Date: 20080326

Docket: IMM-2098-07

Citation: 2008 FC 379

Montréal, Quebec, the 26th day of March 2008

Present: The Honourable Maurice E. Lagacé

BETWEEN:

Roger Eugene Shephard

Applicant

and

Minister of Citizenship and Immigration
and
Minister of Public Safety and Emergency Preparedness

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant has brought an application for judicial review of the decision made by the Refugee Protection Division (the RPD) of the Immigration and Refugee Board on March 19, 2007, denying him refugee protection on the ground that he was excluded under section 98 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act) and also dismissing his related application for a declaration that section 98 of the Act is unconstitutional.

[2] The applicant is asking that the Court set that decision aside and declare that section 98 of the Act is of no force or effect, on the ground that it denies the applicant the opportunity to be granted refugee protection and violates section 7 of the *Canadian Charter of Rights and Freedoms* (the Charter), *Constitution Act, 1982*, S.C. 1982, c. 11, and article 7 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, United Nations General Assembly, New York, adopted on December 10, 1984, in force June 26, 1987 (the Convention against Torture), in that it allows the applicant to be removed to his country of origin, the United States, where he could be subject to the death penalty.

FACTS

[3] The facts are not contested. The applicant was born in the United States on June 12, 1985, and arrived in Canada on or about June 16, 2006. Shortly after the applicant entered Canada, the RCMP contacted the Canada Border Services Agency (the CBSA) and informed it that the applicant was wanted in South Carolina, in the United States, in connection with a murder committed during an armed robbery that took place on June 15, 2006.

[4] If the applicant is convicted of the murder of which he is suspected, he is liable to the death penalty under the *South Carolina Code of Law*, Title 16, Chap. 3, ss. 16-3-2- *et seq*.

[5] The applicant was arrested by City of Montréal police on June 17, 2006, and subsequently claimed refugee protection in Canada under section 97 of the Act.

[6] A conditional removal order was made against the applicant on August 3, 2006, and he filed his personal information form (PIF) on August 11, 2006. He has been detained by Canadian immigration since June 17, 2006.

[7] The Minister of Public Safety intervened in this case at the preliminary stage to argue that the applicant is a person referred to in article 1F of the *United Nations Convention Relating to the Status of Refugees*, July 28, 1951, United Nations Treaty Series, vol. 189, p. 137, article 1 (the Convention).

[8] The applicant subsequently served a notice of constitutional question on the parties concerned and thus announced his intention of challenging the validity of section 98 of the Act, on the ground that it provided for the exclusion clauses in the Convention to be applied against persons who, like himself, otherwise qualified as persons in need of protection within the meaning of section 97 of the Act, despite the fact that Canada has ratified the Convention against Torture and against the removal of a person to a country where the person is in danger of being subjected to torture or cruel treatment.

[9] At a pre-trial conference held on December 20, 2006, counsel for the applicant admitted that the outcome of a hearing on the merits would probably be that his client is a person referred to in article 1F of the Convention. Counsel for the Minister admitted that in the event the applicant was returned to the United States, he would be exposed to the death penalty if he were convicted of the murder he is suspected of and for which he is wanted.

[10] Those admissions having been made, the parties agreed to have the constitutional question decided on the basis of written submissions, and so the issue to be addressed would be a single question of law: whether the applicant is entitled to refugee protection as claimed under section 98 of the Act after he entered Canada, notwithstanding the exclusion alleged against him.

IMPUGNED DECISION

[11] On March 19, 2007, after analyzing section 98 of the Act and section F of article 1 of the Convention and considering the parties' arguments, the Board member hearing the case decided that the section in issue in the case did not necessarily require that a refugee claimant be deported, as the applicant contends; it merely precluded such a claimant from being granted refugee protection.

[12] Having made that finding, the Board member rejected the applicant's argument that section 98 of the Act was unconstitutional as being contrary to sections 7 and 12 of the Charter and article 3 of the Convention against Torture.

[13] Relying on section 98 of the Act and the admission that the applicant is a person referred to in article 1F of the Convention, the Board member dismissed his application, leaving the other remedies he might have under the Act intact, however.

LEGISLATION AND CONVENTIONS

[14] **The *Immigration and Refugee Protection Act***

95. (1) Refugee protection is conferred on a person when

(*a*) the person has been determined to be a Convention refugee or a person in similar circumstances under a visa application and becomes a permanent resident under the visa or a temporary resident under a temporary resident permit for protection reasons;

(*b*) the Board determines the person to be a Convention refugee or a person in need of protection; or

(*c*) except in the case of a person described in subsection 112(3), the Minister allows an application for protection.

...

95. (1) L'asile est la protection conférée à toute personne dès lors que, selon le cas :

a) sur constat qu'elle est, à la suite d'une demande de visa, un réfugié ou une personne en situation semblable, elle devient soit un résident permanent au titre du visa, soit un résident temporaire au titre d'un permis de séjour délivré en vue de sa protection;

b) la Commission lui reconnaît la qualité de réfugié ou celle de personne à protéger;

c) le ministre accorde la demande de protection, sauf si la personne est visée au paragraphe 112(3).

...

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

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

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

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

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

...

...

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.

...

...

112. (1) A person in Canada, other than a person referred to in subsection 115(1), may, in accordance with the regulations, apply to the Minister for protection if they are subject to a removal order that is in force or are named in a certificate described in subsection 77(1).

112. (1) La personne se trouvant au Canada et qui n'est pas visée au paragraphe 115(1) peut, conformément aux règlements, demander la protection au ministre si elle est visée par une mesure de renvoi ayant pris effet ou nommée au certificat visé au paragraphe 77(1).

...

...

(3) Refugee protection may not result from an application for protection if the person

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

...

...

(*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

...

...

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), 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), 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 Canada.

(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.

114. (1) A decision to allow the application for protection has

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.

(*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 was determined to be in need of protection.

(2) If the Minister is of the opinion that the circumstances surrounding a stay of the enforcement of a removal order have changed, the Minister may re-examine, in accordance with paragraph 113(*d*) and the regulations, the grounds on which the application was allowed and may cancel the stay.

(2) Le ministre peut révoquer le sursis s'il estime, après examen, sur la base de l'alinéa 113*d*) et conformément aux règlements, des motifs qui l'ont justifié, que les circonstances l'ayant amené ont changé.

(3) If the Minister is of the opinion that a decision to allow an application for protection was obtained as a result of directly or indirectly misrepresenting or withholding material facts on a relevant matter, the Minister may vacate the decision.

(3) Le ministre peut annuler la décision ayant accordé la demande de protection s'il estime qu'elle découle de présentations erronées sur un fait important quant à un objet pertinent, ou de réticence sur ce fait.

(4) If a decision is vacated under subsection (3), it is nullified and the application for protection is deemed to have been rejected

(4) La décision portant annulation emporte nullité de la décision initiale et la demande de protection est réputée avoir été rejetée.

115. (1) A protected person or a person who is recognized as a Convention refugee by another country to which the person may be returned shall not be removed from Canada to a country where they would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion or at risk of torture or cruel and unusual treatment or punishment.

115. (1) Ne peut être renvoyée dans un pays où elle risque la persécution du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques, la torture ou des traitements ou peines cruels et inusités, la personne protégée ou la personne dont il est statué que la qualité de réfugié lui a été reconnue par un autre pays vers lequel elle peut être renvoyée.

(2) Subsection (1) does not apply in the case of a person

2) Le paragraphe (1) ne s'applique pas à l'interdit de territoire :

(*a*) who is inadmissible on grounds of serious criminality and who constitutes, in the opinion of the Minister, a danger to the public in Canada; or

a) pour grande criminalité qui, selon le ministre, constitue un danger pour le public au Canada;

(*b*) who is inadmissible on grounds of security, violating human or international rights or organized

b) pour raison de sécurité ou pour atteinte aux droits humains ou internationaux ou criminalité organisée

criminality if, in the opinion of the Minister, the person should not be allowed to remain in Canada on the basis of the nature and severity of acts committed or of danger to the security of Canada.	si, selon le ministre, il ne devrait pas être présent au Canada en raison soit de la nature et de la gravité de ses actes passés, soit du danger qu'il constitue pour la sécurité du Canada.
...	...

