Federal Court of Appeal | Cour d'appel fédérale

Date: 20190221

Docket: A-191-17

Citation: 2019 FCA 34

CORAM: **STRATAS J.A.**
RENNIE J.A.
WOODS J.A.

BETWEEN:

STENSIA TAPAMBWA
and RICHARD TAPAMBWA

Appellants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Heard at Toronto, Ontario, on April 10, 2018.

Judgment delivered at Ottawa, Ontario, on February 21, 2019.

REASONS FOR JUDGMENT BY: RENNIE J.A.

CONCURRED IN BY: STRATAS J.A.
WOODS J.A.

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REASONS FOR JUDGMENT

RENNIE J.A.

I. Overview

[1] The main issue in this appeal is whether persons who have been excluded from refugee protection under section 98 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) on the basis of Article 1F(a) of the United Nations *Convention Relating to the Status of*

Refugees, Can. T.S. 1969 No. 6 (the Convention) for committing crimes against humanity are entitled to have the exclusion finding reconsidered prior to deportation. This question arises in the unique and limited circumstances where the interpretation of Article 1F(a), and thus the legal foundation for the finding that the appellants were excluded from consideration as refugees under the Convention, changed between the date of the exclusion finding and the hearing before the pre-removal risk assessment (PRRA) officer.

[2] The answer to this question matters. If the appellants are excluded from consideration as Convention refugees on the basis of Article 1F(a), the nature and scope of the risks assessed by the PRRA officer are limited and the legal burden the appellants must meet in establishing those risks is elevated (IRPA, ss. 112(3)(*c*), 113(d)).

[3] In a risk assessment under section 97 of the IRPA, referred to as a restricted PRRA, the appellants must establish on a balance of probabilities that removal would more likely than not subject them to a personal risk of torture, death or cruel and unusual treatment (*Li v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1 at para. 29, 249 D.L.R. (4th) 306 (*Li*)). Even if such a risk is established, they may still be deported following the Minister's balancing of the factors set out in subparagraphs 113(d)(*i*) and (*ii*) (see *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3 (*Suresh*)). On the other hand, should they succeed in convincing the PRRA officer that they face a section 97 risk, their removal is temporarily stayed (IRPA, s. 114(1)(*b*)).

[4] In contrast, failed refugee claimants have their pre-removal risks assessed under section 96 (IRPA, s. 113(c)). In a section 96 risk assessment, sometimes called Convention grounds assessment, the appellants must establish that they "subjectively fear[] persecution and that this fear is objectively well-founded" (Sukhu v. Canada (Citizenship and Immigration), 2008 FC 427 at para. 25). The latter element requires that there is a "reasonable chance", a "reasonable possibility", or a "serious possibility" of persecution on Convention grounds (*Németh v. Canada (Justice)*, 2010 SCC 56 at para. 98, [2010] 3 S.C.R. 281 (*Németh*) citing *Adjei v. Canada (Minister of Employment & Immigration)*, [1989] 2 F.C. 680 at 683, 57 D.L.R. (4th) 153 (F.C.A.)). While they must establish their case on a balance of probabilities, they do not have to establish that persecution would be more likely than not (*Li* at para. 11). If they convince the PRRA officer that they face a section 96 risk, refugee protection is conferred (IRPA, s. 114(1)(*a*)).

[5] The appellants were found by the Refugee Protection Division (RPD) to have committed crimes against humanity and were therefore excluded from claiming protection under section 98 of the IRPA which incorporates Article 1F into Canadian law. In consequence, and as directed by paragraph 113(d) of the IRPA, the PRRA officer conducted a restricted PRRA – that is, with respect to section 97 grounds alone. The officer determined that the appellants did not meet the threshold in section 97 required to stay their removal orders.

[6] The appellants contend that the PRRA officer has both the jurisdiction and legal obligation to reconsider the finding that they were excluded under Article 1F(a). They assert that their removal under their particular circumstances violates both Canada's international law

obligation to observe the principle of *non-refoulement* and section 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, found in Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11 (the Charter).

[7] The Federal Court, per Southcott J. (2017 FC 522), dismissed the appellants' application for judicial review and certified three questions for determination by this Court:

> a. Do ss. 112(3)(*a*) and (*c*) of the IRPA require the Minister, when conducting a PRRA, to confirm that there remains a substantive basis for excluding the applicant from refugee protection?
>
> b. If not, does s. 25.2 of the IRPA provide the Minister discretion, in the absence of a pre-established policy, to exempt a person making an application for protection under s. 112 of the IRPA from the restrictions that flow from s. 112(3) of the IRPA, which discretion obliges the Minister to consider and make a decision on a request that such discretion be exercised?
>
> c. If not, does the combined effect of ss. 112(3)(*a*) and (*c*), 113(d) and 114 of the IRPA violate s. 7 of the Charter insofar as it deprives an applicant of the right to be recognized as a refugee without confirmation that there remains a substantive basis for excluding the applicant from refugee protection?

[8] The first question is framed by the fact that the legal test for exclusion determinations changed prior to the appellants' removal from Canada. These reasons therefore necessarily address the consequences of a change in the law subsequent to a final determination of exclusion, but prior to removal from Canada.

[9] The appellants also filed a Notice of Constitutional Question, seeking an order to:

> **DECLARE**, pursuant to s. 52(1) of the *Constitution Act, 1982* and/or section 24(1) of the *Charter*, that the combined effect of ss.

> 112(3) and 113(d) and 114(1)(b) and (2) of the [IRPA] and s. 172(4)(b) of the *Immigration and Refugee Protection Regulations* constitutes an unjustifiable violation of s. 7 of the *Charter* and that they are therefore either of no force or effect; or, in the further alternative;
>
> **GRANT** the Applicants an exemption, pursuant to ss. 7 and 24(1) of the *Charter*, from the application of ss. 112(3) and 113(d) and 114(1)(b) and (2) of the Act and s. 172(4)(b) of the *Regulations*, such that they are entitled to a risk assessment that includes s. 96 of the Act and to a grant of refugee protection in the event that they are found to be at risk of persecution;

[10] I would answer the three certified questions in the negative and I would dismiss the relief requested in the Notice of Constitutional Question.

II. Background

[11] The appellants are spouses and citizens of Zimbabwe. Both served in the Zimbabwe National Army. They left Zimbabwe in 2001 for the United States. They made no claim for protection while in the United States, but did so when they came to Canada in 2011.

[12] On November 20, 2012, the RPD concluded that there were serious reasons to believe that the appellants were complicit in crimes against humanity committed by the Zimbabwe National Army. In reaching this decision the RPD applied the test for complicity under Article 1F(a) of the Convention as it then stood in Canadian law (*Ramirez v. Canada (Minister of Employment & Immigration)*, [1992] 2 F.C. 306, 89 D.L.R. (4th) 173 (F.C.A.) (*Ramirez*)). In light of the RPD finding, the appellants were excluded from protection under section 98 of the IRPA.

[13] The RPD made two additional determinations.

[14] Notwithstanding that Article 1F(a) excluded the appellants from consideration as Convention refugees under section 98 of the IRPA, the RPD nevertheless assessed the substance of their claims on Convention grounds under section 96. It did so in the course of its consideration of the dependent claims of their children, which were wholly dependent on the evidence of the appellants. The RPD concluded that on that evidence, if returned to Zimbabwe, the children (and necessarily the appellants) would face nothing more than a remote risk of persecution and, therefore, did not fall within the definition of refugee under section 96. The RPD also found that neither the appellants nor their children would face a personalized risk to their lives or to cruel and unusual treatment and, therefore, were not persons in need of protection under section 97 of the IRPA (Notice of Decision, AB, Tab 6A at 96–97).

[15] Seven months later, on May 16, 2013, the Immigration Division determined the appellants to be inadmissible for crimes against humanity under paragraph 35(1)(*a*) of the IRPA and ordered their deportation under paragraph 45(d) (Deportation Orders and Admissibility Hearing Oral Decision, AB, Tab 6B at 98–104). Paragraph 35(1)(*a*) provides that:

35 (1) A permanent resident or a foreign national is inadmissible on grounds of violating human or international rights for	**35 (1)** Emportent interdiction de territoire pour atteinte aux droits humains ou internationaux les faits suivants :
(a) committing an act outside Canada that constitutes an offence referred to in sections 4 to 7 of the *Crimes Against Humanity and War Crimes Act*	***a)*** commettre, hors du Canada, une des infractions visées aux articles 4 à 7 de la *Loi sur les crimes contre l'humanité et les crimes de guerre*

[16] On July 11, 2013, the appellants' request for leave to apply for judicial review of the RPD decision was dismissed by the Federal Court. (Respondent's Memorandum of Fact and Law (RM) at para. 9).

[17] Eight days later, on July 19, 2013, the Supreme Court of Canada released its decision in *Ezokola v. Canada (Citizenship and Immigration),* 2013 SCC 40, [2013] 2 S.C.R. 678 (*Ezokola*). In *Ezokola,* the Court changed the test for complicity in crimes against humanity, as articulated in *Ramirez,* and as relied on by the RPD. The *Ramirez* test of "complicity by association" was replaced with a new "complicity by contribution" test that requires a finding that the claimant make a "significant and knowing contribution" to an organization's crime or criminal purpose before a claimant can be excluded by virtue of Article 1F(a) (*Ezokola* at paras. 29–30, 84).

[18] Faced with a removal order, the appellants applied for a PRRA under subsection 112(1) of the IRPA. Central to the appellants' argument before the PRRA officer was their assertion that as a result of the decision of the Supreme Court in *Ezokola,* the exclusion finding had to be reconsidered. They contended that as they had been excluded on the basis of their complicity by association, the legal basis of the exclusion finding had evaporated. The PRRA officer was therefore obligated to reconsider the exclusion finding and conduct a risk assessment under the more favourable criteria applicable to failed refugee claimants reflected in section 96.

[19] The officer concluded that there was no jurisdiction to consider either the exclusion finding or the Charter arguments (PRRA Decision, AB, Tab 4 at 69–70). As the appellants were excluded under Article 1F(a), they were persons "described" in paragraph 112(3)(*c*). Thus, their

application was only to be considered under paragraph 113(d) – a restricted PRRA – which only permitted an assessment on the basis of the more serious risks and legal threshold set out in section 97 and in subparagraphs 113(d)(*i*) and (*ii*).

[20] With respect to the substantive question of risk, the officer determined that should the appellants be returned to Zimbabwe, they would not face a risk within the meaning of either section 96 or section 97 of the IRPA (PRRA Decision, AB, Tab 4 at 70–76).

[21] The appellants sought and obtained leave to commence a judicial review application of the PRRA officer's decision. The application came before Southcott J.

III. Federal Court decision

[22] After reviewing the provisions of the IRPA which confer jurisdiction on the PRRA officer, the Federal Court judge found that it was not possible to interpret subsection 112(3) and section 113 of the IRPA as permitting a PRRA officer to review a prior exclusion finding. Southcott J. observed that paragraphs 112(3)(*c*) and 113(d) of the IRPA, which restrict the powers of a PRRA officer, are clear and unambiguous and that neither international criminal law norms nor the Charter required an interpretation of a statutory provision that it could not reasonably bear. In consequence, the judge concluded that the officer properly restricted the risk assessment under paragraph 113(d) of the IRPA to section 97 grounds alone (FC Decision at paras. 36–43, 48–49).

[23] The judge rejected the argument that section 7 of the Charter required a contemporaneous reassessment of the exclusion finding. Relying on the decisions of the Supreme Court in *B010 v. Canada (Minister of Citizenship and Immigration)*, 2015 SCC 58, [2015] 3 S.C.R. 704 (*B010*) and *Febles v. Canada (Citizenship and Immigration)*, 2014 SCC 68, [2014] 3 S.C.R. 431 (*Febles*), the judge observed that section 7 rights are protected by a section 97 assessment and the availability of a stay of removal (FC Decision at paras. 50, 52, 77–78).

[24] On the appellants' request for an exemption from the exclusion finding on public policy grounds under section 25.2, the judge found that section 25.2 did not oblige the Minister to consider the request by the appellants, or of any applicant in particular. In his view, Parliament did not intend to create an additional assessment of exclusion in section 25.2. Therefore, the Minister made no error in refusing to exercise his discretion one way or another concerning the appellants' request. As the appellants did not show that they fell within an already established public policy, the PRRA officer did not err in refusing to consider their application for section 25.2 relief on public policy grounds. The content of public policy is for the Minister alone to determine, and delegates of the Minister cannot create public policy (FC Decision at paras. 72–76).

[25] The judge then considered the reasonableness of the substantive decision of the officer under section 97 that the appellants would not face a risk on return to Zimbabwe. After a thorough and careful review of the record, he found the decision to be reasonable and dismissed the application (FC Decision at paras. 79–101).

[26] The appellants seek an order reversing the Federal Court judgment and remitting the PRRA for redetermination by a different officer. The appellants also seek an order in the nature of *mandamus* compelling the Minister to respond to their request for an exemption under section 25.2. In the alternative, the appellants ask for a declaration that the effect of subsections 112(3), 113(d), 114(1)(*b*) and 114(2) of the IRPA violate section 7 of the Charter. They ask for a declaration that paragraphs 112(3)(*a*) and (*c*) are of no force and effect under subsection 52(1) of the *Constitution Act, 1982*, or alternatively, a constitutional exemption under subsection 24(1) of the Charter.

IV. Analysis

A. Standard of Review

[27] The role of this Court is to determine whether the Federal Court judge identified the appropriate standard of review and applied it properly (*Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras. 45–46, [2013] 2 S.C.R. 559).

[28] Here, the judge did not err in identifying reasonableness as the standard of review concerning the PRRA officer's interpretation of subsection 112(3) of the IRPA (FC Decision at paras. 20–22).

[29] The question whether a PRRA officer has the authority to reconsider a prior exclusion finding concerns the interpretation of the PRRA officer's home statute and does not fall into any of the categories that rebut the presumption of reasonableness. It is clear from the legislative

provisions in issue that the PRRA officer has the authority to make the inquiry into whether the appellants are described by subsection 112(3) of the IRPA. The question raised in this appeal only concerns the extent of that authority and thus cannot conceivably raise a true question of jurisdiction (*Quebec (Attorney General) v. Guérin*, 2017 SCC 42 at para. 32, [2017] 2 S.C.R. 3; *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 59, [2008] 1 S.C.R. 190 (*Dunsmuir*)).

[30] Turning to the Charter question, the PRRA officer determined that PRRA officers do not have jurisdiction to consider questions of constitutional validity (*Covarrubias v. Canada (Minister of Citizenship & Immigration)*, 2006 FCA 365 at paras. 47–57, [2007] 3 F.C.R. 169). Thus, the only decision under review that addresses the Charter argument is that of the Federal Court and that will be reviewed for correctness. Regardless, as the Federal Court judge identified at paragraph 22, questions of constitutional validity are reviewed for correctness (*Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at para. 30, [2011] 3 S.C.R. 654; *Dunsmuir* at para. 58; *Begum v. Canada (Citizenship and Immigration)*, 2018 FCA 181 at para. 36; *Canada (Attorney General) v. Johnstone*, 2014 FCA 110 at para. 46, [2015] 2 F.C.R. 595).

