Date: 20090908

Docket: IMM-748-09

Citation: 2009 FC 877

Ottawa, Ontario, September 8, 2009

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

XIAOQUAN LIU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION and THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the decision of Minister's Delegate Jillan Sadek (Delegate or Minister's Delegate), dated February 11, 2009, refusing the Applicant's Pre-Removal Risk Assessment (Decision).

BACKGROUND

[2] Mr. Liu was born in the People's Republic of China (China or PRC) on December 17, 1970 and is a citizen of that country. He says that on March 2, 2006, a summons was issued by the People's Court for him to appear in Court on March 27, 2006 regarding an alleged violation of the Family Planning Regulations. The Canadian Embassy in Beijing later verified that this summons was a false document.

[3] On March 8, 2006, Mr. Liu is alleged to have obtained RMB 400,000 ($58,946.92 Cdn) from a PRC citizen through fraud. He left China for the United States the next day. On March 15, 2006, the Public Security Bureau in Zigong, China, began its investigation into the complaint filed by victim Xu Bi Qiang about the missing RMB 400,000.

[4] In April 2006, Mr. Liu claimed asylum in the United States and his claim was recommended for approval pending background checks on May 24, 2006.

[5] On September 18, 2006, Mr. Liu, whose whereabouts were unknown to China, was charged by the Public Security Bureau with contract fraud contrary to Section 224 of the *Chinese Criminal Law*.

[6] On February 10, 2007, police in Burlingame, California, were called to the scene by two victims of Mr. Liu who alleged that he had stolen jewellery and cash from them. Mr. Liu left the United States for Hong Kong the following day.

[7] On February 16, 2007, the Burlingame Police Department in the United States issued a Statement of Probable Cause alleging that Mr. Liu swindled several people out of hundreds of thousands of dollars of jade and cash, and then fled to Hong Kong.

[8] On March 20, 2007, Mr. Liu came to Canada from Hong Kong, attempting to enter at the Vancouver International Airport as a business visitor. At the interview with a CBSA Officer, he admitted he entered Canada on the basis of false documents. He agreed to leave Canada and a return flight to Hong Kong was booked for March 24, 2007.

[9] On March 24, 2007, Mr. Liu refused to board the return flight and informed a CBSA Officer that he wanted to make a refugee claim. As a result of being an immigrant without a permanent resident visa, a Departure Order was issued against Mr. Liu that day. In addition, Mr. Liu was arrested and detained for being unlikely to appear for removal and has remained in the custody of CBSA, with regular detention reviews before the Immigration Division of the Immigration and Refugee Board (IRB) ever since.

[10] On April 5, 2007, Mr. Liu withdrew his initial claim for refugee status in Canada, but then withdrew his withdrawal on April 12, 2007 upon finding out that he would be removed to China and not Hong Kong, as he had assumed.

[11] On May 30, 2007, the United States declared Mr. Liu's claim to refugee status abandoned, given that he had left the United States to return to Hong Kong prior to a decision being made on his claim.

[12] On August 7, 2007, the Superior Court of California, San Mateo County, issued a warrant for Mr. Liu's arrest on two charges under section 532 of the *California Penal Code*, which is found in the Section "False Personation and Cheats." The amounts involved are $250,000 worth of jade and $300,000 in cash. A warrant for his arrest was issued in the United States on August 17, 2007. Charges under section 532 of the *California Penal Code* are equivalent to section 380(1)(*a*) of the *Canadian Criminal Code* regarding fraud.

[13] On January 4, 2008, Mr. Liu withdrew his claim for refugee protection in Canada after receiving notice from the Minister of Public Safety and Emergency Preparedness (PSEP) that the Minister would be intervening in the RPD hearing to assert Article 1F(b) of the *Refugee Convention*. The RPD hearing set for January 8, 2008 was therefore cancelled.

[14] On February 9, 2008, Mr. Liu submitted a PRRA application to the Minister of Citizenship and Immigration (Minister), claiming that, due to his non-compliance with the PRC "one child policy," he comes within sections 96 and 97 of the *Immigration and Refugee Protection Act*, 2001, c. 27 (Act), and saying further that, because of that non-compliance, China has accused him of fraud. As well, he also claimed that as a result of the alleged fraud offence in China, general country

condition reports indicate the Applicant would be tortured during the PRC judicial process and would not have a fair trial.

[15] On June 26, 2008, PRRA Officer Robert North gave notice to Mr. Liu that he would be considering whether Mr. Liu was a person described in Article 1F(b) of the *Refugee Convention* and invited him to make submissions on this issue.

[16] On July 8, 2008, at one of his detention reviews, an Immigration Division Member continued the Applicant's detention on the basis that Mr. Liu would be unlikely to appear for removal and stated: "You are, by all accounts, what one might term a scallywag. You have manipulated a number of systems trying to benefit yourself. Some of that manipulation has ended up bringing you where you are today."

[17] On July 17, 2008, PRRA Officer North reviewed Mr. Liu's PRRA Application and prepared a risk assessment. After considering Mr. Liu's application pursuant to section 113(c) of the IRPA, the PRRA Officer found that Mr. Liu was excluded from refugee consideration under section 98 of the Act and Article 1F(b) of the *Refugee Convention* (Convention), because there were serious reasons to consider that he had committed a serious non-political crime in the United States prior to his admission to Canada. Consequently, Mr. Liu became a person described in section 112(3)(*c*) of the Act. Mr. Liu did not seek leave and judicial review from that exclusion decision by the PRRA Officer.

[18] Also, on July 17, 2008, the PRRA Officer formed a section 97 opinion that there were sufficient grounds to find that Mr. Liu would be at risk of cruel and unusual treatment if he were returned to China. The Officer also decided it was unlikely that Mr. Liu would receive a fair trial for fraud.

[19] The case was then forwarded to Ottawa for balancing and further review by the Minister's Delegate.

[20] On November 20, 2008, further material was disclosed to Mr. Liu for comment regarding his pending PRRA application. That same day, the Chief Justice of this Court issued a ruling to overturn the Immigration Division's decision to release Mr. Liu and indicated that further litigation could be case-managed and expedited.

[21] Mr. Liu made his final PRRA submission on December 5, 2008.

[22] The Minister's Delegate, Jillan Sadek, refused Mr. Liu's PRRA application on February 11, 2009, finding there was insufficient evidence to demonstrate risk under section 97. The Delegate therefore rejected the Applicant's application and found that Mr. Liu's removal from Canada should not be stayed.

DECISION UNDER REVIEW

[23] The PRRA Officer concluded that the Applicant is a person described under Article 1F(b) of the Convention based on his analysis of the criminal charges against the Applicant. The charges include: criminal fraud in China; immigration fraud in the United States of America; criminal fraud in the United States of America; and immigration fraud in Canada. However, the PRRA Officer concluded that "if the applicant is returned to China he will more likely than not be at risk of cruel or unusual treatment or punishment due to his being denied his right to a fair trial guaranteed under the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights.*"

[24] The Minister's Delegate concluded, however, that "after carefully reviewing all submissions and current condition information on the PRC, I disagree with this assessment and will explain the reasons for this in the following paragraphs." It was noted by the Minister's Delegate that the contract fraud in China occurred on March 8, 2006. On March 9, 2006 the Applicant entered the U.S. and made an asylum claim. On February 11, 2007, he departed to Hong Kong and remained there from February 11 to March 23, 2007, without entering China.

[25] There is cooperation between Hong Kong and China in relation to criminal matters and so the Minister's Delegate was satisfied that Mr. Liu risked being either arrested and/or possibly extradited to mainland China to stand trial for any crimes he may have previously committed in mainland China. The Applicant attempted to justify his return to Hong Kong to Canadian officials

by stating that he had urgent business matters to attend to, then changed his story and informed Canadian officials that he had to return to a sick child. The Minister's Delegate went on to note that the Applicant provided an entirely different story to American officials; he stated that he departed the U.S. because it was the Chinese Spring Festival and he had pressing matters to attend to. The Minister's Delegate concluded that "[i]rregardless of the reason, the fact remains he returned to Hong Kong to face possible arrest and prosecution. This demonstrates a lack of fear on Mr. Liu's part of serious repercussions."