[15] **The *Canadian Charter of Rights and Freedoms* (the Charter)**

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.	7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

[16] **The *Convention relating to the Status of Refugees***

F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:	**F**. Les dispositions de cette Convention ne seront pas applicables aux personnes dont on aura des raisons sérieuses de penser :
...	...
(*b*) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;	*b*) qu'elles ont commis un crime grave de droit commun en dehors du pays d'accueil avant d'y être admises comme réfugiés;
...	...

[17] **The *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment***

ARTICLE 3	ARTICLE 3
1. No State Party shall expel, return or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.	1. Aucun État partie n'expulsera, ne refoulera, ni n'extradera une personne vers un autre État où il y a des motifs sérieux de croire qu'elle risque d'être soumise à la torture.

Applicable Standard of Review

[18] The correctness standard applies to decisions of the RPD on a question of law (*Dunsmuir v. New Brunswick*, 2008 SCC 9; *Pushpanathan v. Canada (M.C.I.)*, [1998] 1 S.C.R. 982).

[19] Constitutional determinations by administrative tribunals do not call for deference where, as in this case, the constitutional validity of a statutory provision is challenged (*Dunsmuir*, *supra*, at paragraphs 59 and 60). The "reasonableness" standard is not applicable.

Arguments of the Parties

[20] The applicant submits that the effect of applying the exclusion clause in article 1F(*b*) of the Convention to reject his refugee claim is to make the conditional removal order made by the RPD enforceable. Although the applicant acknowledges that he is still not denied the right to claim protection as provided in section 112 of the Act (i.e. to request a pre-removal risk assessment, or PRRA), he stresses the fact that such protection is within the Minister's discretion, and the Minister may refuse it without first obtaining assurances from the American authorities that the death penalty will not be imposed if he is returned to his country of origin.

[21] Based on the fact that section 98 allows the exclusion clauses to be set up against his claim for protection based on a risk of cruel and unusual punishment, the applicant submits that this provision violates Canada's international obligations, and more specifically the Convention against Torture, which Canada has ratified, the purpose of which is to recognize the "non-refoulement principle" with no exclusion clause where such a risk exists.

[22] In the applicant's submission, the protection to which he is entitled cannot be made subject to the Minister's discretion, as justification for violation of a constitutional right as fundamental as the right to life.

[23] The applicant points out that the prohibition on removal to a country that applies the death penalty is a peremptory norm of international law and that derogation from that norm results in a violation of section 7 of the Charter. Because of the fact that the death penalty is irreversible, there is no pressing or substantial objective that could justify it under section 1 of the Charter.

[24] The plaintiff argued that it is particularly appropriate to question the constitutionality of section 98 of the Act at this time, since the question has not been addressed to date, either in *Barrera v. Canada (M.E.I.)*, [1993] 2 F.C. 3 or *Xie v. Canada (M.C.I.)*, [2005] 1 F.C.R. 304, or in any other of the decisions on which the respondent bases his arguments to the contrary.

[25] The respondent's primary argument is that, contrary to the applicant's contentions, the purpose of section 98 of the Act is not to remove a person to his or her country of origin, but to deny the person the right to refugee protection. In addition, the exclusion has no direct effect on the removal order itself, and does not operate to make it enforceable, let alone to authorize removal.

[26] Accordingly, the respondent argues that the applicant's constitutional argument is premature, unless and until the removal order has become enforceable, as is very definitely not the case.

[27] The respondent also argues, in the alternative, that in any event section 98 of the Act does not violate section 7 of the Charter because the mere fact that a claimant is denied "Convention refugee" or "person in need of protection" status does not in any way allow the person to be removed. How, then, can it be argued that the section in question violates the applicant's right to life, liberty or security of the person?

