My name is Jamie Liew and I am a lawyer and a professor at the University of Ottawa, Faculty of Law. I am an expert on immigration law and have intimate knowledge of the ways in which Canadian laws affect migrants and non-citizens. I wish to focus my short time with you today by explaining in 5 minutes what I usually do in an entire semester, which is to explain the many applications that migrants coming to the Canada-US border, who are ineligible to submit a refugee claim, supposedly have access to.

1. The Supreme Court of Canada's decision regarding the Safe Third Country Agreeement

My comments today are in response to the recent Supreme Court of Canada's decision that dealt with a Charter challenge of the Safe Third Country Agreement.[1] I will be focusing on one aspect of that decision, in particular, the fact that migrants may have access to alternative immigration applications and processes if they are ineligible to make a refugee claim. The Court called these "safety valves".

2. Overview of the concept of Safety Valves in the *Immigration and Refugee Protection Act* and why they are practically limited.

The Supreme Court stated, "The IRPA does… contain mechanisms for temporary or permanent exemptions from return to the United States". In my limited time today, I want to give you a brief description of this extremely complicated regime, and then discuss why they don't operate as the Court may envision.

A **Pre-Removal Risk Assessment (PRRA)** is a written application where you explain why you are afraid to return to your country and you provide documentation to support your fear.[2] Statistics from IRCC show a rate of approval at around 3.5%. Between 2007 and 2014 this rate was between 1.4% and 3.1%.[3]

A **Permanent Residence Application on Humanitarian and Compassionate Grounds (H&C)** is a written application where you are asking to be exempt from the requirements in the *IRPA* and granted permanent residence based on hardships you may face if you are not given such status.[4] Government figures from 2021 showed the rate of applications refused climbed to 70%.[5]

---

[1] Canadian Council for Refugees v. Canada (Citizenship and Immigration), 2023 SCC 17 (CanLII), https://canlii.ca/t/jxp04.
[2] *Immigration and Refugee Protection Act,* SC 2001, c 27, s 112(1) [*IRPA*].
[3] Government of Canada, *Evaluation of the Pre-Removal Risk Assessment Program* (April 22, 2016) [online: https://www.canada.ca/en/immigration-refugees-citizenship/corporate/reports-statistics/evaluations/removal-risk-assessment-program/prra.html#toc1-2].
[4] *Ibid*, s 25(1). See also public policy considerations under s 25.2(1) but again this is a highly discretionary remedy.
[5] The Canadian Press (Maan Alhmidi), "Canada refusing more immigration on humanitarian, compassionate grounds: data" (July 14, 2021) [online: https://globalnews.ca/news/8026341/canada-immigration-humanitarian-compassionate-undocumented-migrants/].

A **Temporary Residence Permit (TRP)** requires a written application and is a special permit from Immigration, Refugees and Citizenship Canada (IRCC) that lets a person live in Canada for a certain period for compelling reasons.[6] This permit may be valid from one day to three years and can be cancelled at any time.

A person who has a date set for their removal from Canada may submit a request to the Canada Border Services Agency (CBSA) to ask for a **Deferral of Removal**. The person has to demonstrate why they might suffer irreparable harm outside the normal hardship from removal or if the short-term interests of a child are directly impacted. They are only granted where "compelling personal circumstances" or "exigent personal circumstances" warrant the granting of a deferral request. The discretionary powers afforded to an officer to defer removals is quite narrow.

I want to emphasize that the PRRAs, H&C applications, TRPs and deferrals of removal are discretionary. Immigration officers have wide discretion to grant or deny these applications. It is ultimately up to an assessing officer. Further TRPs are temporary and don't provide a permanent solution.

An **Administrative Deferral of Removal (ADR)** is a temporary measure when immediate action is needed to defer removals in situation of humanitarian crisis.[7] Once the situation in a country stabilizes, the ADR is lifted and removals to that country resume. An ADR is currently in place for certain regions including in Somalia, the Gaza Strip, Ukraine, Syria, Mali, the Central African Republic, South Sudan, Libya, Yemen, Burundi, Venezuela, Haiti, Iran and Sudan.

A **Temporary Suspension of Removals (TSR)** interrupts removals to a country or place when general conditions pose a risk to the entire civilian population such as armed conflict or an environmental disaster.[8] Canada currently has a TSR in place for Afghanistan, the Democratic Republic of Congo, and Iraq. The difference between the TSR and the ADR is that the ADR is put in place within a short period of time to immediately respond to a change in country conditions.

ADRs and TSRs are thus only available to individuals that may be removed to countries listed by the Canadian government. Individuals who are inadmissible to Canada on the grounds of criminality, serious criminality, international or human rights violations, organized crime or security, can be removed despite an ADR or TSR. It is an alternative only available to a limited group of persons.

Persons may also seek a **Judicial Stay of Removal** to prevent the execution of their removal from Canada.[9] To do this, a person must have a matter already before the Federal Court and the stay of removal prevents removal pending the decision of that matter.

[6] *Ibid,* s 24(1).
[7] *Ibid*, s 48(2).
[8] *Ibid.*
[9] *Federal Court Rules,* SOR/98-106, s 373.

The existence of these mechanisms found in the *IRPA* have been used to justify our treatment of migrants at the Canada-US border. Some may not be eligible for the applications depending on the requirements. It is not within the practice of border officials to offer the menu of alternative options to those at a port of entry and lay persons would not be expected to know that these legislative options exist. In fact, when I polled a group of 90 law students in class, only two of them knew that these applications existed prior to taking the class, and only because they had prior work experience with an immigration law office or the government.

All these immigration processes and applications require not only a written request, but many require substantive documentary evidence to show that these requests are merited. They are practically unavailable to migrants unless they hire a lawyer and coordinate the submission of their applications and requests when they reach a port of entry. For those who do not speak or write in English or French, who are unfamiliar with our legal system, and who have no legal support, these avenues are unreachable. The judicial stay of removal requires an underlying court matter and an additional application made to a court, something a lay person would be unable to do at a border crossing.

While there have been few exceptions where migrants have been able to access such alternatives, including the applicants in the Safe Third Country Agreement litigation – these were done with a substantive amount of effort on the part of many lawyers and are the rare exception. The reality is many do not seek legal advice before crossing a border, and many cannot pull together applications at the border.

While alternatives may exist in legislation, it is the practical availability of those options that is important to consider. Would migrants ask for these applications? If they do, would they be able to put their best foot forward in a paper application at a border crossing given their linguistic and legal capacity? Finally, what are the chances that these applications would be granted? Many of the remedies sought are discretionary and rely heavily on the whim of an individual officer. Success rates are dismal for some of these applications. The reality is these so-called safety valves are illusory and do not provide the checks and balances we think they do.

I hope I have given you a sober picture of how feasible it is for migrants to not only access but obtain relief with the so-called “safety valves” in the *IRPA*. Given that we know many will not be able to access the processes and remedies in the *IRPA*, the Canadian government should revisit its decision to maintain and expand the Canada-US Safe Third Country Agreement. Countless people may be put at risk because of the current misunderstandings we have on how the entire immigration regime functions. We cannot rely on the fact that some mechanisms exist on paper to justify a system that is counter to our international obligations under refugee law, including the right to nonrefoulement.