[26] On the topic of torture in China, the Minister's Delegate reviewed the country documentation and concluded that, while torture continues to exist in the Chinese judicial system, since 1996 Chinese officials have been taking concrete steps to combat this systemic problem. There was no evidence before the Minister's Delegate that convinced her that the Applicant belongs to any of the vulnerable groups described. The Delegate concluded that, if the Applicant was returned to China, he would not face more than a mere possibility of torture, would not be at risk of cruel and unusual treatment or punishment as a result of the procedural limitations of the judicial system in China, or face more than a mere possibility of torture, cruel or unusual punishment or treatment as a result of prison conditions in China. Overall, the Delegate felt there would be no possibility of torture, cruel and or unusual punishment if the Applicant was returned to China.

[27] The Minister's Delegate concluded that there were no humanitarian and compassionate grounds to consider in this matter. Therefore, the application was rejected and his removal from Canada was not stayed.

ISSUES

[28] The following issues are raised by the Applicant on this application:

1) Since the Applicant is not a person described in subsection 112(3) of the Act, did the tribunal act without jurisdiction by engaging in an analysis pursuant to paragraph 113(d)(*ii*) of the Act and purporting to give a final PRRA decision?

2) Was the tribunal's finding that the Applicant is not a person at serious risk of torture or cruel and unusual punishment or treatment unreasonable?

STATUTORY PROVISIONS

[29] The following provisions of the Act are applicable in these proceedings:

6. (1) The Minister may designate any persons or class of persons as officers to carry out any purpose of any provision of this Act, and shall specify the powers and duties of the officers so designated.	**6.** (1) Le ministre désigne, individuellement ou par catégorie, les personnes qu'il charge, à titre d'agent, de l'application de tout ou partie des dispositions de la présente loi et précise les attributions attachées à leurs fonctions.
Delegation of powers	Délégation
(2) Anything that may be done by the Minister under this Act may be done by a person that the Minister authorizes in writing, without proof of the authenticity of the authorization.	(2) Le ministre peut déléguer, par écrit, les attributions qui lui sont conférées par la présente loi et il n'est pas nécessaire de prouver l'authenticité de la délégation.
Exception	Restriction

(3) Notwithstanding subsection (2), the Minister may not delegate the power conferred by subsection 77(1) or the ability to make determinations under subsection 34(2) or 35(2) or paragraph 37(2)(*a*).

(3) Ne peuvent toutefois être déléguées les attributions conférées par le paragraphe 77(1) et la prise de décision au titre des dispositions suivantes : 34(2), 35(2) et 37(2)*a*).

Convention refugee

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or

(*b*) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

Définition de « réfugié »

96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Person in need of protection

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of

Personne à protéger

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait

nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

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

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

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

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

(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,

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

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

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

Person in need of protection

Personne à protéger

(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.

Exclusion — Refugee Convention

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.

Exclusion par application de la Convention sur les réfugiés

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
(*a*) is determined to be inadmissible on grounds of security, violating human or international rights or organized criminality;

(3) L'asile ne peut être conféré au demandeur dans les cas suivants :
a) il est interdit de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux ou criminalité organisée;

(*b*) is determined to be

b) il est interdit de territoire

inadmissible on grounds of serious criminality with respect to a conviction in Canada punished by a term of imprisonment of at least two years or with respect to a 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;	pour grande criminalité pour déclaration de culpabilité au Canada punie par un emprisonnement d'au moins deux ans ou pour toute déclaration de culpabilité à l'extérieur du 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; or	*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;
(*d*) is named in a certificate referred to in subsection 77(1).	*d*) il est nommé au certificat visé au paragraphe 77(1).
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 grands criminalité constitue un danger pour le public au Canada,
(ii) in the case of any other	(ii) soit, dans le cas de tout

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.	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.	

[30] The following Regulations are also applicable in this proceeding:

167. For the purpose of determining whether a hearing is required under paragraph 113(*b*) of the Act, the factors are the following:	167. Pour l'application de l'alinéa 113*b*) de la Loi, les facteurs ci-après servent à décider si la tenue d'une audience est requise :

(*a*) whether there is evidence that raises a serious issue of the applicant's credibility and is related to the factors set out in sections 96 and 97 of the Act;	*a*) l'existence d'éléments de preuve relatifs aux éléments mentionnés aux articles 96 et 97 de la Loi qui soulèvent une question importante en ce qui concerne la crédibilité du demandeur;
(*b*) whether the evidence is central to the decision with respect to the application for protection; and	*b*) l'importance de ces éléments de preuve pour la prise de la décision relative à la demande de protection;
(*c*) whether the evidence, if accepted, would justify allowing the application for protection.	*c*) la question de savoir si ces éléments de preuve, à supposer qu'ils soient admis, justifieraient que soit accordée la protection.
…	…
172. (4) Despite subsections (1) to (3), if the Minister decides on the basis of the factors set out in section 97 of the Act that the applicant is not described in that section,	172. (4) Malgré les paragraphes (1) à (3), si le ministre conclut, sur la base des éléments mentionnés à l'article 97 de la Loi, que le demandeur n'est pas visé par cet article :
(*a*) no written assessment on the basis of the factors set out in subparagraph 113(*d*)(i) or (ii) of the Act need be made; and	*a*) il n'est pas nécessaire de faire d'évaluation au regard des éléments mentionnés aux sous-alinéas 113*d*)(i) ou (ii) de la Loi;
(*b*) the application is rejected.	*b*) la demande de protection est rejetée.

[31] The following provision of the Convention is applicable in this proceeding:

1 F. The provisions of this	1F. Les dispositions de cette

Convention shall not apply to any person with respect to whom there are serious reasons for considering that.	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;

STANDARD OF REVIEW

[32] The Applicant submits that the standard of review on questions of law remains correctness, while other issues are reviewable on a reasonableness standard: *Dunsmuir v. New Brunswick* 2008 SCC 9 (*Dunsmuir*). The Applicant says that the question of whether the tribunal acted without jurisdiction, or failed to do what was required by paragraph 113(d)(*ii*) of the Act, is a question of law and reviewable on a correctness standard. The issue of whether the tribunal's finding that the Applicant is not a person at risk was open to it on the evidence before it is reviewable on a reasonableness standard.

[33] The Respondents submit that whether the Applicant is described in paragraph 112(3)(*c*) of the Act and whether the Delegate was authorized to make exclusion findings in relation to the Applicant under Article 1F(b) of the Convention are questions of jurisdiction, and are reviewable on a standard of correctness: *Canada (Citizenship and Immigration) v. Khosa* 2009 SCC 12 (*Khosa*) at paragraph 42.

[34] The Respondents state that the Delegate's assessment of the evidence and her administrative fact-finding commands a high degree of deference. These matters are reviewable on a standard of reasonableness provided by section 18.1(4)(*d*) of the *Federal Courts Act*, R.S.C. 1985, C. f-7. Any decision made in a perverse or capricious manner without regard to the evidence can be said to be unreasonable pursuant to *Khosa*.

[35] In *Dunsmuir*, the Supreme Court of Canada recognized that, although the reasonableness *simpliciter* and patent unreasonableness standards are theoretically different, "the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review": *Dunsmuir* at paragraph 44. Consequently, the Supreme Court of Canada held that the two reasonableness standards should be collapsed into a single form of "reasonableness" review.

[36] The Supreme Court of Canada in *Dunsmuir* also held that the standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[37] In light of the Supreme Court of Canada's decision in *Dunsmuir* and the previous jurisprudence of this Court, I find the standard of review applicable to issue one, a question of law, is correctness, while the standard of review on issue two is reasonableness. When reviewing a

decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir* at paragraph 47. Put another way, the Court should only intervene if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

ARGUMENTS

The Applicant

No Jurisdiction to Make a PRRA Decision

[38] The Applicant submits that there is no basis in the Act or the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (Regulations) that allows a PRRA officer to reject a claim for refugee protection on the basis of Article 1F of the Convention. He says that PRRA officers have been delegated the authority by the Minister to allow or reject an application for protection. The only other authority delegated to PRRA officers is the power to vacate a decision to grant protection where the officer is of the opinion that the applicant has misrepresented material facts on a relevant matter.

[39] The Applicant cites and relies upon the Federal Court of Appeal case of *Xie v. Canada (Minister of Citizenship and Immigration)* 2004 FCA 250 at paragraph 40:

> **40** I would therefore answer the certified questions in accordance with this analysis. Specifically, I would say that a claimant can be

> excluded from refugee protection by the Refugee Protection Division for a purely economic offence. I stress refugee protection because the certified question appears to suggest that the exclusion applies to claims for protection, which is not the case. It applies only to claims for refugee protection. I would also say that in the application of the exclusion, the Refugee Protection Division is neither required nor allowed to balance the claimant's crimes (real or alleged) against the risk of torture upon her return to her country of origin.