[31] The appellants also challenge the implicit refusal of the Minister to exercise discretion under section 25.2 of the IRPA. What section 25.2 requires will be assessed on a correctness basis, but whether, in light of the proper interpretation of section 25.2 and the context of the case, the Minister erred in failing to exercise discretion under section 25.2 will be assessed for reasonableness.

[32] Finally, as the appellants accept, the PRRA officer's section 97 risk assessment will be reviewed for reasonableness (FC Decision at para. 19).

[33] With the background set, I turn to the scope of a PRRA officer's jurisdiction.

B. The interpretation of subsection 112(3) of the IRPA

[34] The crux of the appellants' position is that paragraph 112(3)(*c*) is ambiguous and that the Court must adopt an interpretation that permits reconsideration of a prior exclusion finding by the PRRA officer. They contend that both section 7 of the Charter and Canada's international law obligation to protect against *refoulement* require this interpretation. They also say that PRRA officers must have the ability to reconsider a prior inadmissibility finding. This is necessary because in order to receive a full PRRA, the appellants would not only need to escape paragraph 112(3)(*c*) (described by exclusion), but paragraph 112(3)(*a*) (described by inadmissibility) as well.

[35] As noted, the appellants' argument depends on the assumption that there is an uncertainty or ambiguity in the legislation and so the interpretation that more greatly conforms to international law or the Charter should be selected. As a general proposition, this is not in doubt (*R. v. Jarvis*, 2019 SCC 10 at paras. 104–106). However, in this case there is no ambiguity. The language of Parliament in subsection 112(3) and paragraph 113(d) is unequivocal. If an applicant for refugee protection was excluded under Article 1F(a) of the Convention, the risk assessment to be conducted by the PRRA officer is restricted. That is the case in this appeal.

[36] Applying the modern approach to statutory interpretation (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21, 154 D.L.R. (4th) 193) of text, context and purpose, subsection 112(3) simply cannot be interpreted so as to permit the PRRA officer to reconsider a prior exclusion finding under paragraph 112(3)(*c*) or an inadmissibility finding under paragraph 112(3)(*a*).

[37] Paragraphs 112(3)(*a*) to (*c*) read as follows:

112 (3) Refugee protection may not be conferred on an applicant who	**112 (3)** L'asile ne peut être conféré au demandeur dans les cas suivants :
(*a*) is determined to be inadmissible on grounds of security, violating human or international rights or organized criminality;	***a*)** il est interdit de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux ou criminalité organisée;
(*b*) is determined to be inadmissible on grounds of serious criminality with respect to a conviction in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years or with respect to a 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;	***b*)** il est interdit de territoire pour grande criminalité pour déclaration de culpabilité au Canada pour une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou pour toute déclaration de culpabilité à l'extérieur du 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;
…	[…]

[38] The appellants submit that paragraphs 112(3)(*a*) and (*c*) are ambiguous as to whether the PRRA officer can make a fresh assessment of exclusion and inadmissibility. Paragraph 112(3)(*a*) is ambiguous, they say, because it states a person falls within the paragraph where the person "is determined", rather than "has been determined". The use of the present tense suggests that Parliament intended that the PRRA officer have the jurisdiction to revisit the issue of exclusion.

[39] Similarly, paragraph 112(3)(*c*) states a person falls within its ambit only when that person had a claim for protection that was rejected "on the basis" of Article 1F(a). Since the Supreme Court subsequently changed the test for exclusion on the basis of Article 1F(a), the appellants were not excluded "on the basis" of Article 1F(a). They also assert a latent ambiguity arises once Canada's international law obligations and the principle of *non-refoulement* are considered as part of the interpretive exercise.

[40] Each of these arguments fail.

[41] The text of subsection 112(3) and the scheme of the IRPA demonstrate that there is no authority in a PRRA officer to reconsider an exclusion finding. The appellants' interpretation rests on a de-contextualized reading of subsection 112(3), does not take account of the architecture of the IRPA and seeks to give subsection 112(3) an interpretation which it is incapable of bearing. The purposes of the IRPA set out in section 3, to which the appellants resort, do not permit the Court to re-draft the scheme set out in the IRPA or to give a meaning to subsection 112(3) which is contrary to Parliament's intent.

[42] There is a well-established presumption that, where possible, Canada's domestic legislation should be interpreted to conform to international law (*R. v. Hape*, 2007 SCC 26 at para. 53, [2007] 2 S.C.R. 292 (*Hape*)). Absent contrary indication, legislative provisions are also presumed to observe "the values and principles of customary and conventional international law" (*Hape* at para. 53; *B010* at para. 47; Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed., (Markham: LexisNexis Canada Inc., 2014) at §18.6; see also *de Guzman v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436 at paras. 82–87, [2006] 3 F.C.R. 655).

[43] Therefore both Canada's international law obligations, in this case under the Convention, and principles underlying international law play a role in the contextual interpretation of Canadian laws (*B010* at para. 47). This is reinforced by paragraph 3(3)(*f*) of the IRPA which directs that the Act "is to be construed and applied in a manner that … complies with international human rights instruments to which Canada is signatory".

[44] There is, however, an important counter-weight to these principles – the doctrine of Parliamentary supremacy. An unambiguous provision must be given effect even if it is contrary to Canada's international obligations or international law (*Németh* at para. 35; *Schreiber v. Canada (Attorney General)*, 2002 SCC 62 at para. 50; *National Corn Growers Assn. v. Canada (Canadian Import Tribunal)*, [1990] 2 S.C.R. 1324 at page 1371; *Gitxaala Nation v. Canada*, 2015 FCA 73 at para. 16; *Hape* at para. 54).

[45] With these first principles in mind, I return to the appellants' submission regarding paragraph 112(3)(*a*), namely, that the use of the present tense "is" suggests that a PRRA officer can reconsider a prior determination of inadmissibility at the time of the PRRA.

[46] In short, this argument fails because to permit a PRRA officer to reconsider a prior inadmissibility finding would usurp the processes set out in the IRPA and would be contrary to the legislative scheme. The present tense "is determined to be inadmissible" refers to the fact that once determined to be inadmissible, an applicant remains inadmissible. The claimant is before the section 97 PRRA officer only because he or she "is" inadmissible. Were it not for that fact, they would not be there in the first place. The claimant would be before a section 96 PRRA officer. Parliament did not use language such as "may be inadmissible".

[47] Exclusion and the resulting inadmissibility is a status held by the appellants, which has previously been determined by the RPD and the Immigration Appeal Division (IAD). It is in these bodies that Parliament has reposed responsibility for those decisions. The RPD/IAD determinations are conclusive and final unless set aside by the Federal Court. Parliament's use of the word "is" is consistent with the architecture of the IRPA and the procedures by which exclusion and inadmissibility findings are made.

[48] A PRRA officer, whether acting under section 96 or 97, is neither hearing an appeal nor making a *de novo* determination of the original claim for protection rejected by the RPD. When Parliament wanted to establish an appellate tribunal with respect to RPD decisions, it did so expressly. In 2012, subsection 13(1) of the *Balanced Refugee Reform Act*, S.C. 2010, c. 8

(BRRA) came into force, establishing the Refugee Appeal Division (see *Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93, [2016] 4 F.C.R. 157 for a review of the legislative history and purpose of the Refugee Appeal Division).

[49] To be clear, the legislation says nothing that would give the PRRA officer authority to reverse a finding of inadmissibility or exclusion. To the contrary, Parliament has put that responsibility elsewhere.

