Date: 20081105

Docket: IMM-1570-08

Citation: 2008 FC 1230

Ottawa, Ontario, November 5, 2008

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

TENZIN WANGDEN

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 application for judicial review considers whether the grant of "withholding of removal" status under United States immigration law to a claimant for protection confers recognition as a "Convention refugee" for the purposes of paragraph 101(1)(d) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) so as to permit the return of the claimant to that country.

Background

[2] Mr. Tenzin Wangden is a national of Tibet, Peoples Republic of China (PRC), but considers himself to be stateless. He is a Buddhist monk who follows the Dalai Lama and has lived in monasteries for the greater part of his life. He has a half brother who is a Canadian citizen, and thus would fall within one of the exceptions to the *Agreement between the Government of Canada and the Government of the United States for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries* (the "safe third country agreement") if he has not been granted Convention refugee protection in the US.

[3] On March 3, 2008, Mr. Wangden entered Canada from the US and sought refugee protection at the Fort Erie Refugee Processing Unit. In his initial screening interview with Canada Border Services (CBSA) Officer Rayos Del Sol, the applicant denied in a statutory declaration that he had ever applied for protection in the United States.

[4] A search of the US Immigration and Customs Enforcement database indicated that Mr. Wangden had been granted protection in that country. Officer Rayos Del Sol then contacted an Officer of the US Customs and Border Protection Service who verbally confirmed that Mr. Wangden had been granted “asylum” in the US. Officer Rayos Del Sol’s declaration in the certified record states that the US officer also advised him that there was a reference in their records to some pending status but that he did not have access to the particular file.

[5] Mr. Wangden was asked to complete a second statutory declaration. He again denied having applied for refugee protection in the US. When confronted with the information obtained from the US authorities he admitted that he had applied for asylum, but said that he was unaware of the outcome of his application. He was told by others not to say that he had applied for asylum in the US because he would be refused entry into Canada. He recalled being told by a US Judge that he could not get a "green card" (permanent residence) or sponsor anyone to come to the US but he could live all of his life in the United States. He had been issued a US social security card and a work authorization card. Officer Rayos Del Sol then referred the matter to a Minister's Delegate with the recommendation that the applicant be found ineligible under IRPA paragraph 101 (1) (d) for referral to the Refugee Protection Division (RPD).

[6] In his affidavit dated April 1, 2008, filed on a motion for a stay of execution of the removal order made by the Minister's delegate, the applicant states that he had claimed asylum in or about June 2004 after having been in the US for some seven months. He withdrew his claim on the recommendation of his lawyer at the time that he would stand a better chance of obtaining an alternative form of protection under US law termed "withholding of removal status". Mr. Wangden says he followed this advice and withdrew his asylum application. Attached as Exhibit B to his affidavit is a form which appears to be a summary of an oral decision entered in US Immigration Court in New York City on March 2, 2006 indicating that Mr. Wangden's application for asylum was withdrawn "with prejudice", and that he was granted "withholding of removal".

[7] Opinion evidence was filed on behalf of both parties as to the effect in US law of withholding of removal status. The applicant submitted the affidavit of Craig Trebilcock, an immigration attorney practicing in York, Pennsylvania. The respondent tendered the opinion of David A. Martin, Professor of Law at the University of Virginia. Professor Martin was cross-examined on his affidavit by telephone and the transcript was filed in evidence.

[8] I note that the evidence on this application does not suggest that Mr. Wangden is at any real risk of *refoulement* to the PRC if returned to the US. Mr. Trebilcock's opinion was that Mr.Wangden would have lost his withholding status by reason of his departure from the US but would be entitled to make a fresh claim for protection as a Convention refugee, either for asylum or withholding, or for protection under the Convention against Torture. Professor Martin does not believe that the circumstances of Mr. Wangden's entry into Canada would constitute a "departure" under US law as interpreted by the jurisprudence. Both are agreed that withholding status permits removal to a safe third country. Mr. Trebilcock makes no comment on the likelihood of this happening. Professor Martin asserts that this is more theoretical than real as it rarely happens.

Decision Under Review

[9] The Minister's Delegate, Officer Dela Cruz, determined that Mr. Wangden was ineligible to be referred to the RPD pursuant to paragraph 101(1)(d) as he had been "…recognized as a Convention refugee by the U.S.A. and to which [he] could be sent and returned". The Delegate signed an exclusion order against Mr. Wangden. Pursuant to paragraph 49 (2) (b) of the IRPA, the order did not come into force for seven days and Mr. Wangden was not required to return to the

US immediately. His removal to the United States was stayed until the final disposition of this application by the Order of the Chief Justice issued on April 8, 2008.

Relevant Legislation

[10] The relevant provisions of the IRPA, the US *Immigration and Nationality Act* of 1952, as amended, (INA), the 1951 *Convention Relating to the Status of Refugees* 189 U.N.T.S. 137 ("Convention" or "1951 Convention") and the 1967 *Protocol Relating to the Status of Refugees*, 606 U.N.T.S. 267 are set out in Annex "A" to this judgment.

Issues

[11] The applicant submits that it is not necessary on this application to decide whether withholding of removal status confers Convention refugee recognition. He frames the central issue on this application in these terms: did CBSA Officer Dela Cruz base her decision that the applicant was ineligible to have his refugee claim determined in Canada under s. 101(1)(d) of IRPA on a material error of fact, such that her decision ought to be set aside? In the alternative, he submits, the issue is whether withholding of removal status in US immigration law confers Convention refugee status.

