of causal connection with the delay. In the citizenship revocation cases of *Chabanov v Canada (MCI)* [*Chabanov*] and *Montoya v Canada (AG)* [*Montoya*], both appellants argued that they were prejudiced due to their over 20 years of establishment in Canada and their lack of ties to their native countries. The Federal Court found these H&C arguments to be irrelevant and declined to find an abuse of process in either case, despite the respective delays of 11 years in *Chabanov* and almost 13 years in *Montoya*.[79] The Vacate Member erred by basing her decision on the Appellants' establishment in Canada, their lack of ties in Albania, and their anxieties about their futures. The Appellants' H&C arguments should similarly be dismissed.

60. The Appellants are not directly prejudiced by the delay merely because their establishment occurred during the delay. A similar argument was rejected in the citizenship revocation context in *Canada (MCI) v Omelebele.* Mr. Omelebele argued that he had grown up in Canada and made decisions for his future assuming that he would be able to stay in the country. He failed to provide evidence to demonstrate what decisions he would have made differently if the proceedings were initiated earlier, and how he had been prejudiced as a result.[80] The Appellants likewise failed to provide concrete evidence of prejudice owing to their establishment in Canada.

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[77] Vacate Member's Reasons, *supra* note 2 at para 63.
[78] *Blencoe, supra* note 15 at para 133.
[79] *Chabanov, supra* note 72 at paras 61-62; *Montoya, supra* note 72 at paras 43-44; See also *Ching, supra* note 21 at para 91.
[80] *Canada (Citizenship and Immigration) v Omelebele*, 2015 FC 305 at paras 40-42 [*Omelebele*].

61. Even if the Appellants' establishment was relevant to the *Blencoe* analysis, the prejudice they experienced is not at a magnitude that would put the refugee and immigration system into disrepute. On the contrary, the Appellants enjoyed the benefits of PR during the delay period as a result of their father's misrepresentations. The Federal Court has repeatedly considered that losing the benefits of a life in Canada that one was not entitled to does not amount to significant prejudice.[81] The delay allowed the Appellants to remain in Canada and access privileges and resources that are otherwise inaccessible to them.[82] Losing these unentitled privileges would not undermine the integrity of the immigration and refugee system.

62. Furthermore, the Appellants have many options to remedy their hardships and restore their status if they are vacated. Deportation after vacation is not automatic or inevitable.[83] The Appellants may make submissions to the Minister to argue that formal inadmissibility proceedings under s. 44 are not warranted. IRCC guidelines dictate that their submissions would be afforded "particular care and consideration" as they fall under the definition of "long-term permanent residents."[84] If they are not subject to inadmissibility or removal proceedings, the Appellants can immediately take steps to restore their PR status.

63. As discussed above, the Appellants have a multitude of options even if found inadmissible under s. 40(1)(c). They may: make an in-land H&C application for PR; apply for a PRRA and, if successful, apply for PR; apply for a TRP and, if successful, apply for PR in the

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[81] See e.g. *Torre* FC, *supra* note 20 at para 84; *Canada (Citizenship and Immigration) v Modaresi*, 2016 FC 185 at para 74 [*Modaresi*]. See also *Canada (Citizenship and Immigration) v Parekh*, 2010 FC 692 at para 53, citing *Canada (Minister of Citizenship and Immigration) v Copeland*, [1998] 2 FC 493, 140 FTR 183, *Canada (Secretary of State) v Charran* (1988), 21 FTR 117, 6 Imm LR (2d) 138.

[82] *Modaresi*, *ibid* at para 74; See also *Hassouna v Canada (Citizenship and Immigration)*, 2017 FC 47 at para 154, citing *Canada (Minister of Employment and Immigration) v Chiarelli*, [1992] 1 SCR 711 at 733, 135 NR 161.

[83] *Coomaraswamy*, *supra* note 37 at para 24.

[84] *ENF 5*, *supra* note 70 at 28.

Permit Holder class; apply for PR overseas in a class they qualify for; or be sponsored for PR by their respective partners.[85] The Appellants' PR applications may be accompanied by H&C submissions to waive the statutory waiting periods under ss. 40(2)(a) and 40(3).[86] They are thus not prejudiced to a degree that would offend the public's sense of decency or fairness.