[28] Even if we assume that section 98 infringes the right to life and security of the person, the respondent submits, the infringement would still be in accordance with the principles of fundamental justice, having regard to the structure of the Act, which provides for an independent pre-removal risk assessment (PRRA), thus making scrutiny under section 7 of the Charter unnecessary.

Analysis

[29] The applicant's main argument comes down to an attempt to give the RPD discretion that the Act expressly assigns to the Minister. In *Xie*, *supra*, the Federal Court of Appeal did not share that objective, unfortunately.

[30] Let us not make section 98 say more than it says. When read and understood in the context of the other provisions of the Act, the purpose of that section is not to permit the removal of a person to his or her country of origin; it is merely to deny the person refugee protection.

[31] *Xie, supra* at paragraphs 30, 32 and 33, clearly states:

> [30] But exclusion from refugee protection is not exclusion from protection. Section 113 stipulates that persons described in subsection 112(3) are to have their applications for protection decided on the basis of the factors set out in section 97 with additional consideration given to the issue of whether such persons are a danger to the public in Canada or to the security of Canada. Section 97 is the section which identifies the grounds upon which a person may apply to be designated a person in need of protection:
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> …
>
> [32] … For persons described in subsection 112(3), the result is a stay of the deportation order in force against them. One consequence of the distinction is that protected persons have access to the status of permanent residents and are subject to the principle of non-refoulement:
>
> ...
>
> [33] That is the structure of the Act as it relates to the determination of claims for protection. It has two streams, claims for refugee protection and claims for protection in the context of pre-removal risk assessments. Those who are subject to the exclusion in section 98 are excluded from the refugee protection stream but are eligible to apply for protection at the PRRA stage. The basis on which the claim for protection may be advanced is the same, but the Minister can have regard to whether the granting of protection would affect the safety of the public or the security of Canada. If protection is granted, the result is a stay of the deportation order in effect against the claimant. The claimant does not have the same access to permanent resident status as does a successful claimant for refugee protection.

[32] The applicant's constitutional argument therefore fails in that it conflates an "enforceable removal order" with a removal order that, as in this case, has "come into force". The distinction between the two stages of the order is plain in the Act, and the importance of the distinction is that

only an “enforceable removal order” allows for a person to be removed (s. 48(2) of the Act), unlike a removal order that has “come into force”, which becomes enforceable only if it is not stayed (subs. 48(1) of the Act).

[33] When the RPD made its decision, the removal order made against the applicant was only conditional, and would not take effect until 15 days after notification of the decision was given to the applicant (para. 49(2)(*c*) of the Act).

[34] However, even if the removal order has since come into force, it has still not become enforceable, if we consider section 232 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations), which provides as follows:

232. A removal order is stayed when a person is notified by the Department under subsection 160(3) that they may make an application under subsection 112(1) of the Act, and the stay is effective until the earliest of the following events occurs:	**232.** Il est sursis à la mesure de renvoi dès le moment où le ministère avise l’intéressé aux termes du paragraphe 160(3) qu’il peut faire une demande de protection au titre du paragraphe 112(1) de la Loi. Le sursis s’applique jusqu’au premier en date des événements suivants :
(*a*) the Department receives confirmation in writing from the person that they do not intend to make an application;	*a*) le ministère reçoit de l’intéressé confirmation écrite qu’il n’a pas l’intention de se prévaloir de son droit;
(*b*) the person does not make an application within the period provided under section 162;	*b*) le délai prévu à l’article 162 expire sans que l’intéressé fasse la demande qui y est prévue;
(*c*) the application for protection is rejected;	*c*) la demande de protection est rejetée;
(*d*) …	*d*) …
(*e*) …	*e*) …

(*f*) in the case of a person to whom subsection 112(3) of the Act applies, the stay is cancelled under subsection 114(2) of the Act.	*f*) s'agissant d'une personne visée au paragraphe 112(3) de la Loi, la révocation du sursis prévue au paragraphe 114(2) de la Loi.

