Federal Court  Cour fédérale

Date: 20170526

Docket: IMM-1516-16

Citation: 2017 FC 522

Ottawa, Ontario, May 26, 2017

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

STENSIA TAPAMBWA
and
RICHARD TAPAMBWA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants, Stensia Tapambwa and Richard Tapambwa, seek judicial review of a decision dated February 25, 2016 by a pre-removal risk assessment [PRRA] officer [the Officer or PRRA Officer], who conducted a "restricted PRRA", meaning that the Officer considered their risks only under s. 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the

IRPA], not under s. 96. They challenge the Officer's refusal to consider their risks under s. 96 of the IRPA, the failure to afford them ministerial relief under s. 25.2 of the IRPA against the provisions of the IRPA limiting them to a restricted PRRA, and the constitutional validity of these provisions of the IRPA.

[2] The Applicants take issue with being confined to a restricted PRRA as a result of a Refugee Protection Division [RPD] determination which excluded them from refugee protection under s. 98 of the IRPA based on complicity in crimes against humanity. Their position is that the RPD's determination is inconsistent with the Supreme Court of Canada's decision in *Ezokola v Canada (Minister of Citizenship and Immigration)*, 2013 SCC 40 [*Ezokola*], which changed the test for complicity in the commission of crimes against humanity. *Ezokola* was released on July 19, 2013, approximately eight months after the Applicants' negative RPD decision.

[3] The Applicants' arguments raise issues surrounding the interpretation of the IRPA based on principles of international law and the *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11* [*Charter*], as well as the constitutionality of the relevant IRPA provisions. Finally, the Applicants challenge the reasonableness of the Officer's analysis under s. 97 of the IRPA.

[4] For the reasons that follow, this application is dismissed.

II. Background

[5] The Applicants are citizens of Zimbabwe. Richard Tapambwa served in the Zimbabwean National Army [ZNA] for approximately twenty years and his wife, Stensia Tapambwa, served for approximately sixteen years. Each of the Applicants reached the rank of staff sergeant in the Data Processing Unit of the ZNA. After Mr. Tapambwa allegedly expressed political views hostile to the ruling party in March 2001, the Applicants left Zimbabwe and travelled to the United States. Despite residing in the United States for over ten years, they did not claim refugee protection in that country.

[6] In July of 2011, the Applicants came to Canada and claimed refugee protection. Their claims were denied by the RPD in November 2012, on the basis that they were excluded from refugee protection pursuant to s. 98 of the IRPA because there were serious reasons to consider they were complicit in crimes against humanity committed by the ZNA. The RPD also considered the claims of the Applicants' children but, based on a negative assessment of the Applicants' credibility, found that they were neither Convention refugees nor persons in need of protection. The Applicants' application for judicial review of the RPD's decision was dismissed on July 11, 2013.

[7] In May of 2013, the Applicants appeared before the Immigration Division [ID] for an admissibility hearing. Based on the findings of the RPD, the ID found that there were reasonable grounds to believe that the Applicants were inadmissible for violating human or international

rights by committing an act constituting an offense referred to in sections 4 to 7 of the *Crimes Against Humanity and War Crimes Act*, SC 2000, c 24.

[8] The Applicants then submitted an application for a PRRA and requested relief from the Minister of Citizenship and Immigration [the Minister] against the IRPA provisions which entitled them to assessment only on the basis of s. 97 and not s. 96. The PRRA Officer declined to consider the request for ministerial relief, or to consider constitutional arguments raised by the Applicants in support of their position that their risk should be assessed under both ss. 96 and 97, concluding that PRRA officers were without the jurisdiction to do so.

[9] The Officer noted the RPD's conclusion that the Applicants were excluded from refugee protection pursuant to s. 98 of the IRPA and Article 1F of the *United Nations Convention Relating to the Status of Refugees* [the Convention or Refugee Convention]. The Officer concluded that the Applicants were persons described under s. 112(3) of the IRPA and therefore were not eligible to make a claim for Convention refugee status. As such, the Officer considered their application for protection only on the basis of s. 97 of the IRPA and did not consider s. 96.

[10] After reviewing the evidence presented by the Applicants, the Officer rejected their application on the basis that they had failed to prove a personalized risk to their life or of cruel and unusual treatment or punishment upon return to Zimbabwe. The Officer therefore concluded that the Applicants had failed to meet the requirements of s. 97 of the IRPA and that they were not persons in need of protection.

III. Issues

[11] The Applicants raise the following issues in this application:

A. Do Canada's international legal obligations, s. 7 of the *Charter*, and the correct interpretation of s. 112(3) of the IRPA require an unrestricted PRRA on the facts of this case?

B. In the alternative, must the Minister exercise discretion under s. 25.2 of the IRPA to exempt the Applicants from the application of s. 112(3), such that failure to consider their request for an exemption vitiates the PRRA decision?

C. In the further alternative, does the statutory regime infringe the Applicants' rights under s. 7 of the *Charter*?

D. Was the PRRA Officer's s. 97 risk assessment reasonable?

[12] The Applicants' position that portions of the IRPA infringe the Applicants' rights under s. 7 of the *Charter*, and should therefore be declared of no force and effect, raises an additional preliminary issue: whether this Court should allow a late filing of their notice of constitutional question. The Applicants served notice but did so five days before the hearing of this application and moved at the hearing for an abridgement of the notice period.

IV. Analysis

A. *Preliminary Issue - Notice of Constitutional Question*

[13] Section 57(1) of the *Federal Courts Act*, RSC 1985, c F-7 states that the Court cannot judge legislation to be invalid, inapplicable or inoperable unless notice of the constitutional question has been served on the Attorney General of Canada and the Attorneys General of each province. Section 57(2) requires that such notice be served at least ten days before the day on which the constitutional question is to be argued, unless the Court orders otherwise.

[14] The parties have referred the Court to *Ishaq v Canada (Minister of Citizenship and Immigration)*, 2015 FC 156, at paragraph 14, where Justice Boswell held that the Court may excuse late service of a constitutional notice by extending the time for service. At paragraph 15, Justice Boswell set out the applicable test as follows:

> [15] The test for granting extensions of time generally has been set out in *Canada (Attorney General) v Larkman*, 2012 FCA 204 at paragraph 61, 433 NR 184 [*Larkman*]:
>
> (1) Did the moving party have a continuing intention to pursue the application?
>
> (2) Is there some potential merit to the application?
>
> (3) Has the Crown been prejudiced from the delay?
>
> (4) Does the moving party have a reasonable explanation for the delay?
>
> Not all of these factors are always relevant nor do they all need to favour the moving party, and the "overriding consideration is that the interests of justice be served" (*Larkman* at paragraph 62). The same test should be applied here for purposes of subsection 57(2).

[15] Considering the *Larkman* factors, and relying on the fact that all the Attorneys General had provided written consent to the late filing of the notice, Justice Boswell extended the time for service of the notice of constitutional question.

[16] In the present case, the Respondent consented to excusing the late notice and acknowledged that the Attorney General of Canada had *de facto* notice of the constitutional question as a result of the constitutional arguments having been advanced through the Applicants' written materials. However, the Respondent noted that it was not in a position to consent on behalf of the provincial or territorial Attorneys General. At the hearing of this application, this issue was raised, and the Applicants were afforded an opportunity to pursue such consent and report back to the Court in the days following the hearing. As such, the Court heard arguments on the issue of constitutional validity, while reserving on the decision whether to grant the Applicants the requested abridgment of the notice period and therefore on whether to rule on the invalidity arguments.

[17] The Applicants have subsequently provided the Court with written consent from all the Attorneys General of the provinces and territories, either consenting or not objecting to the abridgement of time and indicating no intention to intervene in this application. The Respondent then confirmed that, in light of these consents, it has no issue with the request for abridgement of the time period for the constitutional notice.

[18] Turning to the *Larkman* factors, it is clear that the Applicants have had a continuing intention throughout this application to pursue these constitutional issues. I also consider that

there is sufficient potential merit to the application that this factor weighs in their favour. The Respondent has not been prejudiced by the delay. The Applicants offer little explanation for the delay, other than that the requirement for timely notice was apparently overlooked. However, considering all these factors and in particular the fact that neither the Respondent nor the other Attorneys General oppose the abridgement of time, the requested abridgement is granted.

B. *Standard of Review*

[19] The Applicants take the position that the PRRA Officer's s. 97 risk assessment is reviewable on a standard of reasonableness but that the other issues, being constitutional questions, questions of international law or pure questions of jurisdiction, are to be reviewed on the correctness standard. The Respondent does not take issue with this position. I agree that the standard of reasonableness applies to the s. 97 risk assessment. However, the selection of the standard applicable to the other issues is not as straightforward.

[20] The Applicants rely on *Hernandez Febles v. Canada (Minister of Citizenship and Immigration)*, 2012 FCA 324 [*Febles FCA*] (affirmed 2014 SCC 68 [*Febles SCC*]), in which the Federal Court of Appeal held at paragraphs 22-25 that the correctness standard of review applied to the RPD's interpretation of Article 1F of the Refugee Convention, noting the importance that a provision of an international convention be interpreted as uniformly as possible. However, the arguments in the case at hand relate more to the interpretation of provisions of the IRPA than to the interpretation of the Refugee Convention itself. The Federal Court of Appeal distinguished *Febles FCA* on a similar basis at paragraph 71 of *B010 v. Canada (Minister of Citizenship and Immigration)*, 2013 FCA 87 (affirmed *B010 v Canada (Minister of Citizenship and*

Immigration), 2014 SCC 58 [*B010 SCC*]) and also recently held in *Majebi v. Canada (Minister of Citizenship and Immigration)*, 2016 FCA 274 [*Majebi*], at paragraph 5, that the interpretation of the Refugee Convention does not fall into one of the categories of questions to which the correctness standard continues to apply.

[21] I also note the analysis of standard of review conducted by the Federal Court of Appeal at paragraphs 19 to 20 of *Canada (Minister of Citizenship and Immigration) v. Li*, 2010 FCA 75. That case involved issues surrounding the interpretation and operation of s. 112(3) of the IRPA, which the Court concluded to be reviewable on a standard of correctness. The statutory interpretation issues raised in the present case also involve s. 112(3), including its interaction with s. 25.2. However, I am again conscious of the guidance by the Federal Court of Appeal in *Majebi,* that authorities that pre-date the articulation of the presumption of reasonableness review applicable to home statute interpretation, set out in cases such as *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association,* 2011 SCC 61 [*Alberta Teachers*], must be approached with caution.

[22] I therefore consider the recent direction of the jurisprudence to favour a reasonableness review applicable to the issues of statutory interpretation raised by this application, including the effect of s 7 of the *Charter* other than in the context of an argument of constitutional invalidity (see *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12). However, questions of constitutional validity represent one of the categories to which the correctness standard continues to apply (see *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*], at para 58; *Alberta Teachers,* at para 30). As such, the constitutional validity of the relevant provisions of IRPA should be

reviewed on a standard of correctness (see also *Atawnah v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2016 FCA 144, at para 7).

[23] Regardless, I note that my conclusions on these issues are not based on any particular deference to the PRRA Officer's decision, as that decision does not engage in analysis of these issues other than to conclude that the Officer did not have jurisdiction to consider the constitutional questions or request for ministerial relief under s. 25.2. As such, my conclusions on these issues, based on the analyses below, would remain the same whether viewed through the lens of correctness or reasonableness.

C. *Legislation*

[24] The principal provision at issue in this application is s. 112(3), the relevant portion of which states as follows:

112 (3) Refugee protection may not be conferred on an applicant who	**112 (3)** L'asile ne peut être conféré au demandeur dans les cas suivants :
(a) is determined to be inadmissible on grounds of security, violating human or international rights or organized criminality;	**(a)** il est interdit de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux ou criminalité organisée;
…	…
(c) made a claim to refugee protection that was rejected on the basis of section F of Article 1 of the Refugee Convention;	**(c)** il a été débouté de sa demande d'asile au titre de la section F de l'article premier de la Convention sur les réfugiés;

[25] Section 112(3) is significant because it determines whether an application for protection is considered under both ss. 96 and 97 of the IRPA, or s. 97 alone. This occurs by operation of the following provisions of s.113:

113 Consideration of an application for protection shall be as follows:	**113** Il est disposé de la demande comme il suit:
…	…
(c) in the case of an applicant not described in subsection 112(3), consideration shall be on the basis of sections 96 to 98;	**(c)** s'agissant du demandeur non visé au paragraphe 112(3), sur la base des articles 96 à 98;
(d) in the case of an applicant described in subsection 112(3) — other than one described in subparagraph (e)(i) or (ii) — consideration shall be on the basis of the factors set out in section 97 and	**(d)** s'agissant du demandeur visé au paragraphe 112(3) — sauf celui visé au sous-alinéa e)(i) ou (ii) — , sur la base des éléments mentionnés à l'article 97 et, d'autre part
(i) in the case of an applicant for protection who is inadmissible on grounds of serious criminality, whether they are a danger to the public in Canada, or	(i) soit du fait que le demandeur interdit de territoire pour grande criminalité constitue un danger pour le public au Canada,
(ii) in the case of any other applicant, whether the application should	(ii) soit, dans le cas de tout autre demandeur, du fait que la

be refused because of the nature and severity of acts committed by the applicant or because of the danger that the applicant constitutes to the security of Canada;	demande devrait être rejetée en raison de la nature et de la gravité de ses actes passés ou du danger qu'il constitue pour la sécurité du Canada;

[26] Sections 96 and 97 set out the requirements which must be met to be, respectively, a Convention refugee or a person in need of protection. Section 98 provides that a person referred to in Article 1E or 1F of the Refugee Convention is not a Convention refugee or a person in need of protection. For present purposes, the relevant Article is 1F(a) which states that the provisions of the Convention shall not apply to any person with respect to whom there are serious reasons for considering the person has committed, among other things, a crime against humanity.

[27] Therefore, the effect of s. 113(c) is that an applicant not described in s. 112(3) receives consideration as a Convention refugee under s. 96 and a person in need of protection under s. 97, unless excluded as a result of the PRRA officer’s consideration of s. 98. However, an applicant who is described in s. 112(3) receives consideration only on the basis of the factors set out in s. 97. The Applicants argue that this is a significant difference for the following reasons:

A. An assessment under s. 97 is limited to risks of death, torture and cruel and unusual treatment and does not extend to persecution as does an assessment under s. 96;

B. The standard of proof is higher under s. 97 than under s. 96, as s. 97 requires demonstration that harm is more likely than not to occur, as opposed to the

requirement to show only more than a mere possibility of persecution under s. 96 (see *Li v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1, at paras 11-12, 39);

C. Section 96 affords protection against generalized risks, as long as there is a nexus to one of the Convention grounds of persecution, while s. 97 requires a personalized risk (see *Fi v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1125, at para 16).

[28] Furthermore, the effect of s. 113(d)(ii) is that even a positive s. 97 risk assessment is not sufficient to warrant protection, in that the assessment is then balanced against the nature and severity of acts committed by the applicant and public security considerations to determine if protection is warranted. Even if the decision is made to allow the application for protection, the effect of s. 114 is that the applicant receives a stay of removal rather than refugee protection:

114 (1) A decision to allow the application for protection has (a) in the case of an applicant not described in subsection 112(3), the effect of conferring refugee protection; and (b) in the case of an applicant described in subsection 112(3), the effect of staying the removal order with respect to a country or place in respect of which the applicant	**114 (1)** La décision accordant la demande de protection a pour effet de conférer l'asile au demandeur; toutefois, elle a pour effet, s'agissant de celui visé au paragraphe 112(3), de surseoir, pour le pays ou le lieu en cause, à la mesure de renvoi le visant.

was determined to be
in need of protection.

[29] The Applicants object to the adverse consequences of being persons described under s. 112(3). Given that the RPD's rejection of their refugee claim, as a result of exclusion under s. 98 and Article 1F of the Refugee Convention, employed pre-*Ezokola* jurisprudence as the test for complicity, the Applicants argue that the Officer should have reconsidered their exclusion as part of their PRRA.

D. *Do Canada's international legal obligations, s. 7 of the Charter, and the correct interpretation of s. 112(3) of the IRPA require an unrestricted PRRA on the facts of this case?*

(1) PRRA Officer's Jurisdiction to Determine Constitutional Questions

[30] As a preliminary point, I note that the Officer relied on the decision of Justice Russell in *Singh v Canada (Solicitor General)*, 2004 FC 288, in concluding that PRRA officers do not have jurisdiction to determine constitutional questions. In a footnote in the Applicant's written submissions, they noted that the Officer made no mention of recent pronouncements by the Supreme Court of Canada on this issue. However, there was no argument before me on the reasonableness of this jurisdictional conclusion by the Officer. In the absence of submissions on this jurisdictional issue and argument on applicable jurisprudence, my decision does not address this issue. Rather, recognizing the importance of the outcome of an administrative decision in conducting judicial review of that decision (see *Dunsmuir*, at paragraph 47), my decision turns

on the parties' arguments surrounding the substantive issue of the interpretation of s. 112(3) of the IRPA.

(2) Canada's International Legal Obligations

[31] The Applicants argue that Canada's international obligations under the Refugee Convention must inform the interpretation of the domestic statutory regime under the IRPA, and s. 112(3) in particular. They rely upon the principle of *non-refoulement* (the protection against deportation to persecution), enshrined in Article 33 of the Refugee Convention, which prohibits contracting states from returning a refugee to territories where the refugee's life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion.

[32] It is clear from the Convention that *non-refoulement* does not apply to claimants who are excluded by Article 1F. Therefore, the IRPA does not conflict with this principle to the extent that it permits removal of such claimants. The more nuanced question raised by the Applicants is whether Canada's obligations under the Refugee Convention mandate a re-examination of a previous exclusion finding contemporaneous with any intended removal, particularly in the context of a change in applicable jurisprudence.

[33] The Applicants rely on the principle described in *Nemeth v Canada (Justice)*, [2010] 3 SCR 281, at paragraph 50, that under the Refugee Convention refugee status depends on the circumstances at the time the inquiry is made, such that formal findings of refugee status do not have binding effect. They argue that this principle supports their position that, when refugee

protection is sought, the decision-maker must make a contemporaneous assessment of whether the claimant meets the definition of a refugee, including an assessment of possible exclusion under Article 1F.

[34] As support for their position in the specific context of exclusion findings, the Applicants refer to a publication of the United Nations High Commission for Refugees [UNHCR], entitled *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugee* dated September 4, 2003 [Background Note]. This document states that there may be occasions when information comes to light after the exclusion of an individual which casts doubt on the applicability of the exclusion clauses. In these cases the exclusion decision should be reconsidered and refugee status recognized if appropriate. The Respondent argues that this Background Note does not form part of the Refugee Convention and that it cannot be characterized as descriptive of Canada's obligations under the Convention.

[35] UNHCR publications of this sort can be useful guidance for interpreting Convention provisions, but they are not law and are not determinative of such interpretation (see *Fernandopulle v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 91, at para 17; *Febles FCA*, at para 50). Moreover, the Background Note refers to the requirement for reconsideration of the exclusion decision when "information comes to light which casts doubt on the applicability of the exclusion clauses". The Background Note does not itself require, at least not explicitly, reconsideration based on a change in the applicable jurisprudence. The Court has not been provided with clear authority that Canada's international obligations include a

requirement for reconsideration based on evolution of jurisprudence. In the absence of such authority, I cannot conclude that such a requirement applies.

[36] Regardless, even if I were to find that the Refugee Convention does include such a requirement, my conclusion is that, taking into account the applicable principles of statutory interpretation, the relevant provisions of the IRPA are not capable of being interpreted as implementing this requirement. The Applicants rely on the presumption that domestic legislation conforms with international obligations and the express interpretive provision in s. 3(3)(f) of the IRPA. This section states that the IRPA is to be construed and applied in a manner that complies with international human rights instruments to which Canada is signatory. The Federal Court of Appeal in *de Guzman v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436, at paras 82, 83 and 87, considered s. 3(3)(f) and held that the IRPA must be interpreted and applied consistently with such instruments unless, in the modern approach to statutory interpretation, this is impossible. This interpretive approach would apply even in the absence of s.3(3)(f), as courts must strive to avoid constructions of domestic law pursuant to which the state would be in violation of its international obligations, unless the wording of the statute clearly compels that result (see *R. v Hape*, 2007 SCC 26, at para 53).

[37] I accept the Applicants' articulation of the relevant interpretive principles and do not understand the Respondent to take issue with them. However, the difficulty with the Applicants' proposed interpretation of s. 112(3), read in combination with ss. 113(c) and (d), is its lack of support in the language of these sections.

[38] The Applicants reference both ss. 112(3)(a) and (c) in their arguments, although s. 112(3)(c) is the most relevant to this analysis. That is the section applicable to an exclusion finding by the RPD, which was the finding on which the PRRA Officer's decision turned. Section 112(3)(c) describes an applicant who "made a claim to refugee protection that was rejected on the basis of section F of Article 1 of the Refugee Convention". The use of the past tense verbs "made" and "was rejected" indicates that this provision relates to a claim that was previously made and adjudicated. I cannot identify a viable construction of s. 112(3)(c) that would permit a PRRA officer to conclude that this section does not apply to a refugee claimant who was previously excluded by the RPD under Article 1F.

[39] The Applicants submit that this construction is available by interpreting the words "on the basis of section F of Article 1 of the Refugee Convention" as referring only to exclusion determinations properly made. They argue that an erroneous exclusion (as they would characterize the pre-*Ezokola* determination by the RPD) is not captured by the language of s. 112(3)(c), as it was not made on the basis of the Convention.

[40] I cannot accept this as an available interpretation of s. 112(3)(c). Such an interpretation would represent a requirement for a PRRA officer, if so requested, to review every previous exclusion finding to assess whether or not it is erroneous. I consider such an interpretation to be the opposite of the legislature's intention, based on the plain and ordinary meaning of the words used in ss. 112(3)(c) and 113(c) and (d), which is to preclude assessment of exclusion where an exclusion finding has previously been made.

[41] The Applicants also note that s. 112(3)(a) is written in the present tense, referring to an applicant who "…is determined to be inadmissible on grounds of security, violating human or international rights or organized criminality". They argue that this supports their interpretation that the PRRA officer must conduct a contemporaneous assessment of inadmissibility, even if a prior finding of inadmissibility has been made. They submit that ss. 112(3)(a) and (c) should be interpreted consistently, such that s.112(3)(c) also requires a contemporaneous assessment.

[42] However, the Applicants acknowledge that the language of s. 112(3)(a) is potentially ambiguous as to the timing of the assessment. Given that s. 112(3)(c) clearly references a past assessment, my conclusion is that the Applicants' argument in favour of consistent interpretations of ss. 112(3)(a) and (c) does not support their position. Rather, it supports the conclusion that a PRRA officer is limited to considering s. 97 if the applicant has previously been the subject of an exclusion or inadmissibility finding.

[43] Accordingly, even if I were to accept the Applicants' argument, that the principle of *non-refoulement* requires contemporaneous re-examination of previous exclusion findings following a change in jurisprudence, I would find that it is not possible to interpret the relevant IRPA provisions to conform with that aspect of the principle. I therefore find that the Applicants' arguments based on the provisions of the Refugee Convention do not support their proposed interpretation of s. 112(3).

(3) Section 7 of the Charter

[44] The Applicants argue that s.7 of the *Charter* requires that their interpretation of s. 112(3) of the IRPA be accepted. Their position is that removal to a risk of persecution engages s. 7 rights and is therefore permissible only if the exposure to such risk is consistent with the principles of fundamental justice. The Applicants submit that their removal, without a contemporaneous assessment of their exclusion from refugee protection, violates such principles, two of which they raise for the Court's consideration.

[45] First, the Applicants submit that the principle of *non-refoulement* meets the criteria for recognition as a principle of fundamental justice, as set out in *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCR 4, at para 8. The Supreme Court of Canada determined that a principle of fundamental justice must be a legal principle, with sufficient consensus that it is vital or fundamental to our societal notion of justice, and that it must be capable of being identified with precision and applied in a manner that yields predictable results.

[46] Second, the Applicants rely on the protection against arbitrariness as a recognized principle of fundamental justice (see *Carter v Canada (Attorney General)*, 2015 SCC 5, at para 83). This principle requires a rational connection between the object of a law and the limit it imposes on life, liberty or security of the person. The Applicants submit that there is no rational connection between denying refugee protection to those who have committed international

crimes (the object of the law in question) and the limit imposed on the Applicants' liberty and security, because there is no substantive basis for excluding them from refugee protection.

[47] The Applicants take the position that the application of s. 7 of the *Charter*, in the context of these principles of fundamental justice, requires that s. 112(3) be interpreted as they advocate, i.e. as requiring a contemporaneous assessment of their exclusion before they can be removed without having their risk assessed under s. 96 of the IRPA.

[48] Turning to the principles of statutory interpretation relevant to this argument, the Applicants note the explanation by the Supreme Court of Canada in *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42, at paragraph 62. The Court explained that statutory interpretation which promotes *Charter* principles and values is only applicable in circumstances of genuine ambiguity, i.e. where a statutory provision is subject to differing, but equally plausible, interpretations. However, the Applicants argue that this limit on the application of the *Charter* as an interpretive tool is overridden in the present case by the effect of s. 3(3)(d) of the IRPA, which states that the statute is to be construed and applied in a manner that ensures that decisions taken thereunder are consistent with the *Charter*. The Applicants' position is that, regardless of whether the provision under review is ambiguous, the IRPA must be interpreted and applied in a manner that ensures conformity with the *Charter*.

[49] The difficulty with the Applicants' position is the same as identified in the above analysis of the interpretive effect of the Refugee Convention. While arguing that an ambiguity is unnecessary, the Applicants submit that s. 112(3)(c) does contain a latent ambiguity, as to

whether an erroneous exclusion can be considered to have been made "on the basis of" the Convention. However, my analysis as set out previously in these Reasons applies equally to the Applicants' arguments on the interpretive effect of the *Charter*. I find not only that s. 112(3)(c) is not ambiguous as submitted by the Applicants but that, particularly when considered in context with s. 113, it is not capable of bearing the Applicants' proposed interpretation. This analysis applies regardless of whether the Applicants are correct in their submission that s.3(3)(d) of the IRPA eliminates the need to demonstrate an ambiguity in the statutory language before one can have recourse to *Charter* values and principles in interpreting the statute. I do not understand the Applicants to be arguing that the effect of the *Charter* is to permit an interpretation that the statutory wording is incapable of bearing.

[50] I also consider the Respondent's position, that the *Charter* does not require the interpretation argued by the Applicants, to be consistent with recent guidance from the Supreme Court of Canada. The Supreme Court has confirmed in *B010 SCC*, at paragraph 75, that s.7 of the *Charter* is typically engaged at the PRRA stage of IRPA's refugee protection process, not at the stage of determining admissibility or exclusion. The Supreme Court referred to its decision in *Febles SCC* that a determination of exclusion from refugee protection under the IRPA did not engage s. 7, because "even if excluded from refugee protection, the appellant is able to apply for a stay of removal to a place if he would face death, torture or cruel and unusual treatment or punishment if removed to that place". The full explanation from the Supreme Court in *Febles SCC* is set out as follows at paragraphs 67 to 68:

> [67] There is similarly no role to play for the *Charter* in interpreting s. 98 of the *IRPA*. Where Parliament's intent for a statutory provision is clear and there is no ambiguity, the *Charter* cannot be used as an interpretive tool to give the legislation a

> meaning which Parliament did not intend: *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at paras. 61-62. Moreover, as the Court of Appeal held, s. 98 of the *IRPA* is consistent with the *Charter* . As stated at para. 10 of these reasons, even if excluded from refugee protection, the appellant is able to apply for a stay of removal to a place if he would face death, torture or cruel and unusual treatment or punishment if removed to that place (ss. 97 , 112 , 113 (*d*)(i) and 114(1) (*b*) of the *IRPA*). On such an application, the Minister would be required to balance the risks faced by the appellant if removed against the danger the appellant would present to the Canadian public if not removed (s. 113 (*d*) of the *IRPA*). Section 7 of the *Charter* may also prevent the Minister from issuing a removal order to a country where *Charter* -protected rights may be in jeopardy: *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, at para. 58.
>
> [68] While the appellant would prefer to be granted refugee protection than have to apply for a stay of removal, the *Charter* does not give a positive right to refugee protection. The appellant is excluded from refugee protection as a result of his commission of serious non-political crimes. If removal of the appellant to Cuba jeopardizes his *Charter* rights, his recourse is to seek a stay of removal, as discussed earlier.
>
> (Emphasis added.)

[51] The Federal Court of Appeal's analysis is expressed in similar terms in paragraphs 68 to 69 of *Febles FCA*:

> [68] If an application by Mr Febles for protection were allowed on a PRRA, on the ground that the personal risks that he would face if returned outweighed the risk to the Canadian public if he remained, his removal would be stayed: paragraph 114(1)(b). Further, section 7 of the *Canadian Charter of Rights and Freedoms* (Charter) will normally also prevent the MCI from removing an individual to a country where their Charter-protected rights may be in jeopardy: *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3 at para. 58.
>
> [69] Applying for and obtaining a stay of removal from the MCI under the PRRA provisions may not be as satisfactory to Mr Febles on grounds of process and substance as an application to the

> RPD for the grant of refugee protection and the rights attached to that status. Nonetheless, protection would comply with the *non-refoulement* principle for those who are excluded from refugee status for serious criminality, but if removed are at risk of death, torture, cruel and unusual treatment or punishment, or the deprivation of other rights guaranteed by section 7 of the Charter.
>
> (Emphasis added.)

[52] I interpret these decisions to support the Respondent's position, that s. 7 rights can be protected through the availability of a s. 97 assessment and the potential for a resulting stay of removal under s. 114(1)(d). The protection of s. 7 rights does not require that an applicant be afforded access to the process or the substance of an application for a grant of refugee protection, or the rights associated with this status. I therefore reject the Applicants' arguments that, on the facts of their case, s.7 mandates that s.112(3) of the IRPA be interpreted as requiring reconsideration of the Applicants' exclusion under s. 98 and potential recourse to an assessment under s. 96.

(4) Res Judicata / Issue Estoppel

[53] The parties' submissions addressed Canadian jurisprudence applicable to *res judicata* and issue estoppel in the context of a change in law. Those submissions focused in particular on the recent decision of the Federal Court of Appeal in *Oberlander v Canada (Attorney General)*, 2016 FCA 52 [*Oberlander*], which considered this subject in the specific context of the change in the test for complicity resulting from the *Ezokola* decision. The appellant in that case was the subject of a pre-*Ezokola* complicity finding by the Governor in Council in a citizenship revocation proceeding, related to war crimes committed during World War II. The complicity

finding was upheld by both the Federal Court and the Federal Court of Appeal, but the citizenship revocation decision was returned to the Governor in Council for consideration of the issue of duress. The Governor in Council concluded that duress had not been established and again revoked the appellant's citizenship. The appellant again applied for judicial review and, following the intervening jurisprudential development in *Ezokola*, sought to have the complicity issue re-determined.

[54] The Federal Court considered whether issue estoppel precluded re-litigation of the complicity finding and held that the doctrine of issue estoppel applied. While recognizing the residual discretion not to apply that doctrine, the Court concluded that the appellant had not established grounds for such an exercise of discretion. The Federal Court of Appeal allowed the appeal on the basis that the Federal Court had failed to consider the link between the complicity finding and the issue of duress and that the doctrine of issue estoppel had therefore created an injustice.

[55] In the present case, the Applicants argue that *Oberlander* has confirmed that pre-*Ezokola* complicity findings should be reassessed because of the change in law and that the doctrines of *res judicata* and issue estoppel should not preclude such reassessments. With respect, the Applicants are overstating the effect of *Oberlander*. The Federal Court of Appeal has clearly stated that a court has a residual discretion not to apply the doctrine of issue estoppel and that, in applying the principles applicable to the exercise of that discretion, the overriding consideration is whether the interests of justice require that result. The result in that case arose from the fact that the Federal Court had been seized with an issue (the judicial review of the duress

determination) which itself required reconsideration of the complicity finding in order to avoid an injustice. I do not read *Oberlander* as broadly stating that pre-*Ezokola* complicity findings require reassessment.

[56] The Applicants note that the discretion not to apply issue estoppel is also available to administrative decision-makers (see *Danyluk v Ainsworth Technologies Inc.*, 2001 SCC 44, at para 62). They submit that the PRRA Officer erred in failing to consider exercising this discretion in relation to the complicity findings of the RPD. I understand the Applicants to be arguing that their application for protection re-engaged the exclusion determination and therefore the complicity finding, such that the Officer should have exercised the discretion not to apply issue estoppel, or at least considered the exercise of same. The difficulty with this position is that it ignores the operation of ss. 112(3) and 113 of IRPA. The Officer's decision not to reconsider the Applicants' exclusion turned not on the common law doctrine of issue estoppel but on the statutory prohibition against considering the PRRA application under s. 96 of the IRPA. There is no basis to import into the statutory regime a discretion not to apply that prohibition.

[57] I therefore conclude that the jurisprudence surrounding the principles of *res judicata* and issue estoppel does not assist the Applicants, either in their arguments surrounding the interpretation of s. 112(3) or in submitting that the Officer failed to consider or exercise a discretion to reconsider their exclusion.

[58] In summary, having considered all the arguments raised by the Applicants under the first issue in this judicial review, I find the PRRA Officer to have acted reasonably, and for that

matter correctly, in limiting the assessment of the Applicants' application for protection to consideration on the basis of s. 97of the IRPA.

E. *In the alternative, must the Minister exercise discretion under s. 25.2 of the IRPA to exempt the Applicants from the application of s. 112(3), such that failure to consider their request for an exemption vitiates the PRRA decision?*

[59] The Applicants argue in the alternative that, if the Court finds that the IRPA precludes a s. 96 assessment, then the *Charter* requires that the Minister exercise the discretion afforded by s. 25.2 of the IRPA to waive the statutory bar and provide them with an unrestricted PRRA.

[60] I note at the outset that, arguably, this submission seeks to impugn a different decision than the Applicants' other arguments, as it focuses not on the PRRA Officer's decision (which on this issue was limited to concluding that the Officer did not have jurisdiction to consider the Applicants' request for ministerial relief) but on the Minister's failure to exercise or consider the exercise of the discretion afforded by s. 25.2. This raises concern about the effect of Rule 302 of the *Federal Courts Rules*, which provides that, unless the Court otherwise orders, an application for judicial review shall be limited to a single order in respect of which relief is requested. However, the Respondent did not raise this as an issue, other than a brief reference in post-hearing submissions on whether any questions should be certified for appeal. As such, particularly given the relationship in this case between the PRRA application and the request for ministerial relief, I will not treat Rule 302 as an impediment to considering the Applicants' arguments related to s. 25.2.

[61] The Applicants submit that the Federal Court of Appeal has confirmed that s. 25.2 relief is available for those who are inadmissible pursuant to s. 35 of the IRPA (see *Austria v Canada (Minister of Citizenship and Immigration)*, 2014 FCA 191, at para 14; *Canada (Minister of Public Safety and Emergency Preparedness) v J. P.*, 2013 FCA 262, at para 16). Section 25.2(1) provides as follows:

Public policy considerations	**Séjour dans l'intérêt public**
25.2 (1) The Minister may, in examining the circumstances concerning a foreign national who is inadmissible or who does not meet the requirements of this Act, grant that person permanent resident status or an exemption from any applicable criteria or obligations of this Act if the foreign national complies with any conditions imposed by the Minister and the Minister is of the opinion that it is justified by public policy considerations.	25.2 (1) Le ministre peut étudier le cas de l'étranger qui est interdit de territoire ou qui ne se conforme pas à la présente loi et lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, si l'étranger remplit toute condition fixée par le ministre et que celui-ci estime que l'intérêt public le justifie.

[62] I do not find the Applicants to have advanced a compelling argument that the Minister was obliged to exercise this discretion so as to provide them with an unrestricted PRRA. Their argument depends on the position that such an exercise of discretion is necessary either to comply with Canada's international obligations or to conform with the *Charter*.

[63] I accept that an exercise of ministerial discretion may be constrained by a requirement to respect a party's *Charter* rights (see *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, at paras 114, 117 and 128). However, I have concluded above that the protection of s. 7 rights does not require that the Applicants' exclusion be reconsidered and that

they be afforded potential recourse to an assessment under s. 96. Therefore, I cannot conclude that the Minister was fixed with an obligation to waive the effects of s. 112(3) of the IRPA.

[64] With respect to the effect of international law, the Applicants rely on the requirement in s. 3(3)(d) of the IRPA that the statute be applied in a manner which complies with international human rights instruments to which Canada is signatory. They argue this requires the Minister to exercise the discretion under s. 25.2 to permit reconsideration of the RPD's exclusion finding. However, I noted earlier in these Reasons that I was unable to conclude that Canada's international obligations under the Refugee Convention include a requirement for reconsideration of previous decisions based on changes in applicable jurisprudence. In the absence of such a requirement, the Applicants' arguments do not support the conclusion that the ministerial discretion afforded by s. 25.2 must be exercised so as to relieve the Applicants of the effect of the RPD's decision.

[65] The Applicants also submit that the Minister's decision under s. 25.2 is subject to judicial review on the basis that the Minister failed to consider their request for relief. They argue that, where a statute provides a discretionary remedy and the favourable exercise of that discretion is expressly sought, it is an error to refuse an application without acknowledging and exercising the discretion in question.

[66] The Applicants rely on the decisions in *Singh Tathgur v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1293 [*Singh Tathgur*] and *Saini v. Canada (Minister of Citizenship and Immigration)*, [1998] 4 FCR 325 [*Saini*]). However, these decisions relate to other decision-

making powers under the IRPA. *Singh Tathgur* involved a discretion conferred upon a visa officer considering an application for a permanent resident visa as a member of a skilled worker class, and *Saini* involved a removal officer's discretion to defer removal pending a risk assessment under a previous version of the IRPA. The Applicants' argument must be considered in the specific context of the discretion conferred by s. 25.2 of the IRPA.

[67] The parties' arguments focused on whether s. 25.2 contemplates an exercise of discretion only when the Minister has established a policy under which a particular applicant falls, or whether it contemplates the exercise of discretion on a case-by-case basis without a pre-established policy from the Minister. The Respondent argues the former position and referred the Court to a number of policies that have been established by the Minister to guide officers to whom the exercise of the s. 25.2 discretion has been delegated. The Respondent also noted that the ministerial power to establish policies has not been delegated. On the other hand, the Applicants argue that s. 25.2 refers to "public policy considerations" and that there is nothing in the wording of the section which requires the establishment of a policy before the discretion can be engaged.

[68] There appears to be very little jurisprudence interpreting s. 25.2 and none that is of assistance in resolving the competing interpretations offered by the parties. However, in my view, the disposition of the Applicants' argument turns on the wording of s. 25.2(1), a comparison to the similar grant of ministerial discretion found as follows in s. 25(1), and a purposive consideration of these provisions:

Humanitarian and compassionate considerations — request of foreign national	**Séjour pour motif d'ordre humanitaire à la demande de l'étranger**
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.	25 (1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 — , soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada — sauf s'il est interdit de territoire au titre des articles 34, 35 ou 37 — qui demande un visa de résident permanent, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

[69] Section 25(1) affords the Minister discretion to examine the circumstances concerning a foreign national who is inadmissible (except where the inadmissibility is under ss. 34, 35 or 37), or who does not meet the requirements of the IRPA, and to grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of the IRPA. The basis for the exercise of discretion is 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.

[70] Section 25.2 (1) provides the Minister with a similar discretion. It entitles the Minister to examine the circumstances concerning a foreign national who is inadmissible, or who does not meet the requirements of this Act, and to grant that person permanent resident status or an exemption from any applicable criteria or obligations of the IRPA. Under s. 25.2(1), the basis for the exercise of discretion is if the foreign national complies with any conditions imposed by the Minister and the Minister is of the opinion that it is justified by public policy considerations.

[71] However, it is noteworthy that s. 25(1) states that the Minister "must" examine the circumstances concerning the foreign national, if the foreign national so requests, and "may" grant certain relief. In contrast, s. 25.2(1) states that the Minister "may", in examining the circumstances concerning a foreign national, grant that person certain relief. Section 25.2(1) does not contain imperative language, equivalent to s. 25(1), requiring the Minister to examine the foreign national's circumstances. The contrast in these two sections suggests that the legislature did not intend that the Minister be obliged to consider requests for relief based on public policy considerations, as opposed to humanitarian and compassionate considerations.

[72] This interpretation is further supported by the nature of public policy. In *De Araujo v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 363, the Court considered a previous version of the IRPA, in which the Minister's power to grant relief based on public policy considerations was contained in s. 25 rather than s. 25.2. The Court rejected the

applicants' argument that the immigration officer considering their application under s.25 failed to consider public policy features of their application. At paragraphs 19 to 23, Justice Mactavish held as follows:

> [19] Moreover, this Court has previously determined that as the term "public policy" as it is used in section 25 of IRPA has no objective content, it must therefore be defined by those constitutionally entrusted with the power to set policy: see *Aqeel v. (Ministre de la Citoyenneté et de l'Immigration)*, [2006] A.C.F. no. 1895, 2006 CF 1498, *Vidal v. Canada (Minister of Employment and Immigration)* (1991), 41 F.T.R. 118 and *Dawkins v. Canada (Minister of Employment and Immigration)* (1991), 45 F.T.R. 198.
>
> [20] Indeed, in *Dawkins*, the Court noted that allowing immigration officers to make exceptions to definitions adopted in the formulation of public policy would in effect amount to the immigration officer usurping the legislative role.
>
> [21] One way that public policy can be articulated is through the promulgation of guidelines. In this case, the Minister has developed guidelines which identify a number of categories of individuals whose applications may be considered for processing under section 25 of the *Immigration and Refugee Protection Act* on "public policy" grounds. The most recent of these categories relates to spousal sponsorships for spouses in Canada without status.
>
> [22] The Guidelines do not currently identify members of skilled construction trades as a category of individuals whose applications may be considered for processing under the "public policy" ground in section 25.
>
> [23] As a consequence, I cannot give effect to the applicants' "public policy" argument.

[73] Similarly, in *Khodja v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 1087, at paragraph 3, Justice Shore explained the authority to determine public policy as follows:

> [3] Given the separation of powers between the three branches of government, public policy considerations are determined by the Minister designated as responsible for the Act in that respect. Only

> the Minister has the discretionary authority to determine what constitutes public policy; officers cannot extend their scope and the judicial branch can only interpret the law according to the intention of Parliament (*Vidal v Canada (Minister of Employment and Immigration)* (1991), 41 FTR 118, [1991] FCJ No 63 (TD) (QL/Lexis); *Dawkins v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 639, 45 FTR 198 (TD)).

[74] I recognize that the Applicants are not arguing that the PRRA Officer had the authority to establish public policy. Rather, their position is that, since their application was made to the Minister, the Minister had an obligation at least to consider their request. However, the fact that only the Minister can determine what constitutes public policy detracts from the Applicants' argument that the Minister has an obligation to consider all requests for relief based on public policy considerations. This would potentially result in the Minister being required to consider an enormous volume of such requests, which cannot have been the legislature's intention. In response to this point, the Applicants submitted that the Minister could delegate this authority. However, while the Minister can delegate (and indeed has delegated) authority to make decisions under s. 25.2 in accordance with policies the Minister has previously promulgated, it would be inconsistent with the nature of public policy and the authorities cited above to require the Minister to delegate the authority to determine the content of public policy.

[75] This supports the Respondent's position that the legislature did not intend s. 25.2(1) to create a decision-making process that must be exercised upon request by any applicant. While there is nothing in the wording of the section which expressly requires the prior establishment of a policy before the discretion can be engaged, this does not assist the Applicants where they have not identified a policy that applies to them (which could engage the delegated discretion) and the Minister has not elected to consider their request for relief. I therefore find no basis, derived from

the Applicants' request for relief under s. 25.2, to identify an error in the decision that is the subject of this judicial review.

[76] In summary, I find the PRRA Officer's decision to be reasonable, and for that matter correct, in concluding that the Officer did not have the jurisdiction to consider the Applicants' request for ministerial relief. To the extent the Applicants' arguments impugn the Minister's failure to exercise or consider the exercise of the discretion afforded by s. 25.2, or the Officer proceeding to assess the Applicants' risks without awaiting a decision by the Minister on the Applicants' s. 25.2 request, I again find no reviewable error on either standard of review.

F. *In the further alternative, does the statutory regime infringe the Applicants' rights under s. 7 of the Charter?*

[77] The Applicants' arguments on this issue are essentially the same as those in support of their position that s.7 of the *Charter* requires s.112(3) to be interpreted to allow an unrestricted PRRA on the facts of this case. They submit that, if the Minister's interpretation of s.112(3) is correct, then the combined effect of that section and ss. 113(d) and 114(1)(b) of the IRPA is to infringe s. 7, such that the Court should either declare those sections to be of no force and effect or grant the Applicants an exemption from the effect of those sections.

[78] If my conclusions on the Applicants' statutory interpretation arguments had been limited to a finding that the statutory language was incapable of bearing the interpretation they advocate based on s. 7 of the *Charter*, there would remain scope for them to argue that the IRPA provision identified by the Applicants nevertheless infringed s. 7. However, I have also found, in reliance

on recent jurisprudence from the Supreme Court of Canada and Federal Court of Appeal, that the protection of s. 7 rights does not require that an applicant be afforded access to the process or the substance of an application for a grant of refugee protection. Section 7 rights can be protected through the availability of a s. 97 assessment and the potential for a resulting stay of removal. I have concluded that, on the facts of the Applicants' case, s.7 does not require that s.112(3) of the IRPA be interpreted as requiring a new assessment of exclusion and potential recourse to an assessment under s. 96. For the same reasons, I conclude that s. 112(3), and the related IRPA provisions identified by the Applicants, do not infringe s. 7 of the *Charter*.

G. *Was the PRRA Officer's s. 97 risk assessment reasonable?*

[79] I have considered the Applicants' arguments, challenging the reasonableness of the Officer's assessment of their risk under s. 97 of the IRPA, but have concluded that these arguments concern the Officer's assessment and weighing of the evidence. They do not raise issues that would place the Officer's decision outside the range of possible, acceptable outcomes, defensible in respect of the facts and law, identified in *Dunsmuir*, at paragraph 47, as informing the reasonableness standard of review.

[80] The Applicants note that their evidence and submissions in support of the PRRA relate to incidents in 2010 and 2013 which were not considered by the RPD.

(1) 2010 Incidents

[81] The evidence related to 2010 involved a Zimbabwean friend of Mr. Tapambwa named Calvin Chiwawa, who fled Zimbabwe after his computer was seized in October 2010 and he was accused of inciting Zimbabweans in the diaspora against the Mugabe regime. The Applicants allege that Mr. Tapambwa and Mr. Chiwawa were in regular electronic communication, which included criticism of the regime, and that the seizure of Mr. Chiwawa's computer therefore puts them at risk. They also referred to government agents visiting Mr. Tapambwa's former home in Zimbabwe in November 2010, searching for him, resulting in his tenants terminating their leases and vacating the property.

[82] The Applicants submitted a letter from Mr. Chiwawa, which referred to his friendship with Mr. Tapambwa and the fact that they communicated through Facebook between 2008 and October 2010. His letter states the government agents took his computer because he was mobilizing people abroad to rise against the Mugabe government and that he then fled Zimbabwe for South Africa. It also states that, upon arriving in South Africa, he contacted Mr. Tapambwa, notifying him that their communication was in the hands of government agents and that it was not safe for him to come back home.

[83] The Officer considered Mr. Chiwawa's letter and accepted that he and Mr. Tapambwa were friends and that they communicated with each other but noted that the letter did not provide details of those communications. The Officer concluded that there was insufficient objective evidence that their communications involved talks against the government and that these communications were such that they would place the Applicants at risk in Zimbabwe within the meaning of s. 97 of the IRPA. The Officer also stated that the information in Mr. Chiwawa's

letter did not overcome the significant credibility findings of the RPD or its determination that any risk the Applicants may face would be a risk shared generally by other persons in Zimbabwe.

[84] The Applicants argue that the Officer's conclusions are unreasonable because, while Mr. Chiwawa's letter did not confirm the nature of the communications, Mr. Tapambwa's affidavit submitted in support of the PRRA described these communications as expressing hope that the Mugabe regime would be defeated, as well as criticisms of the regime and its abuses. The Applicants submit that the Officer either ignored Mr. Tapambwa's affidavit or made veiled and unsubstantiated credibility findings related to his evidence.