64. Parliament is alive to the potential hardships following vacation proceedings and provides many avenues where the Appellants can appropriately make submissions on their establishment and continue building their futures in Canada. The Vacate Member thus erred in usurping these legislative options and considering irrelevant prejudices that do not flow from the delay.

c. There is no evidence that delay caused significant psychological harm

65. The Appellants' lack of evidence of personal prejudice is "fatal" to their claim under *Blencoe*'s second branch.[87] The Appellants testified that they have been anxious over their uncertain status since the suspension of their citizenship applications.[88] As stated by the Federal Court of Appeal in *Torre v Canada (MCI*), claimants must present evidence of harm instead of making vague allegations of the effects of the delay.[89] The psychological harm must be directly caused by the delay, not by other stressors or underlying medical issues.[90] The Appellants have

[85] *IRPA*, *supra* note 1, ss 40(1)(c), 25(1), 112, 24(1).
[86] *IRPA*, *supra* note 1, ss 40(2)(a), 40(3); *Mella*, *supra* note 31 at para 30; *Sedki v Canada (Citizenship and Immigration)*, 2021 CF 1071 at para 108.
[87] *Ching*, *supra* note 21 at para 86; *Akram v Canada (Citizenship and Immigration)*, 2021 FC 1024 at para 31.
[88] Vacate Member's Reasons, *supra* note 2 at para 63. See *Cerna*, *supra* note 21 at paras 42-44 (the present proceedings are not the proper forum to address prejudice, if any, arising from the Minister's decision to suspend the Appellants' citizenship applications; it ought to be challenged in a separate judicial review).
[89] *Torre v Canada (Citizenship and Immigration)*, 2016 FCA 48 at para 5, leave to appeal to SCC dismissed, 36396.
[90] *I.P.P. v Canada (Citizenship and Immigration)*, 2018 FC 123 at paras 294-296.

not provided any evidence of the direct effects of delay, such as psychological reports indicating that the harm has increased in severity or frequency over time.[91]

66. Even if the Appellants had provided evidence, the psychological harm they experienced was not significant enough to put the immigration and refugee system into disrepute. Courts have reiterated that legal proceedings have inherent consequences for a person's wellbeing, such as stress, anxiety, or stigma.[92] Individuals must show a markedly higher degree of emotional injury beyond these inherent consequences to meet the high threshold under *Blencoe's* second branch.[93] For example, in *Lata v Canada (MCI)* [*Lata*], Ms. Lata failed to meet this threshold even though the delay directly worsened her health and rendered her unfit to testify at her vacation hearing.[94] Likewise, in the security inadmissibility case *Najafi v Canada (MPSEP)* [*Najafi*], Mr. Najafi was not able to meet the second branch threshold even though he had the possibility of removal "hanging over his head" for 26 years.[95] In comparison to *Lata* and *Najafi*, the psychological harm alleged by the Appellants is less serious and did not exceed the normal anxieties inherent in legal proceedings.

67. Ultimately, the Appellants benefited throughout the delay from the continuation of their improperly obtained immigration status. As emphasized by the UNHCR: "individuals who were not eligible for international protection at the time they were recognised as refugees cannot claim to be prejudiced by the cancellation of a status which should not have been granted to them in the

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[91] *Omelebele, supra* note 80 at paras 34-35.
[92] See e.g. *Blencoe, supra* note 15 at para 59; *Melo v Canada (Minister of Citizenship and Immigration)* (2000), FCJ No 403 at para 21, 188 FTR 39.
[93] *Ching, supra* note 21 at paras 88-89; *Faroon v Canada (Citizenship and Immigration)*, 2015 FC 931 at para 66 [*Faroon*].
[94] *Lata v Canada (Citizenship and Immigration)*, 2011 FC 459 at paras 10-11, 30, 32.
[95] *Najafi v Canada (Public Safety and Emergency Preparedness)*, 2018 CanLII 102179 (CA IRB) at para 32, aff'd 2019 FC 594.

first place."[96] Hence, this is not one of the "clearest of cases" where an abuse of process has occurred under *Blencoe*'s second branch.[97]

2) A stay of proceedings was not an appropriate remedy

68. In the alternative, even if an abuse of process were to be established, a stay of proceedings would not be the appropriate remedy. *Fabbiano v Canada (MCI)* [*Fabbiano*] sets out the test for a stay of proceedings in the immigration context: (1) there must be prejudice to the person's right to a fair trial or the integrity of the justice system; (2) there must be no adequate alternative remedy; and (3) if there is uncertainty after the first two steps, the court must balance the public interests favouring a stay against the public interest of enforcing the legislation and obtaining a decision on the merits.[98] The Appellants failed on all three stages of the *Fabbiano* test.