[35] This means that the stay applies until there is a decision on the application for protection, which the Minister is required by subsections 160(1) and (3) of the Regulations to allow the applicant to make under section 112(1) of the Act.

[36] Given that the Minister is required to allow the applicant to make an application for protection notwithstanding denial of refugee protection by the RPD, and having regard to the fact that the application for protection stays the removal, the necessary result is that the decision of the RPD cannot operate to make the removal enforceable, let alone to authorize removal.

[37] The applicant is still not being denied his right to request a risk assessment on the merits (PRRA), and if he does his application will be assessed based on the risk factors listed in section 97 of the Act. It is therefore incorrect to say that the risks faced by the applicant, as listed in section 97 of the Act, will not be considered at any point before the removal order becomes enforceable, unless he waives the risk assessment. In the event that his application is allowed, the applicant will be granted a stay of removal for an unlimited time, or until it is revoked by the Minister for good cause.

[38] Accordingly, if the removal order made against the applicant was not enforceable at the time the RPD made its decision and is still not enforceable, it is at least premature to conclude that it will

become enforceable and that excluding the applicant from refugee protection is the final stage in the removal process.

[39] Having regard to the structure of the Act, the arguments regarding the constitutionality of section 98 of the Act are premature when they are made before a claimant has reached the final stage of removal (*Xie*, *supra*; to the same effect, see *Arica v. Canada (Minister of Employment and Immigration)* (1995), 182 N.R. 392, at para. 14).

[40] By attacking section 98 of the Act, the applicant is implicitly and erroneously assuming that being excluded from refugee protection is tantamount to being removed from Canada. As is pointed out in *Xie* (*supra*, para. 36), that reasoning is not consistent with the structure of the Act, since "the purpose of the exclusion is not to remove [the applicant] from Canada. It is to exclude [him] from refugee protection", and he continues to have the right to seek protection under section 112 of the Act.

[41] The Court is bound by that decision and must conclude that the applicant has not shown any error in the Board member's decision that would warrant intervention to set it aside. Nor is there any basis for the Court to rule as to the constitutionality of section 98, having regard to the prematurity of this application.

[42] The applicant places much weight on the fact that the Minister's decision as to whether to grant a stay in response to a PRRA is an exercise of discretion and the outcome cannot be foreseen.

If what the applicant says is correct, however, he is nonetheless failing to take into account the principle that the exercise of that discretion must comply with the constitutional requirements set out in the Charter and Canada's international values and obligations (*Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, paragraphs 32 and 41).

[43] The protection sought by the applicant against the death penalty to which he fears he may be subjected if he is returned to his country of origin is not necessarily to be obtained, as he vigorously argued, by way of refugee protection in Canada.

[44] When the Minister exercises his discretion, he cannot ignore the fundamental values that Canada advocates both here and internationally, and more specifically Canada's values in relation to the death penalty. The Minister would have to be satisfied, before lifting the stay of removal and the removal order becoming enforceable, that he could obtain sufficient assurances that removal of a claimant to his or her country of origin would not be contrary to the values in which Canada believes. The Minister can always require such assurances from the country of origin, to protect a claimant against a sentence that violates the principles of fundamental justice.

[45] Denial of refugee protection by the RPD does not deny the applicant the right to seek protection as provided in section 112 of the Act. In the event that he exercises that right, then despite his fears, there is nothing to suggest, unless we impute intentions to the Minister, that the Minister would not exercise his discretion judicially and would not adhere to Canada's values.

[46] For all these reasons, the Court must dismiss the applicant's application because it is premature and without merit in law. In making this decision, the Court is in no way abdicating the important role it could be asked to play to ensure that the Minister has considered the relevant factors and complied with the requirements of the Act and the Constitution, but only at such time as an immediate need exists.