[40] The Applicant says that the Minister and his Delegate are proceeding in the present case on the basis that a PRRA officer can reject a claim for refugee protection as part of the consideration of an application for protection. The Applicant contends that, in doing this, they are acting unlawfully and that the Minister's Delegate does not have jurisdiction to reject an application for protection, even if the Minister's delegate forms the opinion that the Applicant is a danger to the public.

[41] The Applicant submits that he is not a person described in paragraphs (a) to (d) of section 112(3) of the Act. The PRRA Officer who made the exclusion decision checked "no" in each box corresponding to paragraphs 112(3)(*a*) to (*d*) of the Act in the PRRA Results Form that he filled out in his reasons for decision.

[42] The Applicant says that the opinion of the PRRA Officer and the Delegate's Decision under review are both silent on any authority that the PRRA Officer could rely upon to make a decision to exclude the Applicant from refugee protection as a person described in subsection 112(3) of the Act.

[43] The Act specifically states that a claim for refugee protection may not be made by a person who is subject to a removal order in subsections 99(1) and 99(3) of the Act:

99. (1) A claim for refugee protection may be made in or outside Canada.	**99.** (1) La demande d'asile peut être faite à l'étranger ou au Canada.
…	…
(3) A claim for refugee protection made by a person inside Canada must be made to an officer, may not be made by a person who is subject to a removal order, and is governed by this Part.	(3) Celle de la personne se trouvant au Canada se fait à l'agent et est régie par la présente partie; toutefois la personne visée par une mesure de renvoi n'est pas admise à la faire.

[44] The Applicant also relies upon subsections 100(1) and 107(1) of the Act :

100. (1) An officer shall, within three working days after receipt of a claim referred to in subsection 99(3), determine whether the claim is eligible to be referred to the Refugee Protection Division and, if it is eligible, shall refer the claim in accordance with the rules of the Board.	**100.** (1) Dans les trois jours ouvrables suivant la réception de la demande, l'agent statue sur sa recevabilité et défère, conformément aux règles de la Commission, celle jugée recevable à la Section de la protection des réfugiés.
…	…
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.	**107.** (1) La Section de la protection des réfugiés accepte ou rejette la demande d'asile selon que le demandeur a ou non la qualité de réfugié ou de personne à protéger.

[45] The Applicant notes that no immigration officer is designated in accordance with section 6 of the Act to make determinations with respect to claims for refugee protection, and a PRRA officer is only delegated the authority to consider and allow or reject an application for protection.

[46] The Applicant emphasizes that a claim for refugee protection and an application for protection are two completely different processes and they are dealt with by separate provisions in the Act and the Regulations. A claim for refugee protection is dealt with in sections 99 to 109 of the Act, whereas an application for protection is dealt with in sections 112 to 116 of the Act and sections 160 to 174 of the Regulations.

[47] The Applicant argues that, since the PRRA Officer in this case made a positive risk assessment and the Applicant is not described in subsection 112(3), the effect of his decision is to confer refugee protection on the Applicant:

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 was determined to be in need of protection.	**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.

[48] The Applicant also says that the Minister was well aware that the issue of whether a PRRA officer has the jurisdiction to make an exclusion decision is the subject of a judicial review hearing argued before the Federal Court on December 9, 2008 in the *Li* decision.

[49] The Applicant notes that the Delegate acknowledged in the Decision that the issue of whether a PRRA Officer has the authority to make an exclusion decision is a legal issue that has not been determined but is one "for the courts to decide."

[50] The Applicant concludes on this issue that, since the Act grants no authority to a PRRA officer to exclude an individual from refugee protection, the Delegate acted without jurisdiction in making her Decision.

Tribunal's Finding that Applicant Not at Risk is Unreasonable

[51] The Applicant also submits that the Delegate's conclusion on the assessment of the risk faced by the Applicant in China is clouded by irrelevant considerations including Mr. Liu's previous return to China, the "progress" made by the Chinese government to address concerns about torture and other human rights abuses, and the assertion that Mr. Liu does not belong to any defined vulnerable groups.

[52] The Applicant points out that subjective fear is not relevant to a section 97 analysis. The Delegate did not focus on the evidence before her regarding the widespread use of torture, denial of legal rights inconsistent with basic international standards, and prison conditions that create a risk to life and are inherently cruel. He says the Delegate ignored evidence that did not support her findings, and gave "a blithe overview of the progress that has been made in China since 1996."

[53] The Applicant notes that a considerable amount of documentary evidence was placed before the PRRA Officer who came to the conclusion that the Applicant is at risk. The Applicant says that the country documents before the Delegate establish a continuing pattern of widespread abuse and torture in China, regardless of any improvements made over the past 10 to 15 years. The Applicant points out that the US Department of State's reports on the issue of "Torture and Cruel Inhumane, or Degrading Treatment or Punishment" have changed very little over the past three years and emphasize the inability of the state to control this "widespread" problem.

[54] The Applicant also says that excerpts from the U.S. Department of State Reports (US DOS Report-China 2007) in the Delegate's reasons consistently conclude that torture remains "widespread" in China and that the measures employed by the state to control the problem are inadequate:

> In March 2006 UN Special Rapporteur Nowak reaffirmed earlier findings that torture, although on a decline-particularly in urban areas-remained widespread, and that procedural and substantive measures were inadequate to prevent torture. Nowak reported that beatings with fists, sticks and electric batons continued to be the most common forms of torture. He also found that prisoners continued to suffer cigarette burns, prolonged periods of solitary confinement, and submersion in water or sewage, and that they were made to hold extreme positions for long periods, were denied medical treatment, and were forced to do hard labor.

[55] The Applicant submits that the Delegate's reliance on procedural improvements is irrelevant in light of the overall pattern. Likewise, the Delegate erred in finding that the Applicant would not be at risk because he does not belong to any of the "vulnerable groups" mentioned in the reports.

There was clear evidence that the use of torture is widespread and is not restricted to any particular group.

[56] The Applicant also highlights an excerpt from the 2007 U.S. Department of State report which was referred to in the PRRA opinion:

> The law forbids prison guards from extracting confessions by torture, insulting prisoners' dignity, and beating or encouraging others to beat prisoners. However, in November 2006 the Supreme People's Protectorate (SPP) Deputy Secretary Wang Zhenchuan acknowledged that illegal interrogation by "atrocious torture" existed in local judicial practice throughout China and that most all mishandled criminal cases in the previous year involved the "shadow of illegal interrogation." Wang estimated that at least 30 wrongful convictions were issued each year because of torture. In addition there continued to be reports that police and other elements of the security apparatus employed widespread torture and degrading treatment when dealing with detainees and prisoners.

[57] The Applicant contends that the thirty cases of torture per year that the Chinese authorities admit resulted in wrongful convictions are "only the tip of the iceberg."

[58] The Applicant does not disagree with the Delegate's opinion that "the fact that cases of wrongful convictions are coming to light at all is promising." However, he says this is irrelevant as an analysis of risk and is an "entirely unreasonable and inappropriate summation of the newspaper…article that sets out in detail the cruel and unusual punishment doled out to just one of many wrongfully convicted individuals on the basis of confessions elicited through torture" which reads as follows:

> The Supreme People Procuratorate, China's Justice Department, said in July that 4, 645 criminal suspects had suffered human rights

> violations, including torture during inquisitions in the past 12 months.
>
> Top officials are pushing to improve criminal procedures…But such changes if they come, will take time. China's Communist Party-run legislature has been urged to consider many new protections, like a right to remain silent. But such proposals have gone nowhere because the police steadfastly oppose them.

[59] The Applicant submits that the overturning of a handful of wrongful convictions resulting from confessions elicited by torture (despite the significant resistance and lack of concern of state authorities) does not redress the torture resulting in the wrongful convictions, nor the years spent in an inhumane prison system. The Delegate should have addressed the prevalence of torture as a means of interrogation and the fact that such problems run deep. The Applicant relies upon the *New York Times* articles before the Delegate which illustrate the cruelties of the Chinese judicial system. The PRRA Officer made this obvious correlation, while the Delegate drew the blinds shut and ignored and misconstrued the evidence before her on the real risks posed by the deprivation of basic legal rights.

[60] The Applicant also submits that the Delegate focused on the wrong issue and should have focused on the same question considered by the PRRA Officer: Is the Applicant likely to be denied the basic legal rights enumerated in numerous human rights documents and, if so, will the deprivation of those rights put him at risk of torture or cruel and unusual punishment? The evidence indicates that the Applicant does face such a risk.

[61] The Applicant cites and relies upon *Lai v. Canada (Minister of Citizenship and Immigration)* 2007 FC 361 (*Lai*) at paragraphs 136-138:

> **136** Yet, the officer did not address two major flaws the applicants raised on the basis of the same reports she cited in her decision. First, there appears to be a growing consensus that diplomatic assurances should not be sought when the practice of torture is sufficiently systematic or widespread. In his report to the UN General Assembly of September 1, 2004, the UN Special Rapporteur on Torture looked at the *non-refoulement* obligations inherent in the absolute and non-derogable prohibition against torture and other forms of ill-treatment. Noting that all relevant considerations must be taken into account when determining whether there are substantial grounds for believing a person would be at risk of being subjected to torture, the Special Rapporteur expressed the view that "in circumstances where there is a consistent pattern of gross, flagrant or mass violations of human rights, or of systematic practice of torture, the principle of *non-refoulement* must be strictly observed and diplomatic assurances should not be resorted to" (*Report submitted pursuant to General Assembly resolution 58/164*, UN Document A/59/324).
>
> **137** The logic behind such a stand is easy to grasp. If a country is not prepared to respect a higher legal instrument that it has signed and ratified - in this case, the UN Convention Against Torture, why would it respect a lower-level instrument such as a diplomatic note, that is not binding in international law and not enforceable? At pages 13-14 of the Joint Report, Human Rights Watch, Amnesty International and the International Commission of Jurists elaborate further on this dilemma:
>
> > As noted by the Council of Europe's Commissioner for Human Rights, "the weakness inherent in the practice of diplomatic assurances lies in the fact that where there is a need for such assurances there is clearly an acknowledged risk of torture and ill-treatment". The value of signing an "understanding" or accepting an "assurance" from a state that does not respect even legally-binding multi-lateral agreements prohibiting torture and other ill-treatment is necessarily cheap. Promises to take measures detailed in diplomatic assurances are mere repetitions -- indeed, pale echoes -- of treaty and other international obligations which receiving states have already promised but failed to respect in the past.

> The reliance on such non-binding agreements to enforce legally binding obligations may, in fact, undercut the credibility and integrity of universally binding legal norms and their system of enforcement. This is particularly the case if authorities in a country have persistently refused access to existing international mechanisms.
>
> **138** The PRRA officer acknowledged numerous reports attesting to the fact that the use of torture in China is still widespread. She admitted, at page 20 of her decision, that the evidence speaks of the "troubling existence" of torture as a tool in China, despite being a signatory to the UN Convention Against Torture. However, the PRRA officer nevertheless failed to assess whether it was appropriate to rely on diplomatic assurances at all from the Government of China. This analysis is simply not engaged. The officer moved from the overall pattern of torture in China to considering the Lais' particular case, without ever deciding whether it was at all appropriate to do so in light of the overall pattern. I agree with the Lais that this is, in itself, patently unreasonable.

[62] The Applicant submits that the country conditions considered in the *Lai* case have not changed. Even if the Applicant is described under subsection 122(3) of the Act, the Tribunal's finding that the Applicant is not a person in need of protection is unreasonable.

Respondents

Applicant described in subsection 112(3)

[63] The Respondents submit that the statutory framework of the Act makes it clear that the Delegate had jurisdiction to render her negative Decision because the PRRA Officer acted within the proper jurisdiction in excluding the Applicant from refugee protection on the basis of Article 1F of the Convention.

[64] The Respondents say that the Applicant's narrow interpretation of paragraph 112(3)(*c*) of the Act is inconsistent with the general language, scheme and objects of the Act and would lead to results that are contrary to the intention of Parliament. The Respondents assert that the words of the Act are to be read in a purposeful way, having regard to their entire context, and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the objects of the Act and the intention of Parliament. When the Applicant applied for "refugee protection," this included a claim for refugee protection. Alternatively, if there is a perceived legislative gap, the exclusion scheme in the PRRA context must be read as analogous to the exclusion scheme in the Refugee Protection Division context to prevent absurd consequences.

[65] Paragraph 112(3) of the Act must be read to prevent refugee protection resulting from an application for protection if someone makes a claim for refugee protection, or an application for protection, that was rejected on the basis of section F of Article 1 of the Convention. Thereafter, consideration of an application for protection must be on the basis of the factors set out in section 97 pursuant to paragraph 113(d) of the Act.

Inclusive Interpretation of Paragraph 112(3)(*c*) of the Act

[66] The Respondents submit that paragraph 112(3)(*c*) is reasonably capable of being interpreted to include claims for refugee protection inherent in PRRA applications for protection, given the context of the Act. The Supreme Court recognized that context in *Medovarski v. Canada (Minister of Citizenship and Immigration)* 2005 SCC 51 at paragraphs 5-10, noting that the Act prioritizes

security and communicates “a strong desire to treat criminal and security threats less leniently than under the former Act.”

[67] The Respondents say that the Applicant’s argument is premised on the submission that a claim for refugee protection and an application for protection are “two completely different processes.” However, both of these processes can result in refugee protection. The different ways in which refugee protection may be acquired should not be confused with the two protection streams in the Act, which are the “refugee protection” stream and the “protection” stream. This was recognized by the Federal Court of Appeal in *Xie*. The “protection” stream is found only in the PRRA process. The Respondents say that since a person can obtain “refugee protection” as a result of either process, the “refugee protection stream” is present in both the refugee board process and the PRRA process. Therefore, the Applicant also applied for “refugee protection” when he submitted his PRRA application.

[68] To grant refugee protection to the Applicant after he has been found to be excluded from refugee protection under Article 1F (b) would be contrary to the stated objectives of the Act. See: subsection 3(2) of the Act. The Respondents note that it would be contrary to paragraph 3(3)(*a*) of the Act which requires that the Act “be construed and applied in a manner that furthers the domestic and international interests of Canada.” Legislation should not be interpreted in a fashion contrary to the Act’s statutory objectives and statutory rules of construction. If it is, absurd consequences will follow.

[69] The Respondents submit that granting refugee protection to the Applicant after the Officer found that there were serious reasons for considering that the Applicant had committed a serious non-political crime in the United States before his admission into Canada would be contrary to the objective of denying access to Canadian territory to persons who are serious criminals.

[70] Granting the Applicant refugee protection would create an odd, absurd distinction between persons who were found to be excluded under Article 1F(b) by the Refugee Protection Division and persons who are found to be excluded under Article 1F(b) by a PRRA officer, either because circumstances changed or the person never made a refugee claim before the Refugee Protection Division. Persons excluded by the Refugee Board would not be eligible for refugee protection while those who were excluded by a PRRA officer would be eligible for refugee protection. This would "reward" those like the Applicant who chose to withdraw their refugee claim before the RPD after the Minister intervened in those proceedings to exclude him. By granting refugee protection to the Applicant after he has been found to be excluded from refugee protection on the basis of Article 1F(b) of the Convention would be contrary to the language of sections 113(c) and 114(1) of the Act, which provide that a person's PRRA application cannot be allowed, and refugee protection cannot be conferred on an applicant if they are referred to in Article 1F(b) of the Convention.

[71] The Respondents contend that the Applicant's narrow interpretation would mean that, once excluded, the Applicant would not be entitled to any further assessment of risk, which was not the intent of the legislation. See: sections 96-98 and 113-114 of the Act.

[72] The Respondents argue that it is necessary to interpret 112(3)(*c*) to include both persons whose claims for refugee protection and whose applications for protection have been rejected on the basis of Article 1F(b) of the Convention to avoid the result of either granting refugee protection to persons who have been found to be excluded from refugee protection or preventing further consideration of their circumstances. The Respondents note that this interpretation of paragraph 112(3)(*c*) is consistent with the Federal Court of Appeal's statements in *Xie* that a person who is excluded under section 98 and Article 1F(b) of the Convention cannot obtain refugee protection but can apply for protection through the PRRA process. Paragraph 33 of *Xie* provides the following guidance:

> **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.