[50] Sections 34 to 42 of the IRPA deem persons to be inadmissible for violations of human rights, various forms of serious criminality, medical or financial reasons. Inadmissibility findings arise by operation of law where an officer finds that the person is a person described in one of those sections. Unlike refugee claims, no further adjudication or determination is required. Persons may be deemed inadmissible.

[51] When an official believes a person is inadmissible, an inadmissibility report is prepared under subsection 44(1) of the IRPA. This report is then referred to the Minister of Immigration, Refugees and Citizenship. The Minister reviews the report and, under subsection 44(2), either issues a removal order or refers the matter to the Immigration Division for an admissibility hearing. If the latter, at the conclusion of the hearing the Immigration Division must make one of the orders set out in section 45. In this case, the Immigration Division, accepting the factual determinations of the RPD as it must (paragraph 15(b) of the *Immigration and Refugee Protection Regulations*, S.O.R./2002-227) found that the appellants were inadmissible under paragraph 35(1)(*a*) resulting in a removal order under paragraph 45(d) (see *Johnson v. Canada*

(Citizenship and Immigration) 2014 FC 868 at paras. 24 and 25, 463 F.T.R. 257 for elaboration of this point).

[52] Following an inadmissibility determination and a removal order, an appeal lies to the IAD (IRPA, ss. 63(2), 63(3), 63(5)). However, no appeal to the IAD may be made if the foreign national was "found to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality" (IRPA, s. 64(1)).

[53] In contrast to the extensive process set up for determinations of inadmissibility, the role of a PRRA officer, whether acting under section 96 or section 97, is limited: to assess allegations of risk prior to removal at the time the decision is made based on fresh evidence or a change in country conditions subsequent to the RPD decision (*Azimi v. Canada (Minister of Citizenship and Immigration)*, 2015 FC 1177 at para. 20 (*Azimi*)).

[54] Parliament has also considered the consequences arising from a positive risk assessment in the case of a person described in subsection 112(3), namely those excluded such as the appellants. Even if an applicant is successful on a restricted PRRA, the exclusion and inadmissibility findings are neither reversed nor is refugee status conferred. Rather, there is a temporary, but automatic, stay of removal (IRPA, s. 50(b)). This arises, importantly, not as the result of a discretionary decision of the PRRA officer, but by operation of the IRPA (IRPA, s. 114(1)(*b*)).

[55] If a temporary stay is in place, Parliament has also addressed the next steps in subsection 114(2):

Cancellation of stay	Révocation du sursis
114 (2) If the Minister is of the opinion that the circumstances surrounding a stay of the enforcement of a removal order have changed, the Minister may re-examine, in accordance with paragraph 113(d) and the regulations, the grounds on which the application was allowed and may cancel the stay.	**114 (2)** Le ministre peut révoquer le sursis s'il estime, après examen, sur la base de l'alinéa 113d) et conformément aux règlements, des motifs qui l'ont justifié, que les circonstances l'ayant amené ont changé.

[56] The statute does not give the Minister discretion to reconsider the underlying exclusion finding. It only allows the Minister to cancel the stay and re-trigger the removal process. It would be anomalous, in the extreme, to read into the powers of a PRRA officer a power which was withheld from the Minister.

[57] The officer's task, as prescribed by Parliament, was to consider whether, on new evidence or a change in country conditions, the risks had changed (IRPA, s. 113(d)). The officer does not have the discretion to revisit past evidence or to decide that the question of exclusion should be redetermined. Permitting the PRRA officer to do so would have the effect of injecting a level of appeal in the form of a *de novo* determination. It would also grant a PRRA officer a decision making authority that has been expressly conferred on the RPD and IAD. It would, in effect, re-write the statute and grant PRRA officers new and significant authority which Parliament did not grant.

[58] In conclusion, the use of the present tense "is" in paragraph 112(3)(*a*), does not, when situated in the architecture of the IRPA, give rise to an ambiguity. Rather, the present tense "is" is consistent with the treatment by Parliament of how inadmissibility arises – it is a status that the applicant acquired prior to his request for a PRRA. That finding prevails and there is no further determination unless the exclusion finding decision is set aside on judicial review.

[59] The exclusion finding in respect of the appellants was made on November 20, 2012, the removal order of the Immigration Division was issued on May 16, 2013 and the application for leave to commence judicial review in the Federal Court was dismissed by the Federal Court on July 11, 2013. With the dismissal of the leave application, the exclusion finding was final. There was no further right of appeal, review or recourse under the IRPA. All of these decisions took place prior to *Ezokola*, which was decided on July 19, 2013.

[60] As I have described, the purpose of the PRRA is not to repeat the work of the RPD and the IAD, or to sit on appeal of those decisions. The RPD and the Immigration Division are *functus* once they have rendered their decisions, and the question of exclusion and inadmissibility is final as far as the PRRA officer's authority under the IRPA is concerned. Barring fresh evidence or evidence of a risk not previously assessed, the question of exclusion was finally determined with the dismissal of the appellants' application for judicial review by the Federal Court on July 11, 2013, eight days prior to the decision in *Ezokola*. The appellants' exclusion was finally determined "on the basis" of the applicable law at that time.

[61] With the refusal of leave, the decision that the appellants were complicit within the meaning of Article 1F(a) was final. The appellants' status under the IRPA had been assessed and adjudicated, and all recourse mechanisms exhausted.

[62] Therefore, I agree with the finding of the Federal Court judge that coherence and consistency in the interpretation of the scheme support the conclusion that a PRRA officer has no jurisdiction to reconsider a prior exclusion finding. I would answer the first certified question in the negative.

C. Issue estoppel / res judicata

[63] The Minister says that the appellants' exclusion has been finally determined and is *res judicata*. Relying on *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 at paragraph 62, [2001] 2 S.C.R. 460 (*Danyluk*), the appellants say that administrative decision makers such as the PRRA officer have a discretion whether or not to apply the doctrine, and that given the intervening change in the law of complicity, the officer erred in not exercising discretion to reconsider the finding.

[64] The Minister's argument, and the ancillary arguments which it spawned in response, do not assist in the analysis of the legal issues before the Court. Indeed, the Attorney General's reliance on the doctrine of *res judicata* is inconsistent with his argument with respect to the jurisdiction and role of a PRRA officer.

[65] *Res judicata*/issue estoppel is triggered when a decision maker with authority to determine a matter declines not to do so on the basis that the three criteria (same parties, same question, final decision) have been met (*Danyluk* at para. 25).

[66] A PRRA officer's jurisdiction is to consider whether, on the basis of new evidence that has come to light or could not have reasonably been discovered at the time of the RPD hearing or on the basis of new risks not previously assessed, the claimant now faces a section 96 or 97 risk, as the case may be. *Res judicata* plays no role as the question answered by a PRRA officer's decision is necessarily different from the risks considered by the RPD. While *res judicata* applies in respect of past risks and evidence, the PRRA officer is considering matters arising subsequent to the RPD determination. *Res judicata* is engaged only when the same question has been decided.

[67] As a second observation, *res judicata* has no bearing in circumstances when the second decision maker has no jurisdiction to make the decision in the first place. In *Administrative Law*, 11th ed. (New York: Oxford University Press, 2014) at p. 197, the authors note that "... the most obvious limitation on the doctrine of estoppel is that it cannot be invoked so as to give an authority powers which it does not in law possess. ... Nor can any kind of estoppel give a tribunal wider jurisdiction than it possesses." The objection to the second decision maker making the decision is purely a jurisdictional one, rooted in the statutory scheme.

