Federal Court  Cour fédérale

Date: 20160119

Docket: IMM-968-15

Citation: 2015 FC 1415

Ottawa, Ontario, January 19, 2016

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

BINDER SINGH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

AMENDED JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA or the Act] seeking an order setting aside the decision of the Refugee Protection Division [RPD or Board]. The decision consisted of three determinations: that the Applicant is not a Convention refugee or a person in need of protection;

that there was no credible basis [NCB] for the refugee claim pursuant to section 107(2) of the Act; and that he is excluded from refugee protection pursuant to section 98 of the Act.

[1] The gravamen of this case is whether the Court has jurisdiction to hear this judicial review application [JRA] of the RPD's decision. The Applicant argues that where the RPD makes an exclusion order under section 98 of the Act, the RPD has no further jurisdiction to rule on the Applicant's refugee status or make an NCB ruling [together the inclusion decision] and erred in doing so: (*Xie v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 250 [*Xie*]).

[2] The Applicant has a right of appeal of the RPD's exclusion decision to the Refugee Appeal Division [RAD] pursuant to section 110. As the RPD has no jurisdiction to render the inclusion decision, which would otherwise be reviewable on a JRA because of the NCB ruling that bars an appeal to the RAD (section 110(2)(c)), there is no lawful decision upon which a JRA can be made.

[3] However, the Applicant seeks the following remedial order based on section 18.1(3)(b) of the *Federal Courts Act*, which it submits respects the statutory scheme of the IRPA while also promoting efficiency in administrative decision-making. The order sought would not require the RPD inclusion decision to be set aside, but to be retained as an alternative finding of the RPD, apparently to have some utility if the exclusion ruling is set aside, and the matter reverting to the RPD. The remedy the Applicant seeks is that:

i) the decision be remitted back to the same Board member;

ii) that no hearing be held and that the Board member dismiss the claim on the exclusion ground for the reasons already provided;

iii) that any inclusion findings already made be strictly in the alternative and not prejudice the Applicant's right of appeal to the RAD; and

iv) that the dates for the Applicant to pursue an appeal to the RAD run from the date of the issuance of the new RPD decision.

[4] The Respondent argues that despite the *Xie* decision, the RPD is assigned jurisdiction to determine all issues, except for ineligibility and extradition claims (sections 101 and 105). When the Minister intervenes seeking an exclusion order pursuant to section 98 of the Act, the Respondent is not making a "jurisdictional challenge" to the RPD. There is no order that the Board must follow in making its decisions. It may determine in the first instance claims for protection made within Canada, which includes decisions where the RPD finds the applicants' claims to have no credible basis. On the basis of the RPD's inclusion ruling including its NCB conclusion, pursuant to section 110(2)(c) of the Act, both the RPD's inclusion and exclusion orders are barred from an appeal to the RAD, because of the NCB ruling. I also reject this argument as I conclude that section 110(2)(c) can have no application to bar appeals to the RAD of the RPD's exclusion decision.

II. Background and Impugned Decision

[5] The Applicant, a citizen of India, entered Canada on May 19, 2014 where he claimed refugee protection at the port of entry, all the while not revealing that he had resided elsewhere than in India.

[6] The Applicant stated that he feared his former co-worker and his brother. After a series of events, he traveled from India using an agent and arrived in Canada on May 19, 2014, whereupon he claimed refugee protection.

[7] At the port of entry, he identified himself as "Binder Singh" with a date of birth [DOB] of May 16, 1979. He was not in possession of a passport, but did present several other documents purportedly issued by the Indian authorities, which corroborated this identity. These included an Income Tax Department card, a driving licence, an Election Commission of India Identity card and a Government of India Unique Identification Authority card.

[8] The Applicant also provided several other documents to the Board confirming his identity after submitting his basis of claim [BOC] form. These included a Ration Card, a marriage certificate, giving the above name and DOB and birth certificates for his two minor children, listing their father's name as "Binder Singh". This was in addition to other sworn statements in medical records indicating that he had been known in India as "Binder Singh" and in Canada as well, after his arrival. These latter documents also indicated a DOB of May 16, 1979.