A. The level of prejudice did not meet the high bar for a stay of proceedings

69. There is a "heavy burden" to demonstrate that a stay of proceedings is appropriate because it is a remedy of "last resort."[99] A stay was not granted in *Montoya*, where there was a total delay of almost 13 years in bringing citizenship revocation proceedings. This was despite Mr. Montoya's 27 years of establishment as a Canadian citizen, his lack of ties to his native country of Colombia, and his inability to obtain pension, work, or essential medical treatment in Colombia.[100] A stay was not granted in *Faroon v Canada (MCI)*, where there was an

[96] United Nations High Commissioner for Refugees, *Note on the Cancellation of Refugee Status* (Geneva: United Nations, 2004) at 3 [*Note on Cancellation*].
[97] *Blencoe, supra* note 15 at para 120.
[98] *Fabbiano v Canada (Citizenship and Immigration),* 2014 FC 1219 at para 10, citing *R v Babos,* 2014 SCC 16 at para 32.
[99] *Blencoe, supra* note 15 at para 117; *Charkaoui v Canada (Citizenship and Immigration),* 2008 SCC 38 at para 76. See e.g. *Beltran v Canada (Citizenship and Immigration),* 2011 FC 516 (stay only granted after unexplained delay of 22 years caused hearing unfairness).
[100] *Montoya, supra* note 72 at paras 36-38, 46.

unexplained delay of 12 years in bringing security inadmissibility proceedings. The Federal Court appreciated that the potential consequences of deportation for Mr. Faroon and his family were harsh given his 25 years of establishment in Canada; however, he still failed to demonstrate that the delay caused enough prejudice to warrant a stay of proceedings.[101] The level of delay and prejudice experienced by the Appellants is similar to *Montoya* and *Faroon*. This falls short of the extreme prejudice required for a remedy of last resort.

B. Adequate alternative remedies are available

70. *Blencoe* recognized that alternative administrative remedies are preferable to a stay of proceedings. A generous cost award or an order compelling an expedient resolution is adequate to remedy the prejudices in this case.[102] When remitting this matter back to the RPD, this Court could issue directions to ensure that the vacation hearing occurs without delay in accordance with appropriate timelines. Following a decision to vacate, the Appellants continue to have numerous legislative remedies to address the alleged prejudices caused by delay.

C. The public interest in obtaining a vacation decision on its merits outweighs the interests in granting a stay

71. There is a significant public interest in enforcing s. 109 against the Appellants. Vacation proceedings are essential to the integrity of the immigration and refugee system both domestically and internationally. Vacation proceedings promote the objectives of the *IRPA* by ensuring fair procedures and reversing erroneous grants of international protections.[103] Vacation

[101] *Faroon, supra* note 93 at paras 23, 52.
[102] *Blencoe, supra* note 15 at paras 181-183, Lebel J, dissenting on other grounds; *A.D.M. v Canadian Institute of Actuaries*, 2008 ABQB 522 at para 46.
[103] *IRPA, supra* note 1, ss 3(1)(f.1), 3(2)(e),

proceedings help uphold Canada's international obligations by preserving the integrity of the definitions of "refugee" and "person in need of protection."[104]

72. Section 109 does not require an intention component to serve its public interest purpose. In the analogous case of *Mella v Canada (MPSEP),* the Federal Court held that the intentions of children are irrelevant to the vacation analysis even if they were innocent of the misrepresentations. The Federal Court focused only on whether the initial refugee protections granted to the children were legitimate, because vacation proceedings are not intended to be punitive. Since Sorela and Ester Mella obtained their refugee status as children entirely on the basis of their parents' fraudulent claims, their status was vacated.[105] The Appellants' innocence was similarly irrelevant in determining whether or not they needed international protections in the first place. The Vacate Member erred in stating that there was minimal public interest in enforcing s. 109 against the Appellants merely because they did not obtain status "based on blatant fraud."[106]

73. The public interest in enforcing s. 109 is still maintained if children bear the consequences of their parents' misrepresentations. This is consistent with Parliament's intention to make children "part and parcel" of their parents' claims for protection.[107] The *IRPA* generally offers child claimants the same protections that it offers their parents while imposing the same consequences if the claim for protection is denied.[108] As recognized in *Charalampis v Canada*

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[104] *IRPA, supra* note 1, s 3(3)(f); *Note on Cancellation, supra* note 96; *1951 Convention, supra* note 67; *Convention Against Torture, supra* note 68.
[105] *Mella, supra* note 31 at paras 33-35.
[106] Vacate Member's Reasons, *supra* note 2 at para 64.
[107] *Charalampis v Canada (Citizenship and Immigration),* 2009 FC 1002 at para 39 [*Charalampis*].
[108] *Canada (Citizenship and Immigration) v Tobar Toledo,* 2013 FCA 226 at para 68; *Mella, supra* note 31 at paras 33-34, citing United Nations High Commissioner for Refugees, *Handbook*

(MCI), divorcing a child's claim from their parents' could have "far-reaching consequences" and "create something different from what Parliament intended."[109]

74. Treating children differently under s. 109 is contrary to public policy and could lead to abuses of Canada's refugee and immigration system. This potential for abuse has been recognized by the Federal Court in interpreting s. 40(1)(a), which also has no fault element for misrepresentations.[110] Under s. 40(1)(a), individuals can be found inadmissible if they "directly or indirectly" misrepresent or withhold material facts relating to a relevant matter.[111]

75. Like s. 109, the effect of s. 40(1)(a) is that dependent children bear the consequences of their sponsoring parents' misrepresentations even if they are innocent. Excluding indirect innocent misrepresentations from the scope of s. 40(1)(a) could lead to a "potential absurdity": a sponsor "could directly misrepresent in a [sponsorship] application and bring a person [into Canada] with him or her, and that person would then not be removable from Canada if the person had no knowledge of the misrepresentation."[112] Parents could abuse the refugee and immigration system by fraudulently conferring the benefit of status onto their children.[113]

76. The same absurd consequences could occur if s. 109 was interpreted to exclude innocent or indirect misrepresentations. A parent could fraudulently obtain refugee status and confer that benefit onto their children, who then become immune to vacation proceedings merely because they are not responsible for the misrepresentations. The Appellants, having benefited from their

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on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection (Geneva: United Nations, 2019).

[109] *Charalampis, supra* note 107 at para 39.

[110] See e.g. *Chen v Canada (Citizenship and Immigration)*, 2017 FC 1171 at paras 33-35 [*Chen*]; *Wang v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1059 at para 56 [*Wang*]; *Jiang v Canada (Citizenship and Immigration)*, 2011 FC 942 at para 36.

[111] *IRPA, supra* note 1, s 40(1)(a).

[112] *Wang, supra* note 110 at para 56.

[113] *Chen, supra* note 110 at para 34.

father's fraudulent claim, are asking for such an immunity. Narrowing the scope of s. 109 to exclude unintentional misrepresentations would defeat its legislative purpose and would put the immigration and refugee system into disrepute. Ordering a stay of proceedings in this context would therefore create a dangerous precedent that is contrary to the public interest.

77. In conclusion, the Appellants failed to establish that the vacation proceedings are tainted to an abusive degree. The delay did not impair hearing fairness, as the Appellants still have sufficient evidence to make full answer and defense. The Appellants' allegations of personal prejudice did not bring the immigration and refugee system into disrepute, as the prejudices were not significant and did not flow directly from the delay. Even if there was an abuse of process, a stay of proceedings would not be in the public interest. Ultimately, the Appellants cannot use the abuse of process doctrine to maintain their fraudulently obtained status, as this would violate Parliamentary supremacy and undermine the integrity of the refugee and immigration system.

PART IV: ORDER SOUGHT

78. The Respondent respectfully requests that this Honourable Court dismiss the appeal and answer the Certified Question in the negative.