[12] In the respondent's submission the question to be addressed is as follows: Has the applicant demonstrated that the officer made a material error in finding that, pursuant to

s.101(1)(d) IRPA, his refugee claim was ineligible to be referred to the Refugee Protection Division?

[13] I would rephrase the issues in the form of these questions:

1. What is the appropriate standard of review?
2. Did Officer Dela Cruz base her decision on a material error of fact?
3. Did Officer Dela Cruz err in law in finding that the applicant was ineligible to be referred to the RPD because he had already been granted protection in the United States?

In order to make a determination on this point, the following question must first be answered: Is withholding of removal protection in the United States equivalent to the grant of Convention refugee status?

Standard of Review

[14] As determined by the recent Supreme Court of Canada decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] S.C.J. No. 9 (*Dunsmuir*), a standard of review analysis need not be conducted in every instance. Where the standard of review applicable to a particular question is well-settled by past jurisprudence, the reviewing court may adopt that standard.

[15] In the present case, Officer Dela Cruz's decision is being challenged by the applicant on two grounds. First, the applicant argues that the officer committed a reviewable error in basing her decision on the mistaken assumption that Mr. Wangden had been granted asylum instead of withholding of removal. This is a question of fact.

[16] Prior to *Dunsmuir*, it was well established that decisions of Ministerial Delegates were entitled to an important degree of deference and should only be set aside if they were patently unreasonable: *Mohamed v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 315, [2008] F.C.J. No. 385, paragraph 10. The effect of *Dunsmuir* has been to reduce the standards of review down to two, correctness and reasonableness. The patent unreasonableness standard has been discarded. Paragraph 47 of *Dunsmuir* provides guidance on how to apply the new reasonableness standard:

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[17] I can only grant this application if I find the decision to be unreasonable: *Khokhar v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 449, [2008] F.C.J. No. 571, at paragraph 22; *Espinoza v. Canada (Citizenship and Immigration)*, 2008 FC 834, [2008] F.C.J. No. 1060, at paragraph 15. However, I must also be mindful of paragraph 18.1(4)(d) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 which provides that decisions based on erroneous findings can be disturbed on judicial review if they were made perversely or capriciously or without regard to the evidence: *Da Mota v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 386, [2008]

F.C.J. No. 509; *Obeid v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 503, [2008] F.C.J. No. 633; *Naumets v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 522, [2008] F.C.J. No. 655.

[18] The alternate issue in this application is whether the status of withholding of removal under United States law is equivalent to the status of Convention refugee within the meaning of the 1951 Convention and under paragraph 101(1)(d) of the IRPA. This is a matter of statutory interpretation that ought to be reviewed on a standard of correctness: *Baron v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 245, [2008] F.C.J. No. 304, at paragraph 9.

Issue 2: Did Officer Dela Cruz base her decision on a material error of fact in deciding that Mr. Wangden is ineligible to be referred to the RPD?

Applicant's Submissions

[19] The applicant submits that I do not need to determine whether "withholding of removal" status under US law is equivalent to Convention refugee status but can decide this application solely on the ground that the ineligibility decision was based on erroneous facts. Those facts, obtained by Officer Rayos Del Sol, indicated that Mr. Wangden had been granted asylum in the United States. This information was inaccurate as he was not granted asylum but rather a different form of protection, that of withholding of removal.

[20] In the applicant's contention, Officer Dela Cruz's ineligibility findings should be set aside and a re-determination ordered as it is impossible to know how the officer would have decided the

matter had she been aware of the applicant's correct status in the US. He submits that the mere fact that there is substantial disagreement between the parties regarding whether withholding of removal equates to Convention refugee status indicates that it cannot be said that Officer Dela Cruz's decision would not have been any different had it been based on the correct facts.

Respondent's Submissions

[21] The respondent counters that Officer Dela Cruz was not under the mistaken assumption that Mr. Wangden had been granted asylum as opposed to withholding of removal, nor that this distinction is even material to the central question of this application, namely Mr. Wangden's eligibility (or ineligibility) to be referred to the RPD.

[22] The Minister's Delegate's decision and reasons do not support the applicant's contention, the respondent argues. While Officer Dela Cruz concurred with Officer Rayos Del Sol's recommendation, she does not use the word "asylum" in her notes. The evidence before the deciding officer included the applicant's statements to the effect that he had applied for asylum and was not sure of the outcome, but knew that he could live all of his life in the United States.

[23] The respondent contends that it cannot be inferred from this evidence that Officer Dela Cruz was under the mistaken assumption that the applicant had been granted asylum rather than withholding of removal. Moreover, the respondent submits that the applicant cannot ask this court to draw the inference he proposes when he had an opportunity to cross-examine the officer on her affidavit as to her awareness of the facts when she made her decision and failed to do so.

[24] Furthermore, the respondent maintains that the term “asylum” used by Officer Rayos Del Sol does not establish that she was under the mistaken assumption that the applicant had been granted the form of protection recognized under Sec. 208 of the US *Immigration and Nationality Act* (INA). In the respondent’s view, “asylum” can have a general descriptive meaning, which would include both withholding of removal and asylum under United States law. The respondent maintains that the applicant has not established that the term “asylum” was intended to be used for anything other than the broader meaning of the word, which according to the Cambridge Online Dictionary, is “protection or safety, especially that given by a government to foreigners who have been forced to leave their own countries for political reasons”.