[68] As *res judicata* does not assist in the disposition of the issues on appeal, it is not strictly necessary to address the appellants' argument that the PRRA officer has discretion not to apply

res judicata and to grant the appellants the benefit of a change in the law. Given the emphasis put on this point, I will nevertheless briefly address this argument.

[69] Assuming for the sake of argument that *res judicata* applies and the PRRA officer had discretion not to apply the doctrine, there are no relevant factors which would warrant the discretion being exercised in the appellants' favour. Evolving law is not a reason to depart from the doctrine of issue estoppel (*Régie des rentes du Québec v. Canada Bread Company Ltd.*, 2013 SCC 46, at paras. 28–30, [2013] 3 S.C.R. 125; see as well the discussion of this point in *Eli Lilly Canada Inc. v. Teva Canada Limited*, 2018 FCA 53 at para. 54, *per* Laskin J.A.).

[70] Nor is it relevant that the point of finality was reached a mere eight days before *Ezokola* was decided. No principled distinction can be drawn between an applicant whose exclusion finding became final a day, a month or a year before *Ezokola*. To make the point, consider the circumstances of a judicial review of a PRRA officer's decision refusing to apply the doctrine and deciding to reconsider the exclusion. Such a decision would be assessed on a reasonableness basis. When would a decision be unreasonable? One day, eight days, 30 days or six months prior to the change in law?

[71] The appellants rely on the decision of this Court in *Oberlander v. Canada (Attorney General)*, 2016 FCA 52, 396 D.L.R. (4th) 155 (*Oberlander*). In *Oberlander*, this Court considered the effect of a change in the law of complicity in the context of citizenship revocation proceedings.

[72] I do not agree that *Oberlander* supports the appellants.

[73] *Oberlander* concerned citizenship revocation proceedings under the *Citizenship Act*, R.S.C. 1985, c. C-29. The Governor in Council made a complicity finding, based on pre-*Ezokola* law, arising from the applicants' participation in war crimes in World War II. The complicity finding, on a pre-*Ezokola* basis, was upheld on judicial review in the Federal Court and on appeal. However, this Court returned the case to the Governor in Council for reconsideration of the issue of duress. On reconsideration, the Governor in Council concluded that duress was not established. The applicants applied for judicial review of the Governor in Council's second decision. *Ezokola* was released prior to the second hearing. The Federal Court held that issue estoppel precluded re-litigation of the complicity finding. The applicant appealed.

[74] This Court allowed the appeal, ruling that the Federal Court failed to consider the link between the complicity finding and the issue of duress. The Court of Appeal found that the complicity finding was inherently linked to the issue of duress, and as the question whether or not duress was established was a live issue before the Court, so too was the finding of complicity.

[75] The circumstances under which issue estoppel arose in *Oberlander* are, therefore, quite distinct from those in this appeal. The complicity finding in *Oberlander* was still a live issue. The same cannot be said here.

D. Section 7 of the Charter

[76] The appellants' position is that their removal from Canada in the absence of a risk assessment under the criteria of section 96 violates section 7 of the Charter.

[77] This argument fails on the basis of established Supreme Court jurisprudence with respect to the interface between section 7 of the Charter and exclusion findings. Further, there is no factual foundation for the section 7 argument. As explained above, in assessing the dependent claims of their children on the basis of the risks asserted by the appellants, the RPD found that there was no risk under section 96. The RPD separately considered the appellants' claims under section 97 criteria, likewise finding no risk. As I will explain later in these reasons, the appellants' challenge to these findings fails, with the result that the appellants' Charter argument is hypothetical.

[78] Three principles frame the analysis in respect of section 7 of the Charter and the removal of persons from Canada, whether on the grounds of inadmissibility or otherwise.

[79] First, *Suresh* teaches that a section 97 risk assessment does not violate section 7. The Supreme Court of Canada held that the applicant must make out a *prima facie* case that there may be a risk of torture or similar abuse before the Minister must conduct a risk assessment prior to removal. Even where the threshold has been met, the Minister may nevertheless order removal after weighing the risk to the applicant and the Canadian public interest (*Suresh* at para. 58).

[80] The second principle arises from *Febles.* The Supreme Court held that the Charter does not provide a positive right to refugee protection. In consequence, Parliament has the power to

pass legislation that complies with Canada's obligations under the Convention, or to pass legislation that either exceeds or falls short of the Convention's protections. Affirming the decision of this Court, the Supreme Court found that there was no doubt or ambiguity that Parliament's intention in section 98 of the IRPA was to exclude from refugee protection all persons within the ambit of Article 1F. The Court noted "[t]here is similarly no role to play for the *Charter* in interpreting s. 98 of the *IRPA*" (*Febles* at para. 67). The existence of Article 1F is itself confirmation of the principle that there is no positive right at international law for all persons to be able to make a claim for refugee protection.

[81] The third principle arises from *B010.* Building on *Febles* the Court affirmed that "even if excluded from refugee protection, the appellant is able to apply for a stay of removal to a place if he would face death, torture or cruel and unusual treatment or punishment if removed to that place" (i.e., a risk assessment under section 97) (*B010* at para. 75, citing *Febles* at para. 67; IRPA, ss. 97, 112, 113(d)(*i*) and 114(1)(*b*)). The Court held that this rationale applies equally to determinations of inadmissibility (*B010* at para. 75). Section 7 is therefore not engaged by a finding of inadmissibility or exclusion.

[82] It follows that the appellants' argument that they must have their risks assessed against section 96 criteria runs contrary to the jurisprudence of the Supreme Court. As the determination of exclusion or inadmissibility does not engage section 7, it necessarily follows that section 7 is not engaged by the denial of a section 96 risk assessment. This is the consequence of the trilogy of SCC decisions (*Suresh*, *Febles*, *B010*). Exclusion removes the appellants from the refugee determination process, and, as a direct consequence, from a section 96 risk assessment.

[83] Nevertheless, it is clear that the appellants' section 7 Charter rights are protected by the safeguards available to them under the IRPA. In *Febles*, the Court found that if excluded, the appellant can apply for a stay of removal in the face of section 97 risks. It is at the removal stage where the section 7 interests are engaged (*Febles* at paras. 67, 68).

[84] The decision of this Court in *Atawnah v. Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 144, [2017] 1 F.C.R. 153 (*Atawnah*) is demonstrative of this point.

[85] At issue in *Atawnah* was paragraph 112(2)(*b.1*) of the IRPA, which barred access to any PRRA for refugee claimants from designated countries who had abandoned their claim for refugee status until 36 months had passed from the date of abandonment.

[86] The appellants, facing removal to Israel within the 36 months, argued that their removal from Canada without a section 96 risk assessment violated section 7. They also argued that paragraph 112(2)(*b.1*) of the IRPA violated section 7 as their refugee claim had never been determined.

[87] Consistent with *Febles*, this Court held that individuals who are barred from a full PRRA, as are the appellants here, have their section 7 risks assessed at the removal stage. The manner in which section 7 risks of applicants who are PRRA-barred are assessed is a process where "an enforcement officer assesses the sufficiency of the evidence of risk, and if satisfied the evidence is sufficient, defers removal and refers the risk assessment to another decision-maker" (*Atawnah* at para. 27). An enforcement officer's refusal to defer removal may be challenged in the Federal

Court, and a stay of removal may be obtained pending the outcome of an application for judicial review. The Federal Court can, and often does, consider a request for a stay of removal in a more comprehensive manner than an enforcement officer can consider a request for deferral (*Shpati v. Canada (Minister of Public Safety & Emergency Preparedness)*, 2011 FCA 286 at para. 51, [2012] 2 F.C.R. 133)). Dawson J.A. concluded that the rights available to those being removed in the absence of the basis of any PRRA were "not illusory", but real and effective.