Analogous Interpretation of Paragraph 112(3)(*c*)

[73] The Respondents submit in the alternative that, if the Court is of the view that "a claim for refugee protection" and "an application for protection" are so different that the Act cannot be construed to give PRRA officers the jurisdiction to make exclusion findings, then the principles of statutory interpretation designed to prevent absurdity also require that a perceived legislative gap be

avoided by an approach that permits PRRA officers to find that persons are excluded from refugee protection.

[74] The Respondents state that this alternative approach requires that the exclusion scheme in the PRRA context be read as analogous to the exclusion scheme in the Refugee Protection context. Paragraph 112(3)(c) of the Act must be read to prevent refugee protection resulting from an application for protection if someone makes a claim for refugee protection or an application for protection that was rejected on the basis of section F of Article 1 of the Convention.

[75] Parliament cannot be taken to have intended the absurd consequences that would result if the facts supporting an exclusion finding were either not determined by the Refugee Protection Division or were not apparent prior to the filing of an application for protection in the PRRA context. This would create a distinction between refugee claimants based on the timing of when their possible exclusion came to light. Such a result would arbitrarily preclude the finding of exclusion in relation to an applicant and potentially confer refugee protection where it was not intended, rewarding those excludable persons whose true circumstances are not determined until the PRRA stage.

PRRA Officer Authorized to Consider the Application of Exclusion Clauses

[76] The Respondents contend that a PRRA officer is required to consider whether an applicant is excluded from refugee protection on the basis of Article 1F(b) of the Convention in the course of

considering a PRRA application. Section 113 of the Act provides that a PRRA officer shall consider an applicant's PRRA application on the basis of sections 96 to 98 of the Act. Section 98 of the Act provides a person is not a "Convention refugee" or a "person in need of protection" if he or she is referred to in section E or F in Article 1 of the Convention.

[77] The Respondents note further that if facts arise on an application for protection which bring up the issue of exclusion, subsection 113(c) of the Act requires a PRRA officer to consider the application for protection under section 98. The Respondents stress that the legislation is clear that a PRRA officer has this authority and, once the officer makes an exclusion finding under section 98, the applicant is a person described in paragraph 112(3)(*c*) of the Act. A person described in section 112(3)(*c*) is not entitled to an assessment of refugee protection under section 96 of the Act. If the application is successful, the person is entitled to a stay of the removal pursuant to paragraph 114(1)(*b*) of the Act. If the assessment of protection under these provisions is unsuccessful, the application for protection is rejected by operation of subsection 172(4) of the Regulations. Protection and the PRRA provisions themselves are broadly premised upon the need to assess new or changed circumstances not previously considered and to balance a person's need for protection again that person's ineligibility or inadmissibility. The legislative history, provided as evidence of the law's purpose, supports this interpretation of the legislation in the Respondents' view. See: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at paragraphs 30-35.

[78] The Respondents point out that the Federal Court of Appeal in *Xie* recognized that the structure of the Act as it relates to the determination of claims for protection has two streams: claims

for refugee protection and claims for protection. The Respondents agree that the structure of the Act is such that it has these two streams, but submits that it has both of these streams in the context of the PRRA, as revealed by paragraph 113(c) of the Act. It must be noted that the Federal Court of Appeal's statements in *Xie* were made in the context of an exclusion finding having already been made by the Refugee Protection Division and the consequences in a subsequent PRRA application. By stating this, the Court pronounced exhaustively on the applicable streams of protection in the PRRA context, but did not purport to restrict the assessment of exclusion and refugee protection in the PRRA context.

[79] The Respondents note that the Applicant relies on some legislative history with respect to Regulation 167 to allegedly demonstrate that PRRA officers do not have jurisdiction to consider exclusion with respect to Article 1F of the Convention. The Respondents' view is that while legislative history has been admissible to facilitate the determination of Parliament's purpose it must not be assigned undue weight. Secondly, the criteria for oral hearings originally set out in the RIAS of the *Canada Gazette* on December 15, 2001 remained unchanged in the final version of the RIAS set out in the *Canada Gazette* on June 14, 2002. Had the change in the draft Regulation 159 version of what is now Regulation 167 been intended to represent a substantive change in policy, or if the earlier wording in the draft had been a source of controversy, it is reasonable to assume it would have been highlighted as an area where the Government responded to a concern of public interest. Thirdly, the legislative history does not suggest that Parliament intended to bestow refugee protection conferred on persons who are excludable. Fourthly, there is nothing to prevent a PRRA officer from holding an oral hearing or exclusion if circumstances warrant.

[80] The Applicant relies on the contents of a PP3 Manual that was publicly available at the time the PRRA Officer rendered his exclusion decision on July 1, 2009, as an aid to statutory interpretation, arguing that the Manual supposedly shows that the legislators did not intend to give PRRA officers jurisdiction to consider the exclusion clause. The Respondents say that while administrative interpretation may be cautiously relied upon by courts to assist in determining the meaning of legislation, policy manuals are not binding and do not have the force of law. While the use of manuals as an interpretative tool may be made where statutory language is vague, abstract, ambiguous or otherwise unclear, this is not the case with respect to the languages used in subsection 112(3) of the Act. See: Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (LexisNexis, 2008) at pages 621-630 and *Cha v. Canada (Minister of Citizenship and Immigration)* 2006 FCA 126 at paragraphs 14-15.

[81] The Respondents propose, however, that if this Court uses administrative interpretation as set out in the PP3 Manual to assist in determining whether PRRA officers have jurisdiction to render exclusion decisions under paragraph 112(3)(*c*), then the 2002 PP3 Manual, the 2005 PP3 Manual, the subsequent draft PP3 manual, and the 2008 PP3 Manual reflect legislative intent to give PRRA officers jurisdiction to make exclusion decisions. Indeed, the draft manual as incorporated in the 2008 version of the PP3 Manual is increasingly explicit as to the jurisdiction of PRRA officers to apply exclusion clauses.

[82] In response to the Applicant's argument that PRRA officers supposedly cannot consider exclusion because they conduct risk assessment, the Respondents say the jurisdiction of a PRRA

officer is not limited to risk. A PRRA officer must also consider the non-risk criterion set out in section 98 of the Act where an applicant is not (yet) described in subsection 112(3) of the Act. While an excludable person is not necessarily less at risk, that person cannot be granted refugee protection but can only have the removal order stayed where circumstances warrant.

[83] The Respondents submit that, contrary to paragraphs 29 to 31 of the Applicant's further memorandum of argument, the statutory and regulatory criteria for oral hearings set out in section 113(d) of the Act and Regulation 167 do not prevent a PRRA officer from holding an oral hearing about exclusion where circumstances warrant. The PRRA Officer in this case did not make a credibility determination, but only looked at the sufficiency of evidence about exclusion that the Applicant himself provided. As well, the Respondents point out that the Applicant never requested an oral hearing.

[84] The Respondents state that the Applicant is wrong to allege that the process followed by the PRRA Officer violated section 7 of the Charter and the Supreme Court of Canada's decision in *Singh* because no hearing was held into his refugee claim. The Respondents submit that an oral hearing must be contextually determined and does not automatically apply to circumstances where persons are statutorily prohibited by subsection 99(2) of the Act from hearings before the Refugee Protection Division because exclusion orders have already been issued against them. Section 113(b) of the Act and Regulation 167 do not create a statutory obligation to conduct an oral hearing for a PRRA application. Even where credibility is an issue section 113(b) is discretionary and section 167 criteria are cumulative. There was no central issue of credibility raised in the Applicant's PRRA

application. The process complied with section 7 of the Charter, as the Applicant was afforded a reasonable opportunity to present evidence and participate in the process. See: *Singh; Demirovic v. Canada (Minister of Citizenship and Immigration)* 2005 FC 1284 at paragraph 9 and *Ferguson v. Canada (Minister of Citizenship and Immigration)* 2008 FC 1067 at paragraph 27.

[85] The Respondents submit that, as stated in the PP3 Manual, the PRRA process is non-adversarial and grounded on a policy basis in Canada's domestic and international commitments to the principle of *non-refoulement*, as well as the Charter.