[25] The respondent also submits that the applicant’s challenge is flawed because it is based on the erroneous premise that the onus was on the officer(s) to establish eligibility, when in fact the burden of proof lay with Mr. Wangden. In the respondent’s estimation, the applicant’s arguments are only a misplaced attempt to reverse the burden.

[26] Lastly, and in the alternative, the respondent maintains that nothing can be gained by sending this matter back for re-determination on the mere possibility that the deciding officer erroneously assumed that the applicant had been granted asylum instead of withholding of removal status, since both forms of protection are the equivalent of Convention refugee status.

Analysis

[27] Officer Dela Cruz based her determination of ineligibility on the information that Officer Rayos Del Sol had obtained from two US sources and from the applicant's statutory declarations. That information revealed that Mr. Wangden had applied for "asylum" in the United States as a refugee and had been granted protection by a US Immigration Judge. Officer Dela Cruz inferred from that information that Mr. Wangden had been granted protection by the US as a Convention refugee, within the meaning of that term in IRPA, and could be sent or returned to the US. As such, paragraph 101(1)(d) of the IRPA rendered him ineligible to be referred to the RPD.

[28] The onus was on the applicant to establish eligibility for referral and that he failed to do. Mr. Wangden was not forthcoming about his history in the US until confronted with the information obtained from the US database and border official. He then conceded having applied for asylum and acknowledged that he was entitled to remain in the US and could work there. Mr. Wangden did not provide supporting documentation to clarify his status until after the removal order was issued and he was seeking a stay of its execution.

[29] Mr. Wangden's statements in the second declaration that he did not know the outcome of his asylum application, that he was told he could not get a "green card" and that he could not sponsor anyone to join him in the US were the only indicators in the information available to the officers that perhaps his status had not been fully regularized. In contrast, his statement that he had been told by an Immigration Judge that he could remain in the US and the information obtained from the US sources pointed to a Convention refugee determination.

[30] In these circumstances, Officer Dela Cruz's ineligibility decision was reasonable having regard to the evidence that was available to her at the time. In the absence of any information to the contrary, it was reasonable for the Delegate to conclude that Mr. Wangden had been found to be a Convention refugee in the US and could be returned to that country. Indeed, the applicant acknowledged in argument that his status of "withholding" was unknown to the Delegate. Nonetheless, he argues that it was a material error of fact to find that he enjoyed Convention refugee status.

[31] In my view, the Delegate did not base her decision on a finding of fact made in a perverse or capricious manner or without regard to the material before her. Based on that material, she made a reasonable finding of fact as to the applicant's status in the US and made the determination compelled by that finding. Whether that decision was based on a material error of fact depends on the answer to the next question.

Issue 3: Did Officer Dela Cruz err in law in finding that the applicant was ineligible to be referred to the RPD because he had already been recognized as a Convention refugee in the United States?

Is withholding of removal under United States law equivalent to Convention refugee status?

Applicant's Submissions

[32] The applicant submits, in the alternative, that there are compelling arguments in favour of the proposition that withholding of removal under US immigration law does not equate to Convention refugee status. His reasons are threefold.

[33] First, the applicant submits that it is not disputed that persons who have withholding status do not enjoy protection against expulsion to a safe third country under Article 32 of the Convention. This indicates that withholding of removal does not confer Convention refugee status on its holders. Article 32 extends protection only to persons who are "lawfully in" the territory of the state party. And according to the expert opinion evidence, that does not apply to persons subject to removal orders who are granted withholding.

[34] Second, the applicant submits that withholding of removal in the United States does not amount to Convention refugee status, but rather to a status that is comparable to a "restricted PRRA" under the IRPA. The applicant asserts that persons whose Pre-removal Risk Assessment applications succeed are denied refugee protection and thus the ability to apply for permanent residence, similar to claimants who are granted withholding of removal status in the United States.

[35] Lastly, the applicant points to the "compelling reasons" exception to the requirement that refugee claimants must demonstrate a well-founded fear of *future* persecution. This exception has been codified under United States law, but applies only to individuals who are granted asylum and not to those who enjoy withholding of removal status.

Respondent's Submissions

[36] The respondent submits that withholding of removal is the manner in which the United States implements its *non-refoulement* obligation under Article 33 of the 1951 Convention. Two passages are cited from the US Supreme Court decision in *Immigration and Naturalization*

Service v. Cardoza-Fonseca, 480 U.S. 421 (1987) (*INS v. Cardoza-Fonseca)* to support this proposition:

> If one thing is clear from the legislative history of the new definition of 'refugee', and indeed the entire 1980 (Refugee) Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees…
>
> This [the withholding of deportation or nonrefoulement] provision corresponds to Article 33.1 of the Convention…[which] requires that an applicant satisfy two burdens: first, that he or she be a "refugee", i.e., prove at least a "well-founded fear of persecution"; second, that the "refugee" show that his or her life or freedom "would be threatened" if deported. (at 440-441 with the words in brackets added)

The respondent maintains that from the perspective of United States refugee law, withholding of removal amounts to recognition as a Convention refugee.

[37] The argument that withholding of removal does not amount to Convention refugee status because it leaves open the possibility of removal to a safe third country, contrary to Article 32 of the Convention, lacks an evidentiary foundation in the respondent's submission. There is no evidence to suggest that Mr. Wangden was or will be at risk of being removed to a third country or that such action has ever been contemplated by the US authorities. The evidence is that removal to a third safe country of a person who has been granted withholding is quite rare. Thus, the respondent asserts, the applicant's argument on this point is purely academic.

[38] The respondent argues further that the Parliamentary intent expressed in the IRPA is in the first instance about saving lives and offering protection to the displaced and persecuted. This, according to the respondent, is emphasized by the fact that *non-refoulement* is the primary focus of Canada's refugee program. Applying the modern approach to statutory interpretation adopted

by the Supreme Court of Canada in *Re Rizzo & Rizzo Shoes Ltd.*, [1998] S.C.J. No. 2 to the meaning of paragraph 101(1)(d) of IRPA supports the conclusion that withholding of removal under US law is tantamount to Convention refugee status as contemplated by that paragraph.

[39] In further support of this argument, the respondent points to the Federal Court decision in *Mohamed v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 400 wherein the applicants' refugee claim was denied under Article 1(E) of the Convention. In dismissing the applicants' challenge of the decision, Rothstein J. made the following remarks at paragraphs 8 and 9 of his reasons:

> Applicants' counsel makes the argument that the applicants' status in Sweden is subject to expiry. Therefore they do not have the right of a national envisaged by section E of Article 1 of the Convention. However, the evidence is that having been granted permanent resident status in Sweden, it is only the certificate that must be periodically renewed. There is no evidence that permanent residence status in Sweden is subject to some form of arbitrary cancellation.
>
> This case raises the disturbing question of asylum shopping. If applicants' counsel were correct in his domicile argument, applicants could, at their own will, reject the protection of one country by unilaterally abandoning that country for another. Indeed, that is what has occurred here. The Geneva Convention exists for persons who require protection and not to assist persons who simply prefer asylum in one country over another. The Convention and the Immigration Act should be interpreted with the correct purpose in mind.

[40] The respondent submits that Parliament's intention is reflected in the Parliamentary debates respecting the 1993 amendments whereby the wording of paragraph 101(1)(d) of the IRPA was changed. In his estimation, Parliament did not intend for that provision to include consideration of whether a person could *remain* in the country in which that person was a recognized refugee, or to include consideration by the deciding officer of whether that person had

a credible basis for a well-founded fear of persecution in the country in which he or she was granted asylum.

[41] On a plain reading of paragraph 101(1)(d) of IRPA, a claimant is inadmissible if he or she has already been "recognized as a Convention refugee by a country other than Canada and can be sent or returned to that country". The respondent asserts that nothing in that provision suggests that, in order to be recognized as a Convention refugee in the country to which he or she can be returned, the refugee cannot be subjected to the possibility of removal to a safe third country.

[42] Moreover, the respondent contends that the scheme of the IRPA supports his interpretation of paragraph 101(1)(d). Specifically, section 96 of the IRPA defines a "Convention refugee" and the respondent argues that a person granted withholding of removal under US law meets this definition. The respondent also points to section 115 of the IRPA which provides that "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". In the respondent's view, this express prohibition against *refoulement* reiterates that Canada's refugee program is primarily concerned about protecting people from risk, and not whether they might have the full panoply of rights, benefits, or privileges provided for under the Convention.

[43] Lastly, the respondent discusses the administrative nature of a border services' ineligibility decision under IRPA 101(1)(d) and quotes the following remarks of Justice Evans at paragraph 44

in *Jekula v. Canada (Minister of Citizenship and Immigration)*, [1999] 1 F.C. 266, [1998] F.C.J. No. 1503:

> In my view, the words "can be returned" do not require the senior immigration officer to determine whether the claimant has a well-founded fear of persecution in the country that has already granted asylum. The repeal in 1993 of the specific provision dealing with this very issue suggests that it should not be read back into the statute through the words "can be returned" in paragraph 46.01(1)(a). To require a senior immigration officer to determine whether a claimant has satisfied the definition of a Convention refugee would seem incompatible with the expeditious and relatively straightforward administrative process contemplated by the statutory scheme for screening certain claims out of the Refugee Division's jurisdiction.

The respondent argues that it is incompatible with the expeditious and relatively straightforward administrative process of screening refugee claims out of the RPD's jurisdiction to have officers determine whether a claimant has satisfied the definition of a Convention refugee.

The Expert Opinion Evidence

[44] As noted above, the parties tendered the opinion evidence of two American lawyers as to the legal effect of "withholding of removal" status under US law.

[45] Attorney Craig Trebilcock has practiced immigration and nationality law since 1986 in Pennsylvania. His brief affidavit cites no specific authorities in support of the legal opinions he asserts. He states that withholding of deportation under 8 USC 241 (b)(3)(A) provides only limited rights to persons subject to removal from the United States.

[46] In Mr. Trebilcock's view, refugee status under the 1951 Convention protects not only against refoulement to the country of persecution, but also against expulsion to any other country that would accept the individual, except under the narrowly defined circumstances set out in Article 32. Moreover, Mr. Trebilcock says that by coming to Canada, the applicant surrendered his rights under withholding of removal status and would have to begin a new claim for asylum, or withholding of removal under the Refugee Convention and/or protection under the *Convention against Torture* (CAT) if he were to return to the US.

[47] Professor Martin's qualifications and breadth of knowledge in this area of law are impressive. Professor Martin has had over 29 years of experience in the study of US immigration and refugee law and comparative legal systems. He has practiced extensively in the field including three years as General Counsel to the Immigration and Naturalization Service. He has participated in the drafting of US refugee statutes and has written or edited a considerable number of related texts and articles. As a consultant to various national bodies including Congress, he has conducted studies of foreign asylum adjudication systems including that of Canada.