[88] In sum, consistent with the decision of the Supreme Court in *Febles*, the discretion of the removals officer, under the supervisory jurisdiction of the Federal Court, discharges the section 7 obligations owed to the appellants. These safeguards are sufficient to ensure that persons such as the appellants are removed in a manner consistent with section 7 of the Charter.

[89] I turn to the second reason why the appellants' Charter argument must fail. In the context of the RPD's consideration of the children's dependent claims, the same risks asserted by the appellants were assessed under section 96 and rejected (RPD Decision, paras. 1, 4). The RPD concluded that the claims were not credible and that "they would face nothing more than a remote risk if they were returned to Zimbabwe. They are not Convention Refugees" (RPD Decision at para. 36).

[90] Unless the appellants convince this Court that the PRRA officer's decision is unreasonable, there is no factual foundation to sustain the argument that removal in the absence of a section 96 assessment engages the appellants' section 7 rights. As will be discussed in part F of these reasons, there is no basis to set aside the findings of the PRRA officer in this respect.

E. Was the Minister's implicit refusal to consider the appellants' application under section 25.2 reasonable?

[91] I turn to the second certified question:

> Does s. 25.2 of the IRPA provide the Minister discretion, in the absence of a pre-established policy, to exempt a person making an application for protection under s. 112 of the IRPA from the restrictions that flow from s. 112(3) of the IRPA, which discretion obliges the Minister to consider and make a decision that such discretion be exercised?

[92] I believe the substance of the question was well framed by the Federal Court judge. He asked "must the Minister exercise discretion under s. 25.2 of the IRPA to exempt the Applicants from the application of s. 112(3), such that failure to consider their request for an exemption vitiates the PRRA decision?" (FC Decision at para. 11).

[93] I would answer this question, as re-framed, in the negative.

[94] I note at the outset whether or not the Minister has discretion to grant relief generally under section 25.2 is not at issue. The appellants concede this point, accepting the reasons of the Federal Court. This concession is appropriate. The plain reading of subsection 25.2(1) and the absence of imperative language points to the existence of a discretion. Whether or not a pre-established public policy is a prerequisite to requiring the exercise of the Minister's discretion under section 25.2 remains to be decided.

[95] Subsection 25.2(1) provides:

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

[96] The thrust of the appellants' arguments is that the Minister is obligated to exercise his discretion under section 25.2 and establish a policy which would grant them, as pre-*Ezokola* claimants, an unrestricted PRRA. A policy must be established and the discretion must also be exercised favourably to bring Canadian law into conformity with international law and the Charter.

[97] There is no doubt that the scope of ministerial discretion may be constrained by the Charter (*Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 at paras. 114, 117, 128, [2011] 3 S.C.R. 134). However, the Charter cannot be used to force the Minister to grant an unrestricted PRRA where the legislation (here subsection 112(3)) prevents it.

[98] The appellants contend, on basic principles of administrative law, that where a statute provides a discretion and the office holder refuses to acknowledge or reply to a request that it be exercised, as is the case here, a court can compel the exercise of the discretion.

[99] As a general proposition, the appellants' argument is sound. But it must be situated in its legislative context. The parties join issue on the specific question whether the existence of a specific pre-existing public policy is a pre-requisite to any legal obligation on the Minister to exercise his discretion. The appellants say that the IRPA obliges the Minister to consider requests on a case by case basis and to affirmatively establish a policy. The Minister says that unless there is content or a framework or criteria which constitute "public policy", there is no obligation to act.

[100] The appellants' argument fails when section 25.2 is read in its full context, as it must. The legislative history of section 25.2, the distinction between subsection 25(1) and section 25.2, the nature of public policy itself, coupled with the discretionary language of the section, all point to the conclusion that the Minister has no obligation to establish a public policy on request.

[101] Parliament has expressly addressed the circumstances where the Minister may waive the requirements of the IRPA. Subsection 25(1) allows the Minister to grant relief on humanitarian and compassionate grounds to foreign nationals who do not meet the requirements of the IRPA. Importantly, for the purposes of context, persons who are inadmissible on the basis of sections 34, 35 or 37, such as the appellants, cannot avail themselves of the discretion Parliament granted the Minister under subsection 25(1).

[102] Section 25.2 provides a similar discretion. The foreign national must comply with any ministerial conditions and the Minister must be satisfied that the waiver is justified by public policy.

[103] These similarities aside, there is, however, a stark distinction between subsection 25(1) and section 25.2. The former contains mandatory language. The Minister "must" consider requests for humanitarian and compassionate relief. Section 25.2 in contrast, is discretionary. The Minister "may" consider granting relief. This is not a situation where the permissive or discretionary word, "may," can be read as mandatory.

[104] There are other hurdles to the appellants' argument.

[105] First, there is no objective content to public policy. The content of public policy is vested in the Minister and has not been delegated (*De Araujo v. Canada (Citizenship and Immigration)*, 2007 FC 363 at paras. 19–23, 311 F.T.R. 306). On the appellants' interpretation, the Minister has an open-ended obligation to consider all requests that the requirements of the IRPA be waived and to establish a relevant policy within which the request for a waiver would be considered. This would be a significant shift in, indeed a judicial amendment to, the legislative scheme. It would create, at the apex of the system, a further final appeal to the Minister in all cases, including those on the eve of removal.

[106] Second, where Parliament has granted discretion to grant relief on a case by case basis, it did so expressly and with limitations – the waiver from the requirements of the IRPA must be based on humanitarian and compassionate considerations (IRPA, s.25.1). Further, and as previously noted, those who are inadmissible on the grounds of sections 34, 35 and 37, are ineligible for humanitarian and compassionate relief. That door being closed to the appellants, they urge an interpretation of section 25.2 which would allow them to come in through the back

door. I am not prepared to read into section 25.2 a recourse that Parliament has expressly made unavailable to them in subsection 25(1).

[107] Third, the appellants' argument amounts to a requirement that the Minister establish a policy that applies to them – a policy which would waive subsection 112(3) in the case of pre-*Ezokola* inadmissibility findings. Thus viewed, the appellants' *mandamus* argument, in essence, compels the Minister not only to establish a public policy, but to establish public policy which would operate in their favour.

[108] The legislative history of section 25.2 suggests that this was not Parliament's intent. Recall that "public policy considerations" were, by virtue of the BRRA, extracted from subsection 25(1) and placed within the sole remit and initiative of the Minister. The legislative summary of section 25.1 (Library of Parliament, Legislative Summary of Bill C-11: An Act to amend the *Immigration and Refugee Protection Act* and the *Federal Courts Act* (*Balanced Refugee Reform Act*); Publication No. 40-3-C11-E (12 May 2010) (revised 12 January 2011)) reads:

2.3.1 Removal of Public Policy Considerations from Examinations Conducted on Request (Clauses 4 and 5)	**2.3.1 L'intérêt public ne peut plus être pris en compte dans l'examen effectué par le Ministre sur demande (art. 4 et 5)**
Clauses 4 and 5 of Bill C-11 amend section 25(1) to divide the humanitarian and compassionate decision making process into three Ministerial powers. Clauses 4 and 5 also limit the Minister's consideration of public policy considerations to situations where the Minister, on his or her initiative, undertakes an	Les articles 4 et 5 du projet de loi modifient le paragraphe 25(1) de la LIPR pour répartir les éléments du processus décisionnel relatif aux considérations d'ordre humanitaire en trois pouvoirs distincts du Ministre. Selon ces articles, celui-ci ne prend en compte l'intérêt public que s'il étudie le cas d'un étranger de sa propre

examination of the foreign national's circumstances (new section 25.2).	initiative (nouvel art. 25.2).

[109] The Federal Court found that there was no existing public policy applicable to the appellants and that there had not been any delegation by the Minister to officials to apply a public policy. In these circumstances, to allow PRRA officers to grant or deny exemptions under section 25.2 based on their own personal view of what constitutes good public policy is discordant with the legislative history and the plain text of section 25.2. I note that in *Azimi*, Fothergill J. found that the PRRA officer lacked jurisdiction to consider a prior exclusion finding despite the change in *Ezokola* as there was no statutory basis upon which a PRRA officer could invoke the Minister's discretion under section 25.1 of the IRPA and, on their own initiative, grant an exemption from paragraph 113(d) on humanitarian and compassionate grounds.

[110] The appellants also rely on paragraph 3(3)(*f*), which requires that the IRPA be "construed and applied in a manner that complies with international human rights instruments to which Canada is signatory." As with their Charter argument, the appellants argue that section 25.2 is necessary to achieve compliance with the Convention in the event that the text of subsection 112(3) cannot be interpreted to achieve compliance. This argument is premised on the contention that the Federal Court erred in finding there is no "clear authority that Canada's international obligations include a requirement for reconsideration based on evolution of jurisprudence" (FC decision at para. 35).

[111] For substantially the same reasons of the Federal Court, I agree that no such authority exists. Coupled with the principle established by *Febles*, described above at paragraph 80 of

these reasons, I am unable to conclude that the Convention compels the Minister to consider applications for relief under section 25.2 in circumstances such as the appellants', particularly in light of the recourse otherwise available to them.

[112] The availability of a restricted PRRA under section 97 in combination with the opportunity to apply for a stay of removal are, in and of themselves, sufficient to protect the appellants' Charter rights. It follows in these circumstances that the Minister cannot be seized with an obligation under the Charter to grant the appellants' application under section 25.2.

F. The reasonableness of the PRRA officer's decision

[113] I turn to the final ground of appeal – the appellants' challenge to the underlying decision of the PRRA officer that they would not face any risk under section 97 if returned to Zimbabwe. The Federal Court judge did not err in applying a reasonableness standard of review to this finding.

[114] To be successful in a section 97 risk assessment, a failed claimant must establish on a balance of probabilities that removal would more likely than not subject them to a personal risk of torture, death or cruel and unusual treatment (*Li* at para. 29). The Federal Court judge conducted a thorough and careful review of the PRRA officer's decision, which I adopt. Based on my review of the PRRA officer's reasons and the evidence, I would dismiss this ground of appeal.

[115] The officer assessed each of the appellants' allegations of risk and the evidence in support. The officer concluded that the appellants failed to provide sufficient objective evidence demonstrating that they would face a personal risk to their lives or to cruel and unusual punishment should they return to Zimbabwe.

[116] The appellants contend that the PRRA officer's risk assessment was unreasonable and that the officer relied on an outdated expert report instead of the expert evidence they submitted. They say the officer erred in finding that any risks flowing from the appellant, Mr. Tapambwa, being mistakenly identified as his twin brother were speculative and impersonal. They also assert the officer failed to consider the cumulative weight of the evidence, including in the 2013 incident alleging the Zimbabwean government was looking for Mr. Tapambwa.

[117] The Federal Court judge concluded that the decisions reached were within the range of acceptable outcomes and were defensible on the facts and law. The judge correctly characterized the arguments advanced by the appellants as challenging the officer's assessment of the credibility and weight to be accorded the evidence. I do not accept the argument that the judge ignored "the cumulative weight of the evidence". The evidence has to first be found to be credible and probative in order for it to be given weight. Here, the PRRA officer's conclusions with respect to both credibility and weight were entirely reasonable and open on the record before him, and sufficient in and of themselves to dispose of the allegation of risk.

[118] The officer addressed the expert evidence tendered by the appellants (page 72 of the Appeal Book), and found that it did "not rebut the significant findings of the board with respect

to the applicants' credibility" (see the Appeal Book, Tab E at page 280 for that expert evidence). I agree. The expert report, whatever its weight, could not displace the RPD decision with respect to credibility. I would add that at its best, the expert affidavit does not advance the appellants' case. As the Federal Court judge noted, the affiant "expressly states that it is uncertain whether the Applicants' failed asylum status on its own would place them at risk of persecution" (FC Decision at para. 100).

[119] As to the question whether the appellants' particular profile placed them at an elevated risk, as argued by the expert, the RPD did in fact look at this risk in light of their personal profile. Moreover, by their own admission (in footnote 103 of their factum), the appellants are in fact challenging the RPD's reliance on an allegedly outdated report. This is a collateral attack on a decision that was denied leave to judicially review.

[120] The appellants' second argument is also without merit. The officer did not find that the potential for being mistaken for Mr. Tapambwa's twin brother was merely speculative. Rather, the officer found that the evidence submitted did not demonstrate that he would be mistaken for his twin such that a section 97 risk of harm would result (see 4th paragraph on page 13 of the PRRA officer's decision (page 75 of the Appeal Book)).

[121] Finally, with respect to the evidence concerning events in 2013 and 2014, the officer noted and explained in detail the following pieces of evidence:

- Mr. Tapambwa's mother's letter (see the first half of page 12 of the PRRA officer's decision (page 74 of the Appeal Book) and see Exhibit "D" in the Appeal Book, Tab C at page 136 for the letter);
- his mother's medical report (see the second paragraph on page 12 of the officer's decision (page 74 of the Appeal Book) and see Exhibit "E" in the Appeal Book, Tab C at page 142 for the medical report);
- two letters from the lawyer who was retained to find Mr. Tapambwa's missing father (see the last paragraph on page 12 and the top paragraph on page 13 of the officer's decision (pages 74 and 75 of the Appeal Book) and see Exhibit "F" and "G" in the Appeal Book, Tab C at pages 145 and 148 for the lawyer's letters); and
- a letter from Mr. Tapambwa's uncle (see the second paragraph on page 13 of the officer's decision (page 75 of the Appeal Book) and see Exhibit "H" in the Appeal Book, Tab C at page 154 for the uncle's letter).

[122] I am not satisfied that there was any error in the officer's treatment of any of this evidence. The PRRA officer assessed each piece of evidence individually and collectively and found that it fell short of establishing a possible section 97 risk. In addition to the insufficiency of the evidence, the officer also had concerns about its credibility. I am not persuaded that those concerns were unreasonable. To the contrary, the officer provided clear and rational explanations as to why he or she came to that view. The officer in fact, looked at the whole of the evidence, contrary to what has been argued before us. The application was rejected "[b]ased on the totality of the evidence before [the officer]" (see 3rd paragraph on page 14 of the PRRA officer's decision (page 76 of the Appeal Book)).

V. Conclusion

[123] I would therefore answer the three certified questions, as re-framed, in the negative, and dismiss the appeal.

"Donald J. Rennie"
J.A.

"I agree
David Stratas J.A."

"I agree
Judith Woods J.A."

APPENDIX A

***Immigration and Refugee Protection Act* (S.C. 2001, c. 27)**	***Loi sur l'immigration et la protection des réfugiés* (L.C. 2001, ch. 27)**
Humanitarian and compassionate considerations — request of foreign national	**Séjour pour motif d'ordre humanitaire à la demande de l'étranger**
25 (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.	**25 (1)** Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 —, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada — sauf s'il est interdit de territoire au titre des articles 34, 35 ou 37 — qui demande un visa de résident permanent, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.
…	[…]
Public policy considerations	**Séjour dans l'intérêt public**
25.2 (1) The Minister may, in examining the circumstances concerning a foreign national who is inadmissible or who does not meet the requirements of this Act, grant that person permanent resident status or an	**25.2 (1)** Le ministre peut étudier le cas de l'étranger qui est interdit de territoire ou qui ne se conforme pas à la présente loi et lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations

exemption from any applicable criteria or obligations of this Act if the foreign national complies with any conditions imposed by the Minister and the Minister is of the opinion that it is justified by public policy considerations.

applicables, si l'étranger remplit toute condition fixée par le ministre et que celui-ci estime que l'intérêt public le justifie.

…

[…]

Security

34 (1) A permanent resident or a foreign national is inadmissible on security grounds for

(a) engaging in an act of espionage that is against Canada or that is contrary to Canada's interests;

(b) engaging in or instigating the subversion by force of any government;

(b.1) engaging in an act of subversion against a democratic government, institution or process as they are understood in Canada;

(c) engaging in terrorism;

(d) being a danger to the security of Canada;

(e) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or

(f) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (a), (b), (b.1) or (c).

…

Sécurité

34 (1) Emportent interdiction de territoire pour raison de sécurité les faits suivants :

a) être l'auteur de tout acte d'espionnage dirigé contre le Canada ou contraire aux intérêts du Canada;

b) être l'instigateur ou l'auteur d'actes visant au renversement d'un gouvernement par la force;

b.1) se livrer à la subversion contre toute institution démocratique, au sens où cette expression s'entend au Canada;

c) se livrer au terrorisme;

d) constituer un danger pour la sécurité du Canada;

e) être l'auteur de tout acte de violence susceptible de mettre en danger la vie ou la sécurité d'autrui au Canada;

f) être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle est, a été ou sera l'auteur d'un acte visé aux alinéas a), b), b.1) ou c).

[…]

Human or international rights violations

35 (1) A permanent resident or a foreign national is inadmissible on grounds of violating human or international rights for

(a) committing an act outside Canada that constitutes an offence referred to in sections 4 to 7 of the *Crimes Against Humanity and War Crimes Act*;

…

Organized criminality

37 (1) A permanent resident or a foreign national is inadmissible on grounds of organized criminality for

(a) being a member of an organization that is believed on reasonable grounds to be or to have been engaged in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of an offence punishable under an Act of Parliament by way of indictment, or in furtherance of the commission of an offence outside Canada that, if committed in Canada, would constitute such an offence, or engaging in activity that is part of such a pattern; or

(b) engaging, in the context of transnational crime, in activities such as people smuggling, trafficking in persons or laundering of money or other proceeds of crime.

Atteinte aux droits humains ou internationaux

35 (1) Emportent interdiction de territoire pour atteinte aux droits humains ou internationaux les faits suivants :

a) commettre, hors du Canada, une des infractions visées aux articles 4 à 7 de la *Loi sur les crimes contre l'humanité et les crimes de guerre*;

[…]

Activités de criminalité organisée

37 (1) Emportent interdiction de territoire pour criminalité organisée les faits suivants :

a) être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle se livre ou s'est livrée à des activités faisant partie d'un plan d'activités criminelles organisées par plusieurs personnes agissant de concert en vue de la perpétration d'une infraction à une loi fédérale punissable par mise en accusation ou de la perpétration, hors du Canada, d'une infraction qui, commise au Canada, constituerait une telle infraction, ou se livrer à des activités faisant partie d'un tel plan;

b) se livrer, dans le cadre de la criminalité transnationale, à des activités telles le passage de clandestins, le trafic de personnes ou le recyclage des produits de la criminalité.

…

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.

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

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

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

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

[…]

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.

Personne à protéger

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

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

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

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

country,

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

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

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

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

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

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

Person in need of protection

(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.

Personne à protéger

(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.

…

[…]

Application for protection

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

Demande de protection

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

subsection 77(1).

…

Restriction

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

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

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

(c) made a claim to refugee protection that was rejected on the basis of section F of Article 1 of the Refugee Convention; or

(d) is named in a certificate referred to in subsection 77(1).

Consideration of application

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

(a) an applicant whose claim to refugee protection has been rejected may present only new evidence that arose after the rejection or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances

certificat visé au paragraphe 77(1).

[…]

Restriction

112 (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) il est interdit de territoire pour grande criminalité pour déclaration de culpabilité au Canada pour une infraction à une loi fédérale punissable d’un emprisonnement maximal d’au moins dix ans ou pour toute déclaration de culpabilité à l’extérieur du 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) 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) il est nommé au certificat visé au paragraphe 77(1).

Examen de la demande

113 Il est disposé de la demande comme il suit :

a) le demandeur d’asile débouté ne peut présenter que des éléments de preuve survenus depuis le rejet ou qui n’étaient alors pas normalement accessibles ou, s’ils l’étaient, qu’il n’était pas raisonnable, dans les circonstances, de s’attendre à ce

to have presented, at the time of the rejection;	qu'il les ait présentés au moment du rejet;
(b) a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required;	**b)** une audience peut être tenue si le ministre l'estime requis compte tenu des facteurs réglementaires;
(c) in the case of an applicant not described in subsection 112(3), consideration shall be on the basis of sections 96 to 98;	**c)** s'agissant du demandeur non visé au paragraphe 112(3), sur la base des articles 96 à 98;
(d) in the case of an applicant described in subsection 112(3) — other than one described in subparagraph (e)(i) or (ii) — consideration shall be on the basis of the factors set out in section 97 and	**d)** s'agissant du demandeur visé au paragraphe 112(3) — sauf celui visé au sous-alinéa e)(i) ou (ii) —, sur la base des éléments mentionnés à l'article 97 et, d'autre part :
(i) in the case of an applicant for protection who is inadmissible on grounds of serious criminality, whether they are a danger to the public in Canada, or	**(i)** soit du fait que le demandeur interdit de territoire pour grande criminalité constitue un danger pour le public au Canada,
(ii) in the case of any other applicant, whether the application should 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; and	**(ii)** soit, dans le cas de tout autre demandeur, du fait que la demande devrait être rejetée en raison de la nature et de la gravité de ses actes passés ou du danger qu'il constitue pour la sécurité du Canada;
…	[…]

United Nations Convention Relating to the Status of Refugees, Can. T.S. 1969 No. 6	**Convention relative au Statut des Réfugiés des Nations Unies, R.T. Can. 1969 no 6**
Article 1	Article premier
definition of the term "refugee"	Définition du terme « réfugié »
…	[…]
F. The provisions of this Convention	F. Les dispositions de cette

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

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

…

Convention ne seront pas applicables aux personnes dont on aura des raisons sérieuses de penser :

a) Qu'elles ont commis un crime contre la paix, un crime de guerre ou un crime contre l'humanité, au sens des instruments internationaux élaborés pour prévoir des dispositions relatives à ces crimes;

b) Qu'elles ont commis un crime grave de droit commun en dehors du pays d'accueil avant d'y être admises comme réfugiés;

c) Qu'elles se sont rendues coupables d'agissements contraires aux buts et aux principes des Nations Unies.

[…]

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM A JUDGMENT OF THE FEDERAL COURT DATED MAY 26, 2017 NO. IMM-1516-16 (2017 FC 522)

DOCKET:	A-191-17
STYLE OF CAUSE:	STENSIA TAPAMBWA and RICHARD TAPAMBWA v. MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	APRIL 10, 2018
REASONS FOR JUDGMENT BY:	RENNIE J.A.
CONCURRED IN BY:	STRATAS J.A. WOODS J.A.
DATED:	FEBRUARY 21, 2019

APPEARANCES:

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