[9] The Minister of Citizenship and Immigration intervened, first by providing documentary evidence and later in person at the hearing, including questioning the Applicant and making oral submissions on the applicability of Article 1 F(b) of the Convention refugee definition, as well as on the issues of the Applicant's identity and the credibility of his allegations.

[10] The Minister's evidence was received on July 8, 2014 and included results from a biometric check of the Applicant with US immigration records showing that he:

- resided illegally in the U.S. between 1995 and 2007;
- was arrested in New Jersey on September 25, 1998, charged with "Lewdness" and sentenced to probation;
- was ordered removed from the U.S. by an Immigration Judge in *absentia* on November 24, 1998;
- escaped custody, but was apprehended on August 20, 2007; and
- was deported to India in November 2007.

[11] The Applicant, after being informed of the U.S. biometric check results, amended his BOC form on August 27, 2014 indicating that his name was "Ravinder Singh" and that his DOB was May 17, 1981, as opposed to May 16, 1979, thereby lowering his DOB by two years.

[12] The RPD noted that the only official document provided by the Applicant referring to him as "Ravinder Singh" was the FBI fingerprint report issued on August 18, 2014. The document stated that he was arrested in the U.S. on two occasions, once in 1998 and another in 2007. It also noted that an alias of "Binder Singh" and yet another birth date of May 17, 1979, also matched the fingerprints provided.

[13] The Board concluded that the Applicant's original assertion correctly identified the Applicant as "Binder Singh", born on May 16, 1979, and not "Ravinder Singh", born on the same date in 1981.

[14] With respect to the Applicant's 1998 conviction, he was arrested in New Jersey on September 25, 1998 for "Criminal Sexual Contact with a Minor" and was detained at a juvenile facility. Based on his 1981 DOB, he was processed as a juvenile and was sentenced to probation for the charge of "Lewdness".

[15] The documents indicate that the Applicant had earlier been ordered removed from the U.S. and that he escaped custody on November 24, 1998 and was not apprehended until August 20, 2007, whereupon he was deported.

[16] The RPD concluded that there were serious reasons to consider that the Applicant committed perjury in leading the American judge who sentenced him to believe that he was only 17 years of age based on his false 1981 DOB.

[17] The RPD noted that counsel for the Applicant, while not explicitly conceding that he should be excluded under Article 1 F(b), had little comment to make on the Minister's submissions, other than to consider the aggravating and mitigating factors.

[18] The RPD found that the Applicant admitted to the sexual offence against a child, aggravated by his false portrayal of himself as a minor when charged with this offence, constituted serious reasons for considering that he had committed a serious non-political crime outside the country of refuge. It thereby concluded that the Applicant was excluded from refugee protection pursuant to section 98 of the Act.

[19] In addition to the exclusion ruling, the RPD found that the Applicant had not provided sufficient credible or trustworthy evidence to support his allegations that he faces a serious possibility of harm amounting to persecution in India, or that on the balance of probabilities he would be personally subject to a risk to his life, cruel and unusual treatment or punishment, or danger of torture in India.

[20] Finally, the Board concluded that there was no credible basis for the Applicant's protection claim pursuant to section 107(2) of the Act.

III. Statutory Provisions

[21] The following provisions, which are relevant to these proceedings, are attached as an appendix to this decision: Sections 72(2)(a), 98, 107(2), 110(2)(c), 112(3)(b) & (c), 113(d) of the IRPA and 18.1(3)(b) of the *Federal Courts Act*.

IV. Issues

[22] The central issue is whether the Court has the jurisdiction to judicially review the RPD's decision, or whether it is barred from doing so by section 72(2)(a) of the Act because the Applicant has a right of appeal of the RPD decision to the RAD.

[23] The above issue raises the following sub-issues as presented by the Applicant:

i. Did the Board err by ruling on the inclusion issues in a decision where it found the Applicant was excluded, contrary to *Xie*?

ii. As a corollary to the above issue, did the Board err

   a. in not first ruling on the exclusion issue and, if excluding the Applicant, nevertheless proceeding to rule on the inclusion issues; or alternatively

   b. if it did not err in making both the exclusion and inclusion rulings, did it err in not stating that its inclusion ruling was made in the alternative for the practical purpose in accordance with the decision of *Gonzalez v Canada (Minister of Employment and Immigration)*, [1994] 3 FCR 646 [*Gonzalez*] in order to avoid the necessity of a further hearing, should a court find that the exclusion had been wrongly invoked?

[24] The RPD made no statement or finding on these issues.

V. Standard of Review

[25] The issue of the appropriate redress procedures under the IRPA from an RPD decision between an appeal to the RAD versus an application for judicial review, and other issues relating to the Court's jurisdiction, are subject to a correctness standard of review, particularly where no deference can be attributed to a decision of the RPD that did not consider these issues.

VI. Analysis

A. *Question 1: Did the Board err by ruling on the inclusion issues in a decision where it found the Applicant was excluded, contrary to Xie?*

[26] In this part of the analysis, the Court accepts that *Gonzalez* represents good law as to permitting the RPD to pronounce decisions on both the exclusion and inclusion issues. However, it is not possible in the analysis dealing with the first substantive issue not to implicitly conclude that the RPD erred in not stating its inclusion rulings were in the alternative, to be considered only if the exclusion decision is overturned in the future. The issue of the requirement to state that the inclusion ruling is in the alternative, substantive in its effect, impacts the analysis of the other two issues as well.

[27] The Applicant submits that the RPD did not have the jurisdiction to make the Inclusion Ruling. He argues that the *Xie* decision, and the many cases applying it, stand for the proposition that the RPD is first required to render its exclusion order before deciding the inclusion issues. If an exclusion order is made, this has the effect of rejecting the inclusion refugee protection application pursuant to section 112(3), including the NCB ruling, leaving only the exclusion

ruling as the RPD's decision. Absent any NCB ruling, the Applicant is entitled to appeal the RPD decision to the RAD. As a result, pursuant to section 72(2)(a) of the Act, the Federal Court may not review the RPD decision because there exists a right of appeal to the RAD that has not been exhausted.

[28] The premise for the Applicant's argument on both sub-issues stated above is that the exclusion decision has the effect of rejecting any inclusion decision of the RPD, because the exclusion decision excludes the claimant from any entitlement to a decision declaring him a protected refugee. Paragraphs 27 and 28 of the Applicant's submissions describe the logic underlying his position, which relates to the competing jurisdictions that could rule on the protection issues if the RPD is allowed to make the inclusion ruling, as follows:

> 27. The IRB and the Minister are each responsible for separate and specific classes of individuals who are asserting risk. The separate grants of jurisdiction in this matter are water-tight and mutually exclusive. To choose but one example, the IRB cannot hear a claim for protection from someone who is subject to a removal order (IRPA, s. 99(3)) whereas the Minister on a PRRA can only hear an application for protection from someone who is subject to a removal order (IRPA, s.112(1)).
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> 28. Through s. 98 and 112(2)(b.1) of the IRPA, Parliament has made clear that one such cleavage that divides the jurisdiction of the IRB and the Minister is exclusion under Article 1F(b) of the *Refugee Convention*. Section 98 of the IRPA strips the IRB of the jurisdiction to grant protection to a person who is excludable under this Article; this is true no matter how compelling or deserving their claim may be. At the same time, s. 112(2)(b.1) of the IRPA grants the Minister the jurisdiction to consider those same claims for protection at first instance on the PRRA. Indeed, Parliament has even exempted persons excluded by the IRB under Article 1F(b) from the one-year PRRA bar, reinforcing the understanding that such claims should always have been heard at first instance by the Minister and not by the IRB:

[29] As noted, the Applicant relies upon the Federal Court of Appeal decision in *Xie*, and the cases that have subsequently applied it. The relevant passages from Justice Pelletier's decision in *Xie* at paragraphs 36 to 38 are as follows, with my emphasis:

> [36] In my view, both questions treat the application of the exclusion as being tantamount to a final removal decision. As the review of the statutory scheme has shown, the purpose of the exclusion is not to remove claimants from Canada. It is to exclude them from refugee protection. Claimants who are excluded under section 98 continue to have the right to seek protection under section 112.
>
> [37] If successful, the appellant's arguments on the issue of balancing, both as to the type of offence which gives rise to the application of the exclusion, and the risk of torture upon return, would remove excluded claimants from the PRRA stream by giving the Refugee Protection Division the discretion to decide the questions which the Act has specifically reserved to the Minister. The grounds upon which a person may claim to be a person in need of protection before the Refugee Protection Division are the same grounds upon which an excluded claimant may apply to the Minister for protection. The only difference is that the Minister may have regard to whether the granting of protection to such a person would pose a risk to the public or would endanger the security of Canada, considerations which are not open to the Refugee Protection Division. From the point of view of statutory interpretation, there is no reason to believe that decisions which are reserved to the Minister should be somehow given to the Refugee Protection Division because there is a risk of torture.
>
> [38] This leads to the question as to whether the decision of the Supreme Court in *Suresh* requires a different reading of the statute. I might point out that the issue of *Suresh* only arises at this point because the Board, having found that the exclusion applied, went on to consider whether the applicant was at risk of torture upon her return to China. In my view, the Board exceeded its mandate when it decided to deal with the appellant's risk of torture upon return with the result that the Minister is not bound by that finding. Once the Board found that the exclusion applied, it had done everything that it was required to do, and there was nothing more it could do, for the appellant. The appellant was now excluded from refugee protection, a matter within the Board's competence, and was limited to applying for protection, a matter within the Minister's

> jurisdiction. The Board's conclusions as to the appellant's risk of torture were gratuitous and were an infringement upon the Minister's responsibilities.
>
> [Emphasis added]

[30] The *Xie* decision has been applied on innumerable occasions. Justice Leyden-Stevenson in *Han v Canada (Minister of Citizenship and Immigration)*, 2006 FC 432 [*Han*] applied the *Xie* decision at paragraph 40 of the decision as requiring the RPD to "decide the issue regarding a claimant's exclusion, from refugee protection, before dealing with the merits of the claim. Once the Board finds that a claimant is excluded from refugee protection, there is nothing more that it can or should do." Similarly in the decisions of *Muchai v Canada (Minister of Citizenship and Immigration)*, 2007 FC 944 at paragraph 12 [*Muchai*] and *Canada (Minister of Citizenship and Immigration) v Cadovski*, 2006 FC 364 at paragraphs 1-2 [*Cadovski*], Justices Hughes and O'Reilly found that once the Board finds that the applicant is excluded it should not proceed to deal with the inclusion issues. On the basis of *Xie* and these decisions, the Court is entitled to allow the application at this point, but to do so would not do justice to the Respondent's submissions.

[31] The Respondent seeks to distinguish *Xie* and the line of cases applying it on the basis that in those cases it was the Minister who was defending his jurisdiction to determine the protection issue under section 113(d). In this matter, the Minister is not concerned about any encroachment on his jurisdiction to decide the protection. Rather, as the Court understands it, the Minister seeks to rely upon the inclusion order, and in particular the NCB ruling, to provide jurisdiction for the Federal Court to judicially review the RPD's exclusion Order. If the Court assumes jurisdiction and does not set aside the RPD decision, the matter can proceed to the protection assessment

before the Minister's delegate, without the necessity of the exclusion ruling being appealed to the RAD. The Minister's purpose therefore, appears to be to achieve a degree of judicial economy in avoiding unnecessary procedures.

[32] The Court obviously is sympathetic to any argument intended to achieve judicial economy. However, I do not find that his submission avoids the conundrum raised by the Minister of placing his PRRA Officer [the Officer] in the delicate and potentially embarrassing situation of being forced to render the same or a different decision on the applicability of section 97, as was rendered by the RPD on the same provision.

[33] If the Officer makes the same decision, there will be concerns that the RPD's decision is simply being applied. Of greater potential embarrassment would be a contradictory decision by the Officer, resulting in two decisions on generally the same facts and same legal standard with different outcomes. In either case, these are the type of situations that the *Xie* decision is intended to avoid by acknowledging the exclusive jurisdiction of the Minister's delegate to decide the protection issue by force of preventing the RPD from making any inclusion ruling when it finds the claimant is excluded.

[34] The requirement to decide the exclusion issue in priority over the refugee protection issue is also implicitly supported by other provisions of the Act. The Applicant points out above in the passage cited from his memorandum that Parliament exempted persons excluded by the Immigration and Refugee Board [IRB] under Article 1F(b) from the one-year PRRA bar,

reinforcing the understanding that such claims should always have been heard at first instance by the Minister and not by the IRB.

[35] It is also significant that an applicant who may eventually be removed as the result of an exclusion decision is subject to a deportation order which obliges the applicant to obtain a written authorization in order to return to Canada once removed (Regulation 226(1)). An unsuccessful refugee claimant is normally subject to an exclusion order, which only requires an authorization to return during the one year after the order was enforced (Regulation 225(1)). There is a rationale therefore, not to engage in issues of refugee protection before the RPD pursuant to sections 96 and 97, when the Act establishes that the Minister should decide the subsequent protection issue measured against differently constituted factors and more serious consequences for the Applicant.

[36] As I further understand the Respondent's argument, the *Xie* decision did not preclude any alternative determination on inclusion once an applicant has been determined to be excluded. The Minister also states that the Court in *Xie* did not comment on the timing or order of the inclusion and exclusion decisions relative to each other. Additionally, the Minister submits that the Federal Court of Appeal has endorsed the practice of the RPD considering issues of inclusion, as well as exclusion in the claim, referring to *Gonzalez* in support of this argument.

[37] In *Gonzalez,* the Court concluded that the Board could proceed after arriving at an exclusion decision to decide the inclusion issues for the practical purpose of avoiding the

necessity of having the matter referred back for yet another full hearing, should the court find that the exclusion had been wrongly invoked. Justice Mahoney stated as follows:

> I find nothing in the Act that would permit the Refugee Division to weigh the severity of potential persecution against the gravity of the conduct which has led it to conclude that what was done was an Article 1F(a) crime. The exclusion of Article 1F(a) is, by statute, integral to the definition. Whatever merit there might otherwise be to the claim, if the exclusion applies, the claimant simply cannot be a Convention refugee.
>
> In my opinion, there is no error in law in either approach but there is a practical reason for the Refugee Division to deal with all elements of a claim in its decision. If it were to hold without reviewable error that, but for the exclusion, a claim was not well-founded, it would not be necessary, as it was in *Moreno*, for the matter to be referred back for yet another full hearing should a court find that the exclusion had been wrongly invoked. On the other hand, if it were to hold, as it did in *Ramirez* and *Sivakumar*, that the claim was well-founded but for application of the exclusion and, unlike those cases, it were found on appeal to have erred in applying it, this Court could make the necessary declaration without requiring the Refugee Division to deal with it again. Taxpayers might appreciate the economies of that approach.
>
> [Emphasis added]

[38] The *Gonzalez* decision must be interpreted in its legislative context. At the time in question there was no legislation providing for a consideration of a claimant's protection needs after being found excluded from refugee protection. That is clear from the emphasized sentence in the second paragraph of the decision cited above. In fact, the Court expressed the opinion that there ought to be a consideration of the Applicant's protection needs to be balanced against the reasons for exclusion, stating as follows:

> Article 1F excludes 'persons', rather than 'refugees' from the benefits of the Convention, suggesting that the issue of a well-founded fear of persecution is irrelevant and need not be examined at all if there are 'serious reasons for considering' that an individual comes within its terms. In practice, the claim to be a refugee can rarely be ignored, for a balance must also be struck between the nature of the offence presumed to have been committed and the degree of persecution feared. A person with a well-founded fear of very severe persecution, such as would endanger life or freedom, should only be excluded for the most serious reasons. If the persecution feared is less, then the nature of the crime or crimes in question must be assessed to see whether criminal character in fact outweighs the applicant's character as a bona fide refugee.
>
> [Emphasis added]

[39] It was probably comments such as this by Justice Mahoney that led to the additional consideration of the excluded claimant's protection needs as is found in section 113 of the Act.