[48] Professor Martin's affidavit, supported by references to the statutes and the jurisprudence, provides an overview of the US system for adjudicating requests for political asylum and related forms of protection including "withholding of removal". In addition, he had read the material submitted in support of this application by the applicant, including Mr. Trebilcock's affidavit, and provides an opinion on the issues raised therein. Some aspects of his opinion were explored on cross-examination but, in my estimation did not result in any substantive change in the views that he had expressed.

[49] In Professor Martin's opinion, the grant of withholding of removal in the United States under INA § 241 (b) (3) amounts to recognition as a refugee under the 1951 Refugee Convention. Although a person granted withholding enjoys a more limited range of rights than a person granted asylum under INA § 208, he or she receives the full range of rights guaranteed by the Convention to a refugee in comparable circumstances and in fact is granted rights that go beyond what the Convention requires.

[50] Both experts are in agreement that the legal standard for obtaining withholding of removal status is actually higher than that required for asylum. However, it does not confer the right to permanent residence in the US. Mr. Trebilcock states that persons holding that status can remain only for so long as the US cannot find a third country to which they can be removed.

[51] In Professor Martin's opinion, the Convention does not guarantee that the full panoply of rights should apply to all refugees. It is consistent with the Convention for a Contracting State to withhold certain rights and to leave open the possibility of sending a refugee to a safe third country other than the country in which he or she fears persecution, provided of course that he or she not be at risk. That happens rarely as it is uncommon that other countries are prepared to accept such persons. In any event, before such action could be taken, Mr. Wangden would be entitled to again claim the full range of protection in relation to that third country.

[52] In Professor Martin's estimation, entitlement to certain Convention rights depends on the type of "lawful status" or attachment held by the refugee in the state in which protection has been sought. He draws a distinction between a refugee who is merely present in the territory, a refugee

who is “lawfully in the territory” and a refugee who is “lawfully staying in the territory”. He explains that some core rights necessarily apply to all refugees by virtue of their mere presence in the territory, including *non-refoulement* (Article 33), non discrimination (Article 3), freedom of religion (Article 4), access to courts (Article 16) and access to public education (Article 22). Other rights provided for under the Convention, such as freedom of movement (Article 26), apply only to refugees “lawfully in” the territory. And other more restricted rights apply only to refugees “lawfully staying in” the territory, for example the right to housing, public relief and social security (Articles 21, 23 and 24).

[53] With regard to Article 32 of the Convention, Professor Martin contends that the rights guaranteed thereunder apply solely to refugees who are “lawfully in the territory”. In his opinion, persons granted withholding of removal are refugees, but are not “lawfully in” United States’ territory, therefore they are not protected under Article 32. He submits that Mr. Wangden is a Convention refugee, but one who lacks lawful presence or lawful residence in the United States. Therefore, he finds it consistent with the Convention that Mr. Wangden is only entitled to the core rights under the Convention, namely those that apply to all refugees present in the United States, and that he is not guaranteed against removal to a safe third country.

[54] Professor Martin disputes Mr. Trebilcock’s assertion that Mr. Wangden will have lost withholding protection by having left the US. In his discussion he compares two US cases, namely *Matter of T-*, 6 I&N Dec. 638 (BIA 1955) and *Matter of R-D-*, 24 I&N Dec. 221 (BIA 2007) and explains that the outcome will depend on whether the circumstances in question amount to a *departure*. If there is in fact a departure from the United States, then the holder does not have an

automatic right to return to the United States as he or she is deemed to have executed his or her own removal order.

[55] In Professor Martin's opinion, Mr. Wangden's particular situation should not be considered a departure since he was not granted entry into Canada and is subject to a removal order. The stay of execution of that order he compares to a form of parole extended to persons permitted to physically remain in the US pending the outcome of legal proceedings. In his view, Mr. Wangden should maintain his withholding of removal status upon his return to the United States. Even if his particular circumstance were to be deemed a departure, Professor Martin notes, Mr. Wangden would be eligible to make a fresh claim upon his return and it is very unlikely that he would be detained by United States' authorities.

Analysis and Conclusion

[56] What is central to this application is the interpretation of the meaning of "Convention refugee" in paragraph 101(1)(d) of IRPA. Under Article 1 of the Convention, a refugee is a person who, "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it".

[57] All “Convention refugees” are guaranteed certain fundamental core rights, including non-discrimination (Article 3), freedom of religion (Article 4), exemption from reciprocity (Article 7), exemption from exceptional measures (Article 8), rights with respect to movable and immovable property (Article 13), artistic and industrial property rights (Article 14), access to courts (Article 16), and the right to public education (Article 18).

[58] The language of the Convention categorizes refugees based on the permanence of their attachment or status in the Contracting States. The following terms are used in the Convention to distinguish between the varying forms of attachment or status of refugees: “a refugee” or “refugees within the territory”; “a refugee lawfully in their territory”; and “refugees lawfully staying in their country”.

[59] According to the respondent’s expert affiant, individuals granted withholding of removal are not “lawfully in” or “lawfully staying in the country” in which they have been granted protection, and for that reason they are not entitled to every right or guarantee under the Convention; however they are entitled to the core rights of the Convention, those that are conferred on all refugees within the territory of the Contracting States.

[60] The expert evidence is that asylum and withholding of removal are two different methods provided for under the *Immigration and Nationality Act* (INA) through which an otherwise “deportable alien”, in US terms, who claims a fear of persecution can seek relief. The point of contention is whether both forms of relief, which confer different rights and benefits on their

respective holders, equate to Convention refugee status. A brief explanation of each, drawn from Professor Martin's evidence, would assist this discussion.