[85] As noted by the Respondent, the Officer refers elsewhere in the decision to Mr. Tapambwa's affidavit. It therefore cannot be concluded that the affidavit itself was overlooked. The Applicants are correct that, in the Officer's analysis of Mr. Chiwawa's letter, there is no reference to Mr. Tapambwa's evidence as to the nature of his communications with Mr. Chiwawa. However, a PRRA officer is not required to refer to every piece of evidence before him or her and, in the absence of indications to the contrary, is presumed to have considered such evidence (see *Traoré v Canada (Citizenship and Immigration)*, 2011 FC 1022, at para 48; *Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 598 (FCA)). I do not read the Officer's analysis as supporting a conclusion that Mr. Tapambwa's evidence was overlooked. It is evident from this portion of the analysis and from the decision overall that the Officer was influenced by the RPD's adverse credibility findings, and the Officer's conclusion was that there was insufficient objective evidence that the communications with Mr. Chiwawa involved talks

against the government. Mr. Chiwawa's letter did not provide such evidence, and the record before the Officer did not include any copies of the electronic communications. I find this portion of the Officer's decision to be intelligible and cannot conclude it to be outside the range of possible, acceptable outcomes.

[86] With respect to the lease termination, the Officer refers to a document entitled "Termination of Lease Agreement" dated November 15, 2010, in which the author advises of the termination of his lease because of disturbing scenes suspected to be carried out by government agents. The Officer also refers to the author offering his opinion that the matter seems to be political between government agents and the property owner. The Officer notes that the Applicants are not referenced as the owners of the property anywhere in this document, nor is it accompanied by supporting evidence such as a rental contract with the Applicants. The Applicants take issue with the Officer's subsequent conclusion that there is insufficient objective evidence to conclude that the property owners are in fact the Applicants. They submit that this evidence is provided by Mr. Tapambwa's affidavit in which he referred to the author of the lease termination document as "my tenants" and referred to the property as his home.

[87] However, as pointed out by the Respondent, the Officer's analysis expressly notes that Mr. Tapambwa's affidavit refers to "my tenants". The Officer also referred to a psychological report submitted by the Applicants as stating that Mr. Tapambwa indicated in his psychological interview that his tenants were renting his family home and that they had felt threatened and decided to terminate their rental contract. It therefore cannot be concluded that the Officer overlooked Mr. Tapambwa's evidence. Moreover, the Officer states that, even if it were to be

accepted that the Applicants are the owners of the property, the information in the lease termination document concerning political matters between the government agents and the property owner is based on speculation on the part of the author and not information that is supported by sufficient objective evidence. I find no basis to interfere with the Officer's decision on this issue.

(2) 2013 Incidents

[88] The evidence related to 2013 involves allegations that members of the Zimbabwean intelligence service, the Central Intelligence Organization [CIO], attended at the home of Mr. Tapambwa's parents on two occasions. The Applicants submitted a letter from Mr. Tapambwa's mother, stating that a group of men forced their way into their home on August 26, 2013, looking for Mr. Tapambwa because they believed he had been spotted there the previous afternoon. The letter states that Mr. Tapambwa's parents were beaten, that his father was taken away, and that he has not been seen since. Mr. Tapambwa's mother reported the incident to the police and was taken to hospital. Her letter also states that the CIO returned on September 6, 2013 but were unable to break into her home because she had installed steel bars for extra protection on both doors. She says that she fled Zimbabwe for Zambia the next day.

[89] The Officer's decision reviews the contents of this letter and then notes that, by her own admission, Ms. Tapambwa did not recognize any of the four men from the first attack. However, when the men returned, she stated that they were CIO. The Officer concluded that there was insufficient evidence that these men were indeed from CIO given that neither Ms. Tapambwa nor her husband recognized them in the first attack. The Officer did not find her letter sufficient

objective evidence to establish that the Applicants would be at risk in Zimbabwe pursuant to s. 97 of the IRPA.

[90] The Applicants challenge this finding, because the letter stated that Mr. Tapambwa's mother recognized Joseph Chinotimba among the men who came to her home. The Applicants refer to Mr. Tapambwa's affidavit as stating that Mr. Chinotimba is a prominent war veteran and to documentary evidence establishing a link between him and governmental authorities.

[91] I find that the Applicants' argument does not undermine the reasonableness of this aspect of the decision. Ms. Tapambwa's letter states that the group who forced their way into her home on August 26, 2013 consisted of five men, one of whom she recognized as Mr. Chinotimba who lived in her neighbourhood. She and her husband did not recognize the other four men. She also states that, over the course of the incident, Mr. Chinotimba vanished, from which she concluded that he was the informer. The Officer's decision correctly recites that Ms. Tapambwa states that neither she nor her husband recognized any of the other four men. The Applicants are correct that the Officer did not refer to the identification of Mr. Chinotimba or his connections with the Zimbabwean government. However, I do not consider this evidence to be sufficiently supportive of the Applicants' allegation, that the other four men were representatives of the CIO, for the Officer's finding that there was insufficient evidence to that effect to be unreasonable.

[92] The Applicants also argue that the Officer erred in rejecting a medical report on Ms. Tapambwa because, even though it does not show how she sustained her injuries, it nevertheless corroborates her evidence. They refer to the decision of this Court in *Talukder v Canada*

(Minister of Citizenship and Immigration), 2012 FC 658 for the principle that medical evidence cannot be expected to state the source of the injuries. In that case, Justice Heneghan held at paragraph 12 that the RPD unreasonably concluded that a medical note was unreliable because it did not mention that the injury was the result of a beating. The Court agreed with the applicant's argument that the doctor did not witness the beating and that there was therefore no justification for diminishing the value of the note.

[93] That authority is distinguishable in the present case. The Officer did not conclude that the medical report on Ms. Tapambwa was unreliable. Rather, the Officer accepted it as evidence that she suffered various injuries. However, the Officer concluded that the report did not establish who inflicted the injuries or the reason behind the assault, from which the Officer found there was insufficient objective evidence that these injuries were inflicted by members of the CIO or caused as a result of the CIO seeking Mr. Tapambwa's whereabouts. I find nothing unreasonable in the Officer's treatment of the report.

[94] The Applicants also submit that the Officer erred in dismissing the evidence of a lawyer that Mr. Tapambwa's family had hired to inquire about his father's disappearance, as well as the evidence of Mr. Tapambwa's uncle who had hired the lawyer on the family's behalf. The lawyer provided a letter terminating his legal services, as a result of death threats he had received, and a second letter providing information about the political and security situation in Zimbabwe. The Applicants take issue with the Officer's conclusion that this did not provide sufficient evidence to overcome the RPD's credibility findings or to link the Applicants to the alleged risk.

[95] The Officer concluded that the termination letter provided insufficient objective evidence to establish a link between the Applicants' personal circumstances and the situation the lawyer was handling related to Mr. Tapambwa's father. The Officer found that the letter did not provide sufficient objective evidence to establish that the Applicants would be at risk and that it did not overcome the significant credibility findings of the RPD or the RPD's determination that any risk the Applicants may face would be one shared generally by other persons in Zimbabwe. With respect to the second letter, the Office found it to represent a personal opinion on the generalized country conditions in Zimbabwe, which did not represent evidence of risk that was personal to the Applicants. I find these conclusions to be within the range of possible, acceptable outcomes available to the Officer in considering this evidence. The Applicants' arguments take issue with the Officer's assessment and weighing of the evidence, which is not a basis for the Court to intervene in judicial review.

(3) Risk of Mr. Tapambwa being Mistaken for his Twin Brother

[96] One of the risks asserted by the Applicants was that Mr.Tapambwa could be mistaken for his identical twin brother, who had been accepted as a refugee in Canada after uncovering and threatening to expose a fraudulent scheme profiting his superiors in the Zimbabwean army. The Officer found this argument speculative in nature. The Officer accepted that Mr. Tapambwa has a twin but found there was insufficient objective evidence that he would be mistaken for his twin or at risk as a result of this potential mistaken identity.

[97] The Applicants' position is that this was an unreasonable conclusion, as the risk of being mistaken for an identical twin is real and concrete and is archetypally a risk that is personalized

and not faced by the general population. While I accept that the physical resemblance to one's twin is highly personalized, the potential for mistaken identity can be influenced by factors other than physical resemblance, and I cannot conclude the Officer to have been acting unreasonably in finding that the resulting risk to Mr. Tapambwa was speculative in nature.