[86] The Respondents contend that there was no statutory or judicial stay prohibiting the Minister's Delegate from rendering a decision in the Applicant's case because a court proceeding was pending in *Li.* The Applicant is in immigration detention and there was an obligation on the Minister to act as expeditiously as possible to ensure that a decision on the Applicant's case was rendered as quickly as reasonably possible and to move his proceedings forward rather than wait for a decision of this Court in *Li* regarding other individuals.

Delegate's Decision Reasonable

[87] The Respondents say that, in determining whether a person is more likely than not to face risk if removed to a particular country, the Minister's Delegate must consider the evidence before her as it applies to the individual PRRA applicant and determine whether he or she is likely to personally face risk in any of the forms identified in subsection 97(1) of the Act. This is exactly

what the Respondents contend that the Minister's Delegate did in the Applicant's case. See: *Selliah v. Canada (Minister of Citizenship and Immigration)* 2004 FCA 261 at paragraph 16; *Bouaouni v. Canada (Minister of Citizenship and Immigration)* 2003 FC 1211 and *Li v. Canada (Minister of Citizenship and Immigration* 2003 FC 1514; affirmed 2005 FCA 1; leave to appeal to SCC refused S.C.C.A. No. 119.

[88] The Respondents say that, in assessing the application, the Minister's Delegate sets out how she considered the evidence and the conclusions that she drew. The Delegate's reasons are clear and indicate that she did not fetter her discretion. See: *Usta v. Canada (Minister of Citizenship and Immigration)* 2004 FC 1525 at paragraph 14.

[89] There are no Diplomatic Assurances in the Applicant's case and he does not face the death penalty. The Delegate clearly states the basis upon which she concluded that the Applicant was not likely to face risk on section 97 grounds. Therefore, the nature of the decision of the Minister's Delegate warrants a high deference on judicial review and her Decision is within the range of reasonable outcomes and does not warrant intervention by this court. See: *Tharumarasah v. Canada (Minister of Citizenship and Immigration)* 2004 FC 211 at paragraph 6 and *Bhalru v. Canada (Minister of Citizenship and Immigration)* 2005 FC 1259 at paragraph 24.

Post-*Li* Arguments

[90] After the release of the *Li v. Canada (Minister of Citizenship and Immigration)* 2009 FC 623 judgment, the Respondents sought the certification of two questions:

1) Do pre-removal risk assessment officers have the jurisdiction to exclude persons from refugee protection under section 98 of *IRPA* and find them described in section 112(3)(*c*) of IRPA?

2) Does section 112(3)(*c*) of the IRPA only apply to rejections by the Refugee Protection Division on the basis of Section F of Article 1 of the *Refugee Convention* or does it apply to rejections by pre-removal risk assessment officers on the basis of Section F of Article 1 of the *Refugee Convention?*

[91] The Respondents submit that the exceptions to the principle of judicial comity should be applied in this case and that the Court not follow *Li*.

ANALYSIS

Jurisdiction

[92] The Applicant says that the Decision is wrong because there is no basis in the Act or the Regulations that allows a PRRA officer to consider a claim for refugee protection and reject it on the basis of section F of Article 1 of the Convention.

[93] To support this assertion, the Applicant offers his interpretation of the relevant statutory provisions and Regulations, as well as the Federal Court of Appeal decision in *Xie* and the recent decision of Justice Heneghan in *Li*.

[94] The Applicant has, of his own volition, withdrawn the refugee claim he made before the RPD. He did this when he became aware that the Minister intended to seek a 1F(b) Convention exclusion based upon the Applicant's serious criminality outside of Canada.

[95] The record reveals that the Applicant has sought to avoid the exclusion consequences of his serious criminality outside of Canada by making his claim for both section 96 and 97 protection to the PRRA Officer. In doing this he alleges that the PRRA Officer cannot, under the scheme of the Act and under the relevant jurisprudence, consider exclusion under 1F(b) of the Convention. If this argument is correct, then it means that, even though his claim before the RPD could have foundered because of exclusion for serious criminality, an Article 1F(b) Convention exclusion should not have come into play before the PRRA Officer.

[96] Bearing in mind that under section 114(1)(*a*) of the Act, a PRRA officer's decision to allow an application for protection can have the "effect of conferring refugee protection," if the Applicant is correct in his assertions, this could mean that he will secure refugee protection in Canada even though he might have been denied that protection before the RPD because of Article 1F(b) of the Convention and his own serious criminality.

[97] In other words, the Applicant's withdrawal of his refugee claim before the RPD and his interpretation of the law before the PRRA Officer was an attempt to sidestep the consequences of his serious criminality and Article 1F(b) of the Convention in his bid to acquire refugee protection in Canada.

[98] If the Applicant's interpretation of the law is correct it would mean that someone who has engaged in serious criminality outside Canada could be excluded by the RPD by virtue of section 98 of the Act and 1F(b) of the Convention from acquiring protection in Canada, but that someone who, like the Applicant, decides to sidestep the RPD and to place his section 96 and 97 claims before a PRRA officer, could not be so excluded for the same criminality.

[99] The Applicant is seeking to use Canada as a haven against the consequences of his own criminality while, at the same time, asserting that Canada cannot assess those consequences from the perspective of Canada's own interests.

[100] What is more, in offering his interpretation of the Act and the Regulations, the Applicant alleges that the consequences I have referred to above were intended by Parliament.

[101] Justice Heneghan recently conducted a review and analysis of the relevant provisions of the Act in *Li*. Her analysis has greatly assisted my own review even though there are factors at play before me that require a different result.

[102] The Applicant in the present case deliberately withdrew his refugee claim before the RPD upon the Minister's intervention, and proceeded with a PRRA application in which his counsel asserted as follows:

> We submit that Mr. Liu is entitled to a PRRA determination pursuant to s. 113(c) of the IRPA. Despite his outstanding warrants in the United States and China, no determination has been made that Mr. Liu is inadmissible to Canada or that he should be excluded from refugee protection. We submit further that you do not have jurisdiction to make an exclusion finding pursuant to section 98 of the IRPA and consequently your analysis in this matter should be focused on whether Mr. Liu meets the threshold for protection set out in ss. 96 and 97.

[103] Section 113 of the Act directs a PRRA officer on how to assess a PRRA application. Subsection 113(d), in relevant part, says that, in the case of an applicant described in subsection 112(3), consideration of the PRRA shall be on the basis of the factors set out in section 97 and:

(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

(ii) in the case of any other applicant whether the application should be refused because the nature and severity of acts committed by the applicant or because of the danger that the applicant constitutes to the security of Canada.

[104] This is the provision that the Applicant seeks to avoid, which is why his counsel asserted in the PRRA application that the Applicant falls to be considered under 113(c) of the Act.

[105] Section 113(d) of the Act highlights precisely what the Applicant asserts that Canada should not be allowed to do in his case. He says that Canada should not be allowed to consider his serious

criminality and whether the nature and severity of his criminal conduct should deprive him of refugee protection.

[106] However, the provision that the Applicant says he should have been considered under is subsection 113(c) which reads as follows:

(*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;

[107] As his PRRA application shows, however, in asserting that the Officer should consider him under 113(c), the Applicant also contends that the Officer cannot follow the specific mandatory directions of that provision and consider section 98. In effect, the Applicant asserts that he must be considered under section 113(c) as he chooses to read 113(c), which is without reference to section 98.

[108] The reason the Applicant wishes to exclude section 98 is because, on its face at least, it appears to exclude him from protection under both section 96 and 97:

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.

[109] So, in designating section 113(c) to the Officer, the Applicant was seeking to exclude two principle consequences:

a) Exclusion under 1F(b) of the Convention, even though 113(c) mandates ("shall") that consideration under this section must include a consideration of section 98; and

b) Any attempt by Canada to assess the consequences of his serious criminality and how that criminality should affect his claim for protection.

[110] It is worth noting that, under section 113, the Act provides only two alternative modes of consideration. An applicant must either be "described in subsection 112(3)" or "not described in subsection 112(3)." The Applicant alleges that he is "not described in subsection 112(3)."

[111] The reason the Applicant wishes to avoid the consequences of falling within subsection 112(3) of the Act is that refugee protection "may not result from an application for protection if the person …(c) made a claim to refugee protection that was rejected on the basis of section F of Article 1 of the Refugee Convention."

[112] So subsection 112(3) is a controlling provision because it dictates the form of consideration that can take place under section 113.