Questions Proposed by the Applicant for Certification

[47] The applicant submits the following questions for certification:

> [1] Does denying individuals referred to in the exceptions set out in the *Convention on the Status of Refugees* and the protocols thereto relating to security a hearing before the Refugee Protection Division to consider their claim on the merits, and preventing them from being recognized as persons in need of protection (ss. 97-98), infringe section 7 of the *Canadian Charter of Rights and Freedoms* and article 3 of the *Convention against Torture*?
>
> [2] Does the fact that a person who is denied judicial consideration on the merits by a specialized tribunal (RPD) may seek a pre-removal risk assessment (PRRA) and make representations to the Minister regarding the risk of torture or cruel treatment amount to the absolute protection against removal to torture, in all circumstances, provided in section 3 of the *Convention against Torture*?
>
> [3] Is it premature to challenge the constitutional validity of section 98, which provides for the application of the exclusion clauses in the Geneva convention to persons claiming protection under the *Convention against Torture*, before the RPD, having regard to the fact that the effect of a decision excluding that person is to make the removal enforceable (s. 49)?

[48] The applicant submits that these questions, as they are formulated, are serious questions of general importance as required by section 74(*d*) of the Act.

[49] The respondent opposes certification of the proposed questions and submits that none of these questions meets the tests laid down by the Federal Court of Appeal, and that regardless of how many questions there are and how they are worded, they have only a single purpose: to attack the constitutionality of section 98 of the Act.

[50] Do the proposed questions meet the tests laid down by the Federal Court of Appeal in *Canada (M.C.I.) v. Liyanagamage*, [1994] F.C.J. No. 1637 (C.A.) (QL), [1994] 176 N.R. 4?

> [4] In order to be certified pursuant to subsection 83(1), a question must be one which, in the opinion of the motions judge, transcends the interests of the immediate parties to the litigation and contemplates issues of broad significance or general application (see the useful analysis of the concept of "importance" by Catzman J. in *Rankin v. McLeod, Young, Weir Ltd. et al.* (1986), 57 O.R. (2d) 569 (Ont. H.C.)) but it must also be one that is determinative of the appeal. The certification process contemplated by s. 83 of the *Immigration Act* is neither to be equated with the reference process established by s. 18.3 of the *Federal Court Act*, nor is it to be used as a tool to obtain from the Court of Appeal declaratory judgments on fine questions which need not be decided in order to dispose of a particular case.

[51] We would also adopt what this Court said in *Huynh v. Canada*, [1995] 1 F.C. 633, 646 (T.D.), aff'd [1996] 2.F.C. 976 (F.C.A.), in which it stated that for a question to be certified, it must not only raise an issue of law of general importance, but it must not already have been determined.

[52] The first question was determined by the Federal Court of Appeal in *Xie, supra*, at para. 39, when it found that denying an individual referred to in paragraph 1F of the Convention the right to have a refugee claim heard on the merits before the RPD does not violate section 7 of the Charter; *a fortiori*, therefore, it does not violate article 3 of the *Convention against Torture*, which applies only, as discussed earlier, at the removal stage.

[53] The second question has no more conclusive effect in terms of the outcome of the appeal and appears to be more in the nature of an attempt to obtain a declaratory judgment on that issue, when it is not necessary to examine that question in order to determine the outcome of this application for judicial review.

[54] In that question, the applicant refers to article 3 of the *Convention against Torture*, which deals with the expulsion of an individual. However, having regard to the finding on this question made earlier by the Court, and also the answer given by the Federal Court of Appeal in *Xie*, *supra*, that arguments regarding the constitutionality of section 98 of the Act are premature when they are made, as in this case, before the claimant has reached the final stage of the removal order, the second question should not be certified.

[55] On the third question, the Court has explained at length, in its reasons, that it stems from an erroneous premise that arises from the fact that the applicant is conflating a removal order that has come into force with an enforceable removal order. The Court recognized that distinction in *Xie*, *supra*, and its clear answer to the question was negative, and so it should no more be certified than the other two questions.

JUDGMENT

THE COURT, for these reasons:

- **DISMISSES** the application for judicial review; and

- **REFUSES** to certify the questions proposed.

"Maurice E. Lagacé"
Deputy Judge

Certified true translation

Brian McCordick, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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