[61] Asylum, under the INA, is available to claimants who can establish a well-founded fear of persecution on account of one of the five grounds specified in the 1951 Convention: race, religion, nationality, membership in a particular social group, or political opinion. The INA Regulations describe the "well-founded fear" standard as "a reasonable possibility of suffering such persecution if the claimant were to return to that country". This definition is in essence the same as that prescribed under Article 1 of the Convention as well as that under section 96 of the IRPA.

[62] Asylum is a discretionary remedy granted only to eligible claimants. Asylum status affords a wide range of rights to its holders. Most importantly, a person granted asylum may not be deported to any country while in this status. In addition, asylees are fully authorized to work in the United States, are entitled to bring in their spouse and minor unmarried children and may apply for permanent residence after one year in asylum status.

[63] Withholding of removal protects eligible claimants from removal or deportation to a country in which they are at risk, but does not prevent exclusion or deportation to another hospitable, safe country willing to accept or take in the refugee. Withholding of removal is not a discretionary remedy. An entitlement exists for the subcategory of refugees who can show that it is more likely than not they would be threatened upon return to their home country: *INS v. Cardoza-Fonseca*, above.

[64] According to the United States Supreme Court decisions in *INS v. Stevic*, 467 U.S. 407 (1984) and in *INS v. Cardoza-Fonseca*, above, the standard of proof for granting withholding of removal is more demanding than the standard for asylum. To obtain the former, the claimant must show that persecution is "more likely than not", rather than showing that there is "a reasonable possibility". The following passages from *INS v. Cardoza-Fonseca* are particularly relevant to this discussion:

> In *Stevic*, we dealt with the issue of withholding of deportation, or non-refoulement, under 243(h). This provision corresponds to Article 33.1 of the Convention. Significantly though, Article 33.1 does not extend this right to everyone who meets the definition of "refugee". Rather, it provides that "no Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers or territories where his life or freedom would be threatened on account of his race, religion, nationality, membership to a particular social group or political opinion". Thus, Article 33.1 requires that an applicant satisfy two burdens: first, that he or she be a "refugee" i.e. prove at least "a well-founded fear of persecution"; second, that the "refugee" show that his or her life or freedom "would be threatened if deported". Section 243(h)'s imposition of a "would be threatened" requirement is entirely consistent with the United States' obligations under the Protocol.
>
> Thus, as made binding on the United States through the Protocol, Article 34 provides for a precatory, or discretionary, benefit for the entire class or persons who qualify as "refugees", whereas Article 33.1 provides an entitlement for the subcategory that "would be threatened" with persecution upon their return. This precise distinction between the broad class of refugees and the subcategory (of refugees) entitled to 243(h) relief is plainly revealed in the 1980 Act. See *Stevic*.

[65] In my opinion, individuals who are granted withholding of removal status are necessarily Convention refugees since they have established that they have a well-founded fear of persecution in their country of nationality on one of the Convention grounds. On a simple reading of Article 1 of the Convention, Mr. Wangden fits the profile of a Convention refugee. He is outside of his country of nationality, has a well founded fear of being persecuted for his religious and political

beliefs, and is unwilling to avail himself of protection in that country. He was granted protection in the United States on those grounds.

[66] The applicant submits that withholding of removal status under United States law can be compared to that which is held by a restricted PRRA holder under Canadian law, since those who are successful in their PRRA applications are granted a Ministerial stay of removal to the country where they are at risk. The applicant argues that under section 112(3) of the IRPA, persons whose PRRA applications are successful are expressly denied refugee protection as well as the ability to apply for permanent residence. Similarly, persons granted withholding of removal in the United States are limited to the same category of rights, which, in the applicant's view, does not amount to Convention refugee status.

[67] In my view, the applicant has misinterpreted the PRRA provisions of the IRPA. Contrary to what the applicant suggests, refugee protection may result from a successful PRRA application, however persons listed under subsection 112(3) of the IRPA cannot avail themselves of that right. Pursuant to section 114 of the IRPA, a decision to allow the application for protection in the case of an applicant not described in subsection 112(3) has the effect of conferring refugee protection; and 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. Thus, subsection 112(3) is not a sweeping prohibition that precludes all applicants from obtaining refugee protection once their PRRA applications are successful. Rather, subsection 112(3) lists the persons who are excluded from obtaining refugee protection once their PRRA application are allowed.

[68] At the heart of this controversy is the interpretation of the term “Convention refugee” under Article 1 and within the meaning of paragraph 101(1)(d) of the IRPA. The plain meaning of the words in this provision appears to restrict the eligibility for referral to the RPD of all claimants who have been granted Convention refugee protection or status in another country and can be returned there.

[69] Statutory interpretation cannot be founded on the legislation alone; the words of an Act must be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. This approach was upheld by the Supreme Court of Canada in *Re Rizzo & Rizzo Shoes*, above, and is consistent with section 10 of the *Interpretation Act*, R.S.O., c. 219, which provides that every Act “shall be deemed to be remedial” and directs that every Act shall “receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit”. Accordingly, I must look at the true objectives of the IRPA before making a final determination on the issue.

[70] Subparagraph 3(2)(a) of IRPA provides that one of the main objectives of the IRPA with respect to refugees is “to recognize that the refugee program is in the first instance about saving lives and offering protection to the displaced and persecuted”. In keeping with this objective, I must be mindful of the relationship between Canada and the United States in the refugee law context and the reciprocal agreement that exists between the two countries. More specifically, the Safe Third Country Agreement is an agreement between the two countries to better manage the flow of refugee claimants at the shared land border. Under this agreement, persons seeking

refugee protection must make a claim in the first country they arrive in (United States or Canada), unless they qualify for an exception under the Agreement. Although a refugee claimant may qualify for an exception under the Agreement, he or she must meet all other eligibility requirements in order to have his or her refugee claim referred to the RPD.

[71] In the case at bar, Officer Dela Cruz's ineligibility decision is consistent with the primary objective of IRPA, which is about saving lives and offering protection to the displaced and persecuted, since Mr. Wangden can be returned to the United States where he will not be at risk of persecution.

[72] Based on the objectives of the IRPA and on the wording of paragraph 101(1)(d) of the IRPA, I would argue that Parliament did not intend for this provision to include consideration of whether a person could *remain* indefinitely in the country in which he or she has been recognized a Convention refugee and to which he or she can be returned. What is of concern is whether these individuals are protected from risk, not whether they have the full panoply of rights provided for under the 1951 Convention.

[73] Within the same argument, I turn to the passage cited by the respondent in his memorandum of fact and law from the Federal Court decision in *Jekula*, above, wherein Justice Evans discussed the issue of asylum shopping:

> If applicants' counsel were correct in his domicile argument, applicants could, at their own will, reject the protection of one country by unilaterally abandoning that country for another. Indeed, that is what has occurred here. The Geneva Convention exists for persons who require protection and **not to assist persons who simply prefer asylum in one**

> **country over another**. The Convention and the Immigration Act should be interpreted with the correct purpose. (Emphasis added)

[74] Mr. Wangden is attempting to do just that by leaving the United States and seeking protection in Canada. Through his own admissions, Mr. Wangden is implicitly asylum shopping as he is seeking a more favorable status in Canada to take advantage of the benefits that accrue from permanent residence, including the right to travel abroad and to sponsor others which he could not have enjoyed from withholding status in the US.

[75] Though a person granted withholding has a more limited range of rights than a person granted asylum under US law, he or she still enjoys several important entitlements. The differences do not undermine my conclusion that withholding of removal is equivalent to recognition as a Convention refugee.

[76] Lastly, I agree with the respondent that it would be incompatible with the expeditious and relatively straightforward administrative process of screening certain claims out of the RPD's jurisdiction to require front line immigration officers to conduct a more expansive review of claimants' status in another country to determine whether the particular features of that jurisdiction's domestic law satisfy the definition of "refugee" under the Convention. This is not their role; the RPD level is tasked with this assessment. In this case, the decision makers acted reasonably and within the scope of their authority.

[77] For the reasons I have stated, I find Officer Dela Cruz's ineligibility decision to be reasonable based on the evidence that was available to her at the time. Her decision was also

correct in law as holders of withholding of removal status in the United States are Convention refugees within the meaning of paragraph 101(1)(d) of IRPA.

Certified Questions

[78] The applicant has submitted the following question for certification:

> Is the legal remedy or status of "withholding of removal" in the United States of America, equivalent to being "recognized as a Convention refugee", pursuant to s. 101(1)(d) of the *Immigration and Refugee Protection Act*?

[79] The respondent submits that the question as framed by the applicant is broader than the issue raised by the applicant in his written and oral arguments and would not be dispositive of an appeal in this matter. In the event that the application were to be allowed, the respondent proposed the following question to certify:

> Does the fact that the United States of America retains the theoretical right to remove a Convention refugee to a country where they would not be at risk of persecution mean that the claimant has not been "recognized as a Convention refugee" as found in s. 101(1)(d) of the *IRPA*?

[80] In my view, the question proposed by the applicant would be dispositive of an appeal in this matter as it would determine whether the Minister's Delegate made a material error of fact in deciding that the applicant enjoyed Convention refugee status in the US.

JUDGMENT

IT IS THE JUDGMENT OF THIS COURT that the application is dismissed. The following question is certified:

> Is the legal remedy or status of "withholding of removal" in the United States of America equivalent to being "recognized as a Convention refugee", pursuant to ¶ 101(1)(d) of the *Immigration and Refugee Protection Act*?

"Richard G. Mosley"
Judge

ANNEX

Relevant Legislation

The *Immigration and Refugee Protection Act*:

Convention refugee	Définition de « réfugié »
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,	**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*) 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	*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*) 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.	*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	Personne à protéger
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,	**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

their country of former habitual residence, would subject them personally

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.

Ineligibility

101. (1) A claim is ineligible to be referred to the Refugee Protection Division if

(*d*) the claimant has been recognized as a Convention refugee by a country other than Canada and can be sent or returned to that country;

Irrecevabilité

101. (1) La demande est irrecevable dans les cas suivants :

d) reconnaissance de la qualité de réfugié par un pays vers lequel il peut être renvoyé;

Protection

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.

Principe

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

…

…

Removal of refugee

(3) A person, after a determination under paragraph 101(1)(*e*) that the person's claim is ineligible, is to be sent to the country from which the person came to Canada, but may be sent to another country if that country is designated under subsection 102(1) or if the country from which the

Renvoi de réfugié

(3) Une personne ne peut, après prononcé d'irrecevabilité au titre de l'alinéa 101(1)*e*), être renvoyée que vers le pays d'où elle est arrivée au Canada sauf si le pays vers lequel elle sera renvoyée a été désigné au titre du paragraphe 102(1) ou que sa demande d'asile a été rejetée dans le pays d'où elle

person came to Canada has rejected their claim for refugee protection.	est arrivée au Canada.