[113] The reason why the Applicant says he does not fall under 112(3)(c) is because he withdrew his claim for refugee protection before the RPD, so that he has never had a claim to refugee protection that was rejected on the basis of section F of Article1 of the Refugee Convention.

[114] The Respondents, however, say that the Applicant's claim for refugee protection was rejected by the PRRA Officer on the basis of a 1F(b) exclusion. This being the case, the Respondents say that the Applicant falls within subsection 112(3), and so should be considered under subsection 113(d), so that the Minister can assess the Applicant under section 97, which is what happened in the present case.

[115] So there are several key issues for the Court to decide:

a) Does the Applicant fall under subsection 112(3)(c) of the Act so that his application was correctly considered under subsection 113(d) by the PRRA Officer, or is the Applicant correct that his application should have been considered under subsection 113(c)?

b) If the Applicant is correct in his assertion that his application should have been considered under 113(c), does this make any difference in light of the fact that subsection 113(c) of the Act directs and mandates the PRRA Officer to consider and base his decision upon sections 96 to 98 of the Act, and section 98 says that a person referred to in section E or F of Article 1 of the Convention is not a Convention refugee or a person in need of protection?

c) Does a PRRA officer have the jurisdiction under the Act to make an exclusion finding pursuant to section 98 of the Act?

[116] At the heart of the Applicant's argument lies his assertion that a PRRA officer does not have the jurisdiction to find that someone is excluded from protection by virtue of section 98 of the Act

and 1F(b) of the Convention. The Applicant says that Parliament never intended to grant a PRRA Officer this jurisdiction and the Federal Court of Appeal has confirmed this and settled the matter in *Xie*.

[117] I note that, in *Li*, Justice Heneghan concluded at paragraph 55 of her reasons that a PRRA officer does have the jurisdiction to exclude under section 98 of the Act:

> For present purposes, it seems to me that section 98 is the most important provision of the Act in the assessment of the Applicants' claim for protection. I am satisfied that the Officer has jurisdiction to consider section 98 when acting pursuant to subsection 113(c). Section 98 requires the Officer to assess whether an applicant is described in either section E or F of Article 1 of the Refugee Convention. Section F is relevant to the within matter in the face of allegations that the Applicants committed serious non-political crimes, that is fraud, outside Canada, that is in China.

[118] Although Justice Heneghan in *Li* rejected the applicant's arguments that a PRRA Officer did not have the jurisdiction to consider section 98 of the Act (the same arguments that counsel has made before me) she was not satisfied that the officer in *Li* had properly exercised that jurisdiction. At paragraph 56 of her reasons she says that

> Although I am satisfied that an officer <u>clearly has the jurisdiction to consider section 98</u>, upon a plain reading of the language of subsection 113(c), I am not satisfied that she properly exercised that jurisdiction since she was erroneously purporting to assess the Applicants' application pursuant to subsection 113(d). It follows that in this case, the officer improperly assumed jurisdiction. (Emphasis added).

[119] In the case before me, the PRRA Officer decided that the Applicant fell under subsection 112(3) of the Act and so considered him under subsection 113(d).

[120] The Respondents submit that the fair approach to this issue, and the one dictated by the general objectives of the Act and by *Xie*, is to bring the Applicant within subsection 112(3) so that he can be assessed under subsection 113(d), which is what actually happened in the present case.

[121] In looking at this approach, Justice Heneghan in *Li* examined subsection 112(3) closely and came to the following conclusions at paragraph 48 of her reasons:

> Each of the four situations referred to in paragraphs (a), (b), (c) and (d), respectively, contemplate that some action or determination has already occurred. Paragraphs 112(3)(a) and (b) address the consequences of inadmissibility hearings pursuant to section 45 of the Act. These hearings are conducted by the Immigration Division.

[122] For reasons of judicial comity and otherwise, I concur with Justice Heneghan that each of the four situations "contemplates that some action or determination has already occurred."

[123] I also concur with Justice Heneghan's conclusion in paragraph 49 of her reasons that "Paragraph 112(3)(*c*) describes the consequences of a hearing before the Refugee Protection Division, where a claim was rejected on the basis of section F of Article 1 of the Refugee Convention." This is certainly one of the things it describes.

[124] But I do not regard Justice Heneghan to be saying that paragraph 112(3)(*c*) will only apply where the RPD has made a decision. First of all, subsection 112(3)(*c*) only requires someone to have made a claim for refugee protection that has been rejected on the basis of 1F of the Convention. It does not say that the refugee claim has to be a claim that was made before the RPD.

Also, Justice Heneghan specifically found that PRRA officers have the jurisdiction to make 1F(b) exclusion decisions under section 98.

[125] If I am incorrect in my reading of Justice Heneghan's interpretation of section 112(3)(*c)*, so that *Li* must be interpreted to say that only the Refugee Protection Division can hear the claim for refugee protection that is rejected on the basis of section 1F of the Refugee Convention, then I must, on the facts before me, decline to follow *Li* on the basis that, to do so, would create an injustice. See *Almrei (Re)* 2009 FC 3, [2009] F.C.J. No. 1. The injustice is that, on the present facts, the Applicant would be able to acquire refugee protection and avoid entirely the consequences of his criminality simply by avoiding the RPD, while those seeking protection through the RPD would enjoy no such exemption. It would also mean that the jurisdiction given to a PRRA officer under section 113(c) to consider section 98 would be nullified, and the scheme of the Act, which requires the need for protection to be balanced against serious criminality, could be totally disregarded at the choice of an applicant.

[126] It cannot be forgotten that, on the present facts, the Applicant deliberately chose not to have his claim decided by the RPD. He voluntarily relinquished any rights he had to be considered by the RPD with all of the protections associated with a refugee claim before the RPD. In fact, he insisted that the PRRA Officer should consider his section 96 and section 97 rights under the PRRA process. And it seems to me that, under the scheme of the Act, he was certainly entitled to do that.

[127] But in so doing, the Applicant directed that his section 96 and 97 rights be addressed pursuant to subsection 113(c) of the Act. In my view, that could only lead to two possible consequences neither of which supports the Applicant's position which, in my view, is both contrary to the plain wording of the Act and the purpose and scheme of the Act.

[128] First of all, the PRRA Officer is mandated by subsection 113(c) of the Act to consider the application "on the basis of sections 96 to 98." That could have the consequence of immediately extinguishing the Applicant's section 96 and 97 rights by virtue of the wording of section 98. Justice Heneghan has concluded in *Li* that PRRA officers do have the jurisdiction under section 98 to make 1F(b) exclusion decisions.

[129] The second possibility in that, in considering the application under 113(c) "on the basis of sections 96 to 98" a PRRA officer may decide that, by virtue of section 98, the applicant is excluded from refugee protection under section 96. At that point a decision has been made on exclusion in relation to section 96. That decision immediately invokes subsection 112(3)(c) because it means the applicant has made a "claim to refugee protection" – which occurred here – that has been rejected on the basis of section F of Article 1 of the Convention – which also occurred on the facts before me.

[130] Because subsection 112(3)(*c*) is engaged as a result of the Officer's considering section 98 in relation to the section 96 claim, the matter must now proceed by way of 113(d), which is what occurred in the present case.

[131] In other words, I do not think that the direction in 113(c) that "consideration shall be on the basis of sections 96 to 98" means that a PRRA officer who makes a 1F(b) exclusion decision cannot then go on to consider section 97 risk under subsection 113(d). It is also my view that the PRRA Officer's approach to these statutory provisions and his way of dealing with section 96 to 98 of the Act was in accordance with the guidance provided by the Federal Court of Appeal in *Xie*. The Officer kept the two streams separate and ensured that exclusion was only applied to refugee protection.

[132] The Applicant, however, rejects both of these interpretations of the statutory provisions and asserts that a PRRA officer does not have the jurisdiction to consider section 98. In my view, this interpretation is not supported by the plain wording of section 113(c) and the purpose and scheme of the Act. I also have to consider the decision by Justice Heneghan in *Li* to the effect that "an officer clearly has the jurisdiction to consider section 98, upon a plain reading of the language of subsection 113(c) … ."

[133] In order to refute this jurisdiction (and it has to be borne in mind that the consequences of such refutation could be that an applicant could acquire refugee protection in Canada without any assessment of criminality as opposed to a claimant who has placed his/her claim before the RPD), the Applicant contends that it was not Parliament's intent to confer such a jurisdiction upon a PRRA officer and that the two-streams approach to the Act outlined by the Federal Court of Appeal in *Xie* makes it clear that there is no such jurisdiction.