APPENDIX: LIST OF AUTHORITIES

Legislation

Canadian Charter of Rights and Freedoms, ss 7, 11, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
7 Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. **11** Any person charged with an offence has the right [...] (b) to be tried within a reasonable time; [...] (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

Immigration and Refugee Protection Act, SC 2001, c 27 at ss 3(1)(f.1), 3(2)(e), 3(3)(f), 24(1), 25(1), 40(1)(a), 40(1)(c), 40(2)(a), 40(3), 44(1), 44(2), 46(1)(d), 97(1), 108, 109, 112(1).
3 (1) The objectives of this Act with respect to immigration are [...] **(f.1)** to maintain, through the establishment of fair and efficient procedures, the integrity of the Canadian immigration system; [...] **(2)** The objectives of this Act with respect to refugees are [...] **(e)** to establish fair and efficient procedures that will maintain the integrity of the Canadian refugee protection system, while upholding Canada's respect for the human rights and fundamental freedoms of all human beings; [...] **(3)** This Act is to be construed and applied in a manner that [...] **(f)** complies with international human rights instruments to which Canada is signatory.
24 (1) A foreign national who, in the opinion of an officer, is inadmissible or does not meet the requirements of this Act becomes a temporary resident if an officer is of the opinion that it is justified in the circumstances and issues a temporary resident permit, which may be cancelled at any time.
25 (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the

foreign national, taking into account the best interests of a child directly affected.

40 (1) A permanent resident or a foreign national is inadmissible for misrepresentation

(a) for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of this Act;

[...]

(c) on a final determination to vacate a decision to allow their claim for refugee protection or application for protection;

[...]

(2) The following provisions govern subsection (1):

(a) the permanent resident or the foreign national continues to be inadmissible for misrepresentation for a period of five years following, in the case of a determination outside Canada, a final determination of inadmissibility under subsection (1) or, in the case of a determination in Canada, the date the removal order is enforced;

[...]

(3) A foreign national who is inadmissible under this section may not apply for permanent resident status during the period referred to in paragraph (2)(a).

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(1) An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister.

(2) If the Minister is of the opinion that the report is well-founded, the Minister may refer the report to the Immigration Division for an admissibility hearing, except in the case of a permanent resident who is inadmissible solely on the grounds that they have failed to comply with the residency obligation under section 28 and except, in the circumstances prescribed by the regulations, in the case of a foreign national. In those cases, the Minister may make a removal order.

46 (1) A person loses permanent resident status [...]

(d) on a final determination under section 109 to vacate a decision to allow their claim for refugee protection or a final determination to vacate a decision to allow their application for protection;

97 (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themself of

the protection of that country, (ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country, (iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and (iv) the risk is not caused by the inability of that country to provide adequate health or medical care.
108 **(1)** A claim for refugee protection shall be rejected, and a person is not a Convention refugee or a person in need of protection, in any of the following circumstances [...] **(2)** On application by the Minister, the Refugee Protection Division may determine that refugee protection referred to in subsection 95(1) has ceased for any of the reasons described in subsection (1). **(3)** If the application is allowed, the claim of the person is deemed to be rejected. **(4)** Paragraph (1)(e) does not apply to a person who establishes that there are compelling reasons arising out of previous persecution, torture, treatment or punishment for refusing to avail themselves of the protection of the country which they left, or outside of which they remained, due to such previous persecution, torture, treatment or punishment.
109 **(1)** The Refugee Protection Division may, on application by the Minister, vacate a decision to allow a claim for refugee protection, if it finds that the decision was obtained as a result of directly or indirectly misrepresenting or withholding material facts relating to a relevant matter. **(2)** The Refugee Protection Division may reject the application if it is satisfied that other sufficient evidence was considered at the time of the first determination to justify refugee protection. **(3)** If the application is allowed, the claim of the person is deemed to be rejected and the decision that led to the conferral of refugee protection is nullified.
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).

Refugee Protection Division Rules, SOR/2012-256 at r 64.
64 **(1)** An application to vacate or to cease refugee protection made by the Minister must be in writing and made in accordance with this rule. **(2)** In the application, the Minister must include (a) the contact information of the protected person and of their counsel, if any; (b) the identification number given by the Department of Citizenship and Immigration to the protected person; (c) the date and file number of any Division decision with respect to the protected person; (d) in the case of a person whose application for protection was allowed abroad, the person's file number, a copy of the decision and the location of the office; (e) the decision that the Minister wants the Division to make; and (f) the reasons why the Division should make that decision. **(3)** The Minister must provide (a) a copy of the application to the protected person; and (b) the original of the application to the registry office that provided the notice of decision in the claim or to a registry office specified by the Division, together with a written statement indicating how and when a copy was provided to the protected person.

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