[40] Accordingly *Gonzalez*, assuming it is correct, can only have application to the propriety of the RPD considering and making rulings on both the exclusion and inclusion issues on the basis of achieving judicial economy. But otherwise, I agree with the Applicant that the case can only be reconciled with *Xie* (which came after it), if it is interpreted so as not to interfere with the principle that the exclusion decision precludes any effective application or recourse to the inclusion decisions until after the exclusion decision is set aside.

[41] This is because at the time the exclusion decision is rendered by the RPD, the protection claim is rejected (section 112(3)). More importantly, it cannot have any effect or impact on the protection issue, because otherwise, it would encroach on the Minister's exclusive authority to determine the protection issue under section 113(d), which specifically is not permitted by *Xie*.

[42] What this means is that the NCB ruling, accepting for the purposes of argument that the RPD can make an inclusion ruling in the same case as it makes an exclusion ruling for expediency reasons outlined in *Gonzalez*, can similarly only have a future effect, conditional upon the exclusion decision somehow being set aside. But the correct redress route (i.e. an appeal to the RAD or a JRA to the Federal Court), must be determined on the basis of the conclusions of the RPD, not on the possibility that the exclusion ruling may be overturned on a judicial review application in the future.

[43] At the conclusion of the RPD hearing, the NCB ruling -- which is the only component of the inclusion ruling that is relevant to this matter -- cannot have any effect because as part of the refugee protection claim it has been rejected by the exclusion order (section 112(3)(c): "a claim to refugee protection that was rejected on the basis of section F of Article 1 of the Refugee Convention"). [Emphasis added]

[44] To stress the point, the NCB declaration is not a free-standing ruling. It is only relevant to the inclusion claim. It can only be made as an addendum to a rejected inclusion claim for refugee protection under sections 107(1) and (2), as set out below. I emphasize the word "claim" in these provisions as it limits an NCB ruling to a refugee protection claim:

> 107. (1) The Refugee Protection Division shall accept a claim for refugee protection if it determines that the claimant is a Convention refugee or person in need of protection, and shall otherwise reject the claim.

> (2) If the Refugee Protection Division is of the opinion, in rejecting a claim, that there was no credible or trustworthy evidence on which it could have made a favourable decision, it shall state in its reasons for the decision that there is no credible basis for the claim.
>
> [Emphasis added]

[45] An NCB ruling therefore, has no relevance to the exclusion ruling, and at best is only pending in the contingent outcome of the exclusion order being set aside sometime in the future. It cannot be relied upon as a basis for denying the Applicant his right of appeal of the exclusion ruling to the RAD.

[46] In light of my reasoning above, I am satisfied that the inclusion rulings of the RPD and in particular its NCB conclusion, cannot be used as a ground to prevent the appeal of the RPD's decision to the RAD. I find that the Board erred in ruling on the inclusion issue without indicating that it was in the alternative of a future rejection of the exclusion order.

B. *Question 2: Did the Board err*

1) in not first ruling on the exclusion issue and, if excluding the Applicant, nevertheless proceeding to rule on the inclusion issues; or alternatively

2) if it did not err in making both the exclusion and inclusion rulings, did it err in not stating that its inclusive ruling was made in the alternative for the practical purpose in accordance with the decision of *Gonzalez* in order to avoid the necessity of a further hearing, should a court find that the exclusion had been wrongly invoked?

[47] I have already indicated that insofar as *Gonzalez* has application, it must be stated clearly by the RPD in its reasons, where it has made an exclusion ruling in addition to an inclusion ruling, that the inclusion ruling has no effect unless the exclusion ruling is set aside, because its decision excludes the Applicant from refugee protection. Otherwise, it would be in conflict with the principles underlying the *Xie* decision.

[48] I think the more pertinent question is whether in the face of *Xie*, the RPD can make any inclusion ruling at all, even with the disclaimer of "not to be effective before the exclusion decision is set aside". I agree with the Applicant's submissions that an appeal to the RAD is to be favoured because it provides a broader and more exhaustive reconsideration than is offered by the JRA. Particularly, there is an opportunity to introduce new evidence before the RAD. The appeal to the RAD is also conducted as a limited *de novo* review. This generally affords more scope to review the RPD's decision than is available by way of a JRA applying a deferential reasonableness standard. The judicial review track therefore, prevents the Applicant from accessing redress mechanisms the will better protect his rights.

[49] Support for the RPD making an inclusion ruling in the face of a decision excluding the claimant from refugee protection on the basis of it being "practical" and providing "judicial economy" is found in a number of cases: *Ezekola v Canada (Minister of Citizenship and Immigration)*, 2010 FC 662, paras 110-109; *Rathinasingam v Canada (Minister of Citizenship and Immigration)*, 2006 FC 988, para 48; *Alemu v Canada (Minister of Citizenship and Immigration)*, 2004 FC 997, para 42; *Zoya v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No. 1884, paras 12-14; *San Vicente Freitas v Canada (Minister of Citizenship and*

Immigration), [1999] 2 FC 432; *Brzezinski v Canada (Minister of Citizenship and Immigration)*, [1998] 4 FCR 525, para 33; and *Cordon v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No. 470.

[50] I disagree with these decisions. I conclude that the decisions cited above of *Han*, *Muchai and Cadovski* properly reflect the *ratio* of the Federal Court of Appeal in *Xie*. It is recalled that those cases require the RPD to first decide the exclusion issue, before dealing with the protection claim, and that if the claimant is excluded from refugee protection, there is nothing more that the RPD can or should do.

[51] The *Han* line of cases are consistent with the premise underlying *Xie* that the scheme of the IRPA is to ensure that two decision-makers cannot make incompatible or the same ruling, in the alternative or otherwise, on the same issue on the same facts. Once the claimant is excluded or inadmissible, the Act stipulates that the Minister alone should decide whether the claimant is in need of protection.

[52] While I am in complete agreement with the need for more "judicial economy", it just does not seem to be a relevant consideration in matters relating to exclusions and inadmissibility of foreign nationals. Parliament has chosen not to adhere to the big-tent, single decision-maker model to decide all relevant issues, in the alternative where practical to do so, relating to a person's right to remain in Canada, such as is found in labour or other civil jurisdictions. Instead, this field abounds with a multiplicity of similarly endowed decision-makers, rendering essentially many of the same decisions, but in mutually exclusive jurisdictions, as in this case,

leading to excessive judicial reviews with all the attendant delays, and costs that this scheme entails. That is Parliament's choice. It is not for the courts to introduce "judicial economy" in the procedures to be followed where the Act eschews it.

VII. Conclusion

[53] On the basis of the foregoing I conclude that the Board erred by ruling on the inclusion issues after it found the Applicant was excluded. The Board similarly exceeded its jurisdiction by conducting an inclusion determination in the alternative on any basis, including that for the purpose of judicial economy.

[54] In reliance upon the decision of Mdm. Justice Tremblay- Lamer in *Pembina Institute for Appropriate Development v. Canada (Attorney General)*, 2008 FC 302, I set aside the Board's decision with respect to its inclusion conclusions regarding the Applicant's claim for refugee protection pursuant to sections 96 and 97, as well as its non-credibility ruling pursuant to section 107(2).

[55] Otherwise, I order as follows:

i. I remit the decision back to the same Board member;

ii. I order that no hearing be held and that the Board member dismiss the claim on the exclusion ground for the reasons already provided; and

iii. I order that the dates for the Applicant to pursue an appeal to the RAD run from the date of the issuance of the new RPD decision.

VIII. Certified Question

[56] The parties have agreed that a question should be certified in this matter. I am satisfied that the proposed question by the Respondent meets the requirements of section 74(d) of the Act that the question is serious and involves issues of general importance.