The US *Immigration and Nationality Act* of 1952, as amended, (INA):

Sec. 101. [8 U.S.C. 1101] (a) As used in this Act-

(42) The term "refugee" means:

(A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or

Sec. 208. (a) Authority to Apply for Asylum.-

(1) In general. - Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 235(b).

(2) Exceptions. -

(A) Safe third country. - Paragraph (1) shall not apply to an alien if the Attorney General determines that the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection, unless the Attorney General finds that it is in the public interest for the alien to receive asylum in the United States.

(B) Time limit. - Subject to subparagraph (D), paragraph (1) shall not apply to an alien unless the alien demonstrates by clear and convincing evidence that the application has been filed within 1 year after the date of alien's arrival in the United States.

(C) Previous asylum applications. - Subject to subparagraph (D), paragraph (1) shall not apply to an alien if the alien has previously applied for asylum and had such application denied.

(D) Changed conditions. - An application for asylum of an alien may be considered, notwithstanding subparagraphs (B) and (C), if the alien demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing the application within the period specified in subparagraph (B).

(3) Limitation on judicial review. No court shall have jurisdiction to review any determination of the Attorney General under paragraph (2).

(b) Conditions for Granting Asylum. -

(1) In general. - (A) ELIGIBILITY- The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General under this section if the Secretary of Homeland Security or the Attorney General determines that such alien is a refugee within the meaning of section 101(a)(42)(A) .

(B) BURDEN OF PROOF-

(i) IN GENERAL- The burden of proof is on the applicant to establish that the applicant is a refugee, within the meaning of section 101(a)(42)(A) . To establish that the applicant is a refugee within the meaning of such section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.

…

(3) TREATMENT OF SPOUSE AND CHILDREN-

(A) IN GENERAL- A spouse or child (as defined in section 101(b)(1)(A) , (B) , (C) , (D) , or (E)) of an alien who is granted asylum under this subsection may, if not otherwise eligible for asylum under this section, be granted the same status as the alien if accompanying, or following to join, such alien.

…

(c) ASYLUM STATUS. -

(1) In general.- In the case of an alien granted asylum under subsection (b), the Attorney General -

(A) shall not remove or return the alien to the alien's country of nationality or, in the case of a person having no nationality, the country of the alien's last habitual residence;

(B) shall authorize the alien to engage in employment in the United States and provide the alien with appropriate endorsement of that authorization; and

(C) may allow the alien to travel abroad with the prior consent of the Attorney General.

(2) Termination of asylum. - Asylum granted under subsection (b) does not convey a right to remain permanently in the United States, and may be terminated if the Attorney General determines that -

(A) the alien no longer meets the conditions described in subsection (b)(1) owing to a fundamental change in circumstances;

(B) the alien meets a condition described in subsection (b)(2);

(C) the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien is eligible to receive asylum or equivalent temporary protection;

(D) the alien has voluntarily availed himself or herself of the protection of the alien's country of nationality or, in the case of an alien having no nationality, the alien's country of last habitual residence, by returning to such country with permanent resident status or the reasonable possibility of obtaining such status with the same rights and obligations pertaining to other permanent residents of that country; or

(E) the alien has acquired a new nationality and enjoys the protection of the country of his new nationality.

(3) Removal when asylum is terminated. - An alien described in paragraph (2) is subject to any applicable grounds of inadmissibility or deportability under section 212(a) and 237(a) , and the alien's removal or return shall be directed by the Attorney General in accordance with sections 240 and 241 .

(d) ASYLUM PROCEDURE. -

(1) Applications. - The Attorney General shall establish a procedure for the consideration of asylum applications filed under subsection (a). The Attorney General may require applicants to submit fingerprints and a photograph at such time and in such manner to be determined by regulation by the Attorney General.

(2) Employment. - An applicant for asylum is not entitled to employment authorization, but such authorization may be provided under regulation by the Attorney General. An applicant who is not otherwise eligible for employment authorization shall not be granted such authorization prior to 180 days after the date of filing of the application for asylum.

…

Sec. 241. (b) Countries to Which Aliens May Be Removed.-

> **(3)** Restriction on removal to a country where alien's life or freedom would be threatened.-
>
> (A) In general.-Notwithstanding paragraphs (1) and (2), the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.
>
> …

The 1951 *Convention Relating to the Status of Refugees* 189 U.N.T.S. 137 ("Convention" or "1951 Convention"):

> ***Article 1***
> **definition of the term "refugee"**
> A. For the purposes of the present Convention, the term "refugee" shall apply to any person who:
>
> (1) Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization;
>
> Decisions of non-eligibility taken by the International Refugee Organization during the period of its activities shall not prevent the status of refugee being accorded to persons who fulfil the conditions of paragraph 2 of this section;
>
> (2) As a result of events occurring before 1 January 1951 and owing to wellfounded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.
>
> In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.

Article 32
expulsion

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

Article 33
prohibition of expulsion or return ("refoulement")

1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

Article 34
naturalization

The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.

The 1967 *Protocol Relating to the Status of Refugees*, 606 U.N.T.S. 267:

Article 1. - General provision

1. The States Parties to the present Protocol undertake to apply articles 2 to 34 inclusive of the Convention to refugees as hereinafter defined.

2. For the purpose of the present Protocol, the term "refugee" shall, except as regards the application of paragraph 3 of this article, mean any person within the definition of article I of the Convention as if the words "As a result of events occurring before 1 January 1951 and..." and the words "...as a result of such events", in article 1 A (2) were omitted.

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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