(4) Affidavit of Norma Kriger

[98] The Applicants submitted an affidavit by Norma Kriger, an expert on Zimbabwe and the Zimbabwean diaspora, as evidence of the current country conditions. This evidence was submitted in support of the allegations of risk based on both the Applicants' history and their circumstances as refused asylum seekers. They argue that the Officer ignored this evidence and, in relation to the risk as refused asylum seekers, relied on outdated evidence that influenced the RPD's finding that the CIO would distinguish between returning deportees in general and those in whom there was some reason to have interest.

[99] It cannot be said that the Officer ignored Ms. Kriger's affidavit. The Officer expressly accepted the affidavit as expert information and opinion on the history and current state of affairs in Zimbabwe but did not find it established that the Applicants would be at risk should they be required to return to Zimbabwe. In particular, the Officer found that the affidavit did not rebut the RPD's conclusion that the Applicants had not established fear of persecution due to Mr. Tapambwa's political opinions.

[100] In considering the risk of returning failed asylum seekers, Ms. Kriger expressly states that it is uncertain whether the Applicants' failed asylum status on its own would place them at risk

of persecution, as many Zimbabweans have returned home from different countries without negative repercussions. Ms. Kriger offers the opinion that their former relationships and the claim of the CIO searching for them in 2010 and 2013 make them particularly vulnerable to persecution. However, this opinion is consistent with the evidence upon which the RPD and the Officer relied, to the effect that whether a returning asylum seeker would be of interest to the CIO would depend on the person's specific profile. As the RPD and the Officer did not find a sufficient basis for the Applicants' assertion that they feared persecution or were being sought by the CIO, my conclusion is that the Officer's treatment of Ms. Kriger's evidence is reasonable.

V. Conclusion

[101] In summary, I have identified no basis for a conclusion that the Officer erred, either in the decision to carry out a restricted PRRA considering only s.97 of the IRPA, or in the conduct of the s. 97 assessment. This application for judicial review is therefore dismissed.

VI. Certified Questions

[102] The Applicants have proposed the following questions for certification:

A. Do ss. 112(3)(a) and (c) of the IRPA require the Minister, when conducting a PRRA, to confirm that there remains a substantive basis for excluding the applicant from refugee protection?

B. If not, does s. 25.2 of the IRPA provide the Minister discretion to exempt a person making an application for protection under s. 112 of the IRPA from the restrictions that flow from s. 112(3) of the IRPA?

C. If not, does the combined effect of ss. 112(3)(a) and (c), 113(d) and 114 of the IRPA violate s. 7 of the *Charter* insofar as it deprives an applicant of the right to be recognized as a refugee even where there is no substantive basis for denying that right?

[103] Both parties made post-hearing written submissions in support of their positions on certification. The Respondent opposes certification of these questions, arguing they do not raise issues of broad significance or general application and also, in the case of the second question, that it would not be dispositive of an appeal in this case.

[104] While I have ruled against the Applicants on each of the issues that give rise to these proposed questions, my conclusion is that each question, subject to some reformulation, does raise an issue of broad significance or general application that would be dispositive of an appeal.

[105] The first question, which concerns the interpretation of ss. 112(3)(a) and (c) of the IRPA, would be dispositive of an appeal, as a successful appeal by the Applicants would result in a conclusion that the PRRA Officer should have revisited their 98 exclusion. However, the Respondent notes that Justice Fothergill declined to certify a similar question in *Azimi v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2015 FC 1177 [*Azimi*]. Justice Fothergill found that a PRRA officer and Canada Border Services Agency enforcement officer did not have jurisdiction to revisit an exclusion finding by the RPD. Like the case at hand, the RPD's finding in *Azimi* predated *Ezokola*, and the applicant in that case sought to have the finding revisited in light of *Ezokola*'s modification to the test for complicity.

[106] I consider the decision not to certify the question in *Azimi* to be distinguishable from the present case. Justice Fothergill noted that the number of refugee claimants who are caught between the jurisprudence predating *Ezokola* and the subsequent change in law is small and getting smaller and also held that the relevant legal principles are well-established and do not require further elucidation by the Court of Appeal. However, the applicants in *Azimi* did not advance the arguments based on the interpretive effect of Canada's obligations under the Refugee Convention or s. 7 of the *Charter* upon which the Court has ruled in the case at hand. Notwithstanding that the pool of refugee claimants who may be affected by this decision may be small and diminishing, the question raised by the Applicants does transcend their interests and, given the international law and constitutional principles engaged by the Applicants' arguments in support of their proposed answer to the question, I consider it to be appropriate for certification.

[107] It follows that the third question, which is derived from the Applicants' argument that the combined effect of s. 112(3) and related provisions of the IRPA infringes s. 7 of the *Charter*, should also be certified. However, I would rephrase the question as follows, so that it better tracks the premise of the first question:

> If not, does the combined effect of ss. 112(3)(a) and (c), 113(d) and 114 of the IRPA violate s.7 of the *Charter* insofar as it deprives an applicant of the right to be recognized as a refugee without confirmation that there remains a substantive basis for excluding the applicant from refugee protection?

[108] Turning to the second question, the Respondent submits that the question as formulated does not raise a serious issue of general importance, because the answer is clearly that s. 25.2 of the IRPA provides the Minister with discretion to exempt a person making an application for

protection under s. 112 from the restrictions that flow from s. 112(3) of the IRPA. In their post-hearing submissions, the Applicants appear to concede this point, noting that the proposed question was intended to raise whether the Minister has such a discretion in the absence of a pre-established policy. The Applicants confirmed that they would not object to the question being rephrased to make this clear.

[109] The Respondent's position is that, even if reformulated, no serious question of general importance is raised. However, the Respondent characterizes the reformulation as asking whether the Minister is obliged to consider drafting a public policy when asked to do so by a foreign national. As pointed out by the Applicants, this is not the question they are raising. Rather, their position is that, in the absence of a pre-established policy, the Minister still has the discretion to grant relief against the effects of s. 112(3) by taking into account public policy considerations on a case-by-case basis.

[110] This question transcends the interests of the parties to the present application but, as formulated, would still not be dispositive of an appeal. An appellate decision confirming that the Minister has the discretion, in the absence of a pre-established policy, to grant the requested relief would not necessarily address whether the Minister was obliged to exercise such discretion in the Applicants' favour or at all. The Applicants' submissions in support of the proposed certified question argue that it would be dispositive of the appeal because confirmation of the existence of the discretion would compel the Minister to exercise that discretion (either positively or negatively) on the facts at bar. I read the Applicants' submissions as raising a question which would be better formulated as follows;

> If not, does s. 25.2 of the IRPA provide the Minister discretion, in the absence of a pre-established policy, to exempt a person making an application for protection under s. 112 of the IRPA from the restrictions that flow from s. 112(3) of the IRPA, which discretion obliges the Minister to consider and make a decision on a request that such discretion be exercised?

[111] I consider the arguments in this application to raise this question, which I find to be a question of general application which would be dispositive of an appeal and therefore appropriate for certification.

JUDGMENT IN IMM-1516-16

THIS COURT'S JUDGMENT is that:

1. This application is dismissed.

2. The following questions are certified for appeal:

    a. Do ss. 112(3)(a) and (c) of the IRPA require the Minister, when conducting a PRRA, to confirm that there remains a substantive basis for excluding the applicant from refugee protection?

    b. If not, does s. 25.2 of the IRPA provide the Minister discretion, in the absence of a pre-established policy, to exempt a person making an application for protection under s. 112 of the IRPA from the restrictions that flow from s. 112(3) of the IRPA, which discretion obliges the Minister to consider and make a decision on a request that such discretion be exercised?

    c. If not, does the combined effect of ss. 112(3)(a) and (c), 113(d) and 114 of the IRPA violate s. 7 of the *Charter* insofar as it deprives an applicant of the right to be recognized as a refugee without confirmation that there remains a substantive basis for excluding the applicant from refugee protection?

"Richard F. Southcott"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1516-16
STYLE OF CAUSE:	STENSIA TAPAMBWA and RICHARD TAPAMBWA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
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