[57] The only difference in the questions proposed by the parties was the Applicant's objection to the words "in the alternative". The Applicant argued that this wording should be removed because the RPD did not make its inclusionary ruling in the alternative. I find that the issue was raised implicitly, and moreover, speaks to an issue on which decisions of this Court express contradictory views. The Court certifies the following question for appeal:

> Considering the authority of the RPD under section 107(2) and section 107.1 of the IRPA to determine that a claim has no credible basis or is manifestly unfounded, is the RPD precluded from making such determinations after, or in the alternative, to its findings that the claimant is excluded under section F of Article 1 of the Refugee Convention?

[58] The judicial review application is allowed and a question is certified for appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that:

i. the Board's decisions regarding the Applicant's claim for refugee protection pursuant to sections 96 and 97 of the Act, as well as its non-credibility ruling pursuant to section 107(2) are set aside;

ii. the decision is remitted back to the same Board member;

iii. no hearing shall be held, rather the Board is directed to dismiss the application solely on the exclusion ground for the reasons already provided; and

iv. the dates for the Applicant to pursue an appeal to the RAD from the Board's decision run from the date of the issuance of the new RPD decision.

"Peter Annis"

Judge

APPENDIX A

Sections 72(2)(a), 98, 107(2), 110(2)(c), 112(3)(b) & (c), 113(d) of the IRPA.

Application for judicial review	Demande d'autorisation
72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is, subject to section 86.1, commenced by making an application for leave to the Court.	**72.** (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est, sous réserve de l'article 86.1, subordonné au dépôt d'une demande d'autorisation.
Application	Application
(2) The following provisions govern an application under subsection (1):	(2) Les dispositions suivantes s'appliquent à la demande d'autorisation :
(a) the application may not be made until any right of appeal that may be provided by this Act is exhausted;	a) elle ne peut être présentée tant que les voies d'appel ne sont pas épuisées;
Exclusion — Refugee Convention	Exclusion par application de la Convention sur les réfugiés
98. A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection.	98. La personne visée aux sections E ou F de l'article premier de la Convention sur les réfugiés ne peut avoir la qualité de réfugié ni de personne à protéger.
No credible basis	Preuve
107. (2) If the Refugee Protection Division is of the opinion, in rejecting a claim,	107. (2) Si elle estime, en cas de rejet, qu'il n'a été présenté aucun élément de preuve

that there was no credible or trustworthy evidence on which it could have made a favourable decision, it shall state in its reasons for the decision that there is no credible basis for the claim.

crédible ou digne de foi sur lequel elle aurait pu fonder une décision favorable, la section doit faire état dans sa décision de l'absence de minimum de fondement de la demande.

Restriction on appeals

110. (2) No appeal may be made in respect of any of the following:

[…]

(c) a decision of the Refugee Protection Division rejecting a claim for refugee protection that states that the claim has no credible basis or is manifestly unfounded;

Restriction

110. (2) Ne sont pas susceptibles d'appel :

[...]

c) la décision de la Section de la protection des réfugiés rejetant la demande d'asile en faisant état de l'absence de minimum de fondement de la demande d'asile ou du fait que celle-ci est manifestement infondée;

Application for protection

112. […]

Restriction

(3) Refugee protection may not be conferred on an applicant who

[...]

(b) is determined to be inadmissible on grounds of serious criminality with respect to a conviction in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years or with respect to a

Demande de protection

112. […]

Restriction

(3) L'asile ne peut être conféré au demandeur dans les cas suivants :

[...]

b) il est interdit de territoire pour grande criminalité pour déclaration de culpabilité au Canada pour une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou pour toute déclaration de culpabilité à l'extérieur du

conviction outside Canada for an offence that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years;

Canada pour une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans;

(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;

Consideration of application

Examen de la demande

113. Consideration of an application for protection shall be as follows:

113. Il est disposé de la demande comme il suit :

[…]

[…]

(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 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

(ii) soit, dans le cas de tout autre demandeur, du fait que la 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;

Canada;

FEDERAL COURT

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