[134] I have reviewed each of the Applicant's arguments regarding statutory interpretation and Parliamentary intent using the well-known principles in *Rizzo*. I have already set out above what my review leads me to conclude and I have also noted that I concur with Justice Heneghan in *Li* on the jurisdiction issue.

[135] On the facts of the present case, the Applicant imposed upon the PRRA Officer a full consideration of his section 96 and 97 rights without the benefit of a determination by the RPD. The Act appears to contemplate this alternative approach, but it was the Applicant's choice to use the PRRA system. This is not something that was forced upon him. He has not been made to relinquish rights and safeguards he would otherwise have had. He now argues that, as a result of his choice, and because the PRRA Officer made a positive risk assessment under section 97, the effect of the Decision was to confer refugee protection on him by virtue of subsection 114(1) of the Act.

[136] In the end, I just cannot accept that it was Parliament's intent to provide a means for a claimant to bypass the RPD and to have his/her section 96 and 97 rights considered *de novo* by a PRRA officer, but without any reference to serious criminality and 1F(b) of the Convention. I also believe that the wording of the Act makes it clear that this cannot be done and that a PRRA officer, placed in the position of Officer North in this case, must address sections 96 to 98. Subsection 113(c), the provision relied upon by the Applicant, says that Officer North must address section 98.

[137] The Applicant, however, says that the Federal Court of Appeal in *Xie* has decided otherwise.

[138] The following paragraphs from *Xie* provide guidance on the facts before me:

> **29** Section 95 excludes persons described in subsection 112(3) from refugee protection. Subsection 112(3) lists those persons who are ineligible for refugee protection, including persons who made a claim for refugee protection which was rejected on the basis of section F of Article 1 of the Convention as set out in section 98 of the Act:
>
> > 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.
>
> **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:
>
> > 113. Consideration of an application for protection shall be as follows:
> >
> > ...
> >
> > (c) in the case of an applicant not described in subsection 112(3), consideration shall be on the basis of sections 96 to 98;
> >
> > (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
> >
> > > (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
> > >
> > > (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.
>
> …
>
> **32** For all except those described in subsection 112(3), a successful application for protection results in the grant of refugee

protection and the status of protected person. 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:

...

> 21.(2) Except in the case of a person described in subsection 112(3) or a person who is a member of a prescribed class of persons, a person whose application for protection has been finally determined by the Board to be a Convention refugee or to be a person in need of protection, or a person whose application for protection has been allowed by the Minister, becomes, subject to any federal-provincial agreement referred to in subsection 9(1), a permanent resident if the officer is satisfied that they have made their application in accordance with the regulations and that they are not inadmissible on any ground referred to in section 34 or 35, subsection 36(1) or section 37 or 38.
>
> ...
>
> 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.
>
> ...

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.
>
> …
>
> **40** I would therefore answer the certified questions in accordance with this analysis. Specifically, I would say that a claimant can be excluded from refugee protection by the Refugee Protection Division for a purely economic offence. I stress refugee protection because the certified question appears to suggest that the exclusion applies to claims for protection, which is not the case. It applies only to claims for refugee protection. I would also say that in the application of the exclusion, the Refugee Protection Division is neither required nor allowed to balance the claimant's crimes (real or alleged) against the risk of torture upon her return to her country of origin.

[139] I find nothing in these paragraphs that undermines the approach of the PRRA Officer and the Decision taken in this case, or the interpretation of the statutory provisions I have outlined above in my reasons. In fact, I believe that *Xie* supports my own conclusions and the approach which the PRRA Officer took on exclusion.

[140] The Applicant in this case has been excluded under section 98 from the refugee protection stream but has also been assessed for protection at the PRRA stage. The only difference on the present facts from the usual process is that the Applicant’s refugee protection has, at his own insistence, been assessed *de novo* by the PRRA Officer. But the two streams have been kept separate. Section 98 has only been applied to exclude him from refugee protection.

[141] The Applicant places particular emphasis upon the words of the Federal Court of Appeal in paragraph 40 of *Xie* where the Court was answering the certified questions posed in the *Xie* case:

> I stress refugee protection because the certified question appears to suggest that the exclusion applies to claims for protection, which is not the case. It applies only to claims for refugee protection.

[142] In the *Xie* case, the Federal Court of Appeal was not dealing with an applicant who had chosen to bypass the RPD and who had asked a PRRA officer to consider his section 96 claim *de novo*. If an applicant does this it seems to me that he/she has placed consideration of refugee protection in the hands of a PRRA officer under the PRRA process. In undertaking the task, the PRRA Officer in this case only applied the exclusion to the refugee protection aspects of the Applicant's claim and considered section 97 protection under subsection 113(d). The Applicant wishes to prevent the consequences of this by arguing that he does not fall within sections 112(3) and 113(c) so should have been considered under subsection 113(c), but I have already explained above why, in my view, the PRRA Officer is provided sufficient scope under the relevant sections of IRPA to do what he did in this case, and to preserve intact the spirit and purpose of the Act and the balancing of competing interests embodied in the Act as the Federal Court of Appeal has directed in *Xie*.

[143] The Applicant is attempting in this application to throw the system into imbalance by insisting that he must be considered under subsection 113(c) while, at the same time, insisting that 113(c) cannot be read at its face value. In my view, the principles set out in *Xie* were observed by PRRA Officer North in this case, even though the Applicant attempted to divert him from those

principles, by insisting that his application could not be considered under subsection 113(d) of the Act.

[144] Using a standard of correctness, I find that neither the PRRA Officer nor the Delegate acted without jurisdiction or committed an error of law in their determination of the Applicant's claim in so far as it related to serious criminality outside of Canada and the Article 1F(b) exclusion issue.

Risk

[145] The Applicant also takes issue with the Delegate's Decision that he is not a person at serious risk of torture or cruel and unusual punishment or treatment.

[146] I have reviewed this issue on a standard of reasonableness using the well-known principles set out in *Dunsmuir*.

[147] It is noteworthy in this case that the PRRA Officer and the Minister's Delegate reached different conclusions on section 97 risk. In my view, there is nothing strange in this. In *Khosa*, the Supreme Court of Canada pointed out that different reasonable decisions are possible.

[148] I have reviewed each of the points of concern raised by the Applicant and, while I recognize that there is evidence that supports the Applicant's position, that evidence was carefully considered in the weighing process and full reasons were given by the Delegate for arriving at her conclusion.

In the end, I cannot say that the Delegate's negative risk assessment neglects the principles set forth in *Dunsmuir*. In my view it "falls within a range of acceptable outcomes, which are defensible in respect of the facts and law."

Certification

[149] The Respondents have put forward two questions for certification with which the Applicant concurs:

1. Do pre-removal risk assessment officers have the jurisdiction to exclude persons from refugee protection under section 98 of the IRPA and find them described in section 112(3)(*c*) of the IRPA?
2. Does section 112(3)(*c*) of the IRPA only apply to rejections by the Refugee Protection Division on the basis of section F of Article 1 of the *Refugee Convention* or does it apply to rejections by pre-removal risk assessment officers on the basis of section F of Article 1 of the *Refugee Convention*?

[150] Upon having regard to the criteria set out in subsection 74(d) of the Act and related jurisprudence, including the recent decision of the Federal Court of Appeal in *Varela v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 145, I agree with the parties that these questions should be certified.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The application for judicial review is dismissed;

2. The following questions are certified:

   Do pre-removal risk assessment officers have the jurisdiction to exclude persons from refugee protection under section 98 of the IRPA and find them described in section 112(3)(*c*) of the IRPA?

   Does section 112(3)(*c*) of the IRPA only apply to rejections by the Refugee Protection Division on the basis of section F of Article 1 of the *Refugee Convention* or does it apply to rejections by pre-removal risk assessment officers on the basis of section F of Article 1 of the *Refugee Convention*?

"James Russell"

Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

COURT FILE NO.:	IMM-748-09
STYLE OF CAUSE:	***XIAOQUAN LIU***
	v.
	THE MINISTER OF CITIZENSHIP AND IMMIGRATION and THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	Vancouver, B.C.
DATE OF HEARING:	June 18, 2009
REASONS FOR JUDGMENT:	RUSSELL J.
DATED:	September 8, 2009

WRITTEN REPRESENTATIONS BY:

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