Date: 20061110

Docket: A-418-05

Citation: 2006 FCA 365

CORAM: LINDEN J.A.

NADON J.A.

MALONE J.A.

BETWEEN:

KATIA MONTANO COVARRUBIAS,

ANGEL GABRIEL OLVERA RAMIREZ,

BEERI NOE OLVERA MONTANO,

ASAEL OLVERA MONTANO and

ELIEZER IVAN OLVERA MONTANO

Appellants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Heard at Toronto, Ontario, on October 17, 2006.

Judgment delivered at Ottawa, Ontario, on November 10, 2006.

REASONS FOR JUDGMENT BY:
LINDEN J.A.

CONCURRED IN BY:
NADON J.A.
MALONE J.A.

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REASONS FOR JUDGMENT

LINDEN J.A.

[1] This appeal raises several important issues, all of which have an effect on whether a failed refugee claimant and his family are entitled to protection under the Pre-removal Risk Assessment ("PRRA") scheme of the *Immigration and Refugee Protection Act,* S.C. 2001, c. 27 ("IRPA"). The male appellant, Mr. Ramirez, has a serious health condition and requires life-sustaining medical treatment which he is unable to afford in his native country (Mexico), and which he says his country will not freely provide.

[2] This is an appeal against the decision of Mosley J. of the Federal Court, dated September 1, 2005, reported as (2005), 48 Imm. L.R. (3d) 186, which upheld the decision of the PRRA officer, wherein he denied the appellants protected person status by reason of subparagraph 97(1)(b)(iv) of the IRPA, which excludes from protection a risk to life caused by the "inability [of a claimant's country of nationality] to provide adequate health or medical care."

ISSUES

[3] The following question was certified by the Applications Judge:

> Does the exclusion of a risk to life caused by the inability of a country to provide adequate medical care to a person suffering a life-threatening illness under section 97 of the IRPA infringe the *Canadian Charter of Rights and Freedoms* in a manner that does not accord with the principles of fundamental justice, and which cannot be justified under section 1 of the *Charter*?

[4] The appellants raised four additional issues:

(a) Did the Applications Judge err when he upheld the PRRA officer's decision that the appellants were excluded from protection by operation of subparagraph 97(1)(b)(iv) of the IRPA?

(b) Did the Applications Judge err when he determined that the PRRA officer does not have the jurisdiction to consider constitutional questions in a PRRA application?

(c) Did the Applications Judge err when he determined that the PRRA officer does not have to consider humanitarian and compassionate ("H&C") factors in a PRRA application?

(d) Did the Applications Judge err when he held there was no evidentiary basis for determining whether the appellants' constitutional rights have been violated?

[5] At the appeal hearing, the appellants withdrew the third issue, namely, that the Applications Judge erred when he held that a PRRA officer cannot consider H&C factors in a PRRA application. This withdrawal was premised on a change in an Immigration and Refugee Board (the "Board") policy with respect to PRRA applications. The appellants have informed the Court that as of February of this year, PRRA officers in Ontario may now deal with H&C applications and PRRA applications at the same time.

[6] Before dealing with the certified question, I shall consider the other questions raised by the appellant. I begin by outlining the basic facts.

FACTS

[7] The male appellant, his wife and their three children are citizens of Mexico who arrived in Canada in October 2001 and made a claim for refugee protection on the basis that they feared persecution by reason of their membership in the social group of impoverished people and victims of crime.

[8] In February 2002, before their claim was heard, the male appellant was diagnosed with end-stage renal failure and was immediately put on life-sustaining hemo-dialysis treatment. He continues to receive that treatment to this day.

[9] On March 7, 2003, the Refugee Protection Division of the Board denied the appellants' claims for refugee protection. The Board found that the appellants were not Convention refugees, nor were they persons in need of protection, because evidence established that the appellants did not face a personalized risk of persecution and that state protection was available to them. The Board also found that the male appellant was not a person in need of protection on the basis of his medical problems. The Board, at page 8 of the decision, wrote:

> […]The IRPA is clear when it states that when considering risk to life under Section 97 (1) (b), that risk cannot be caused by the inability of the country to provide adequate health or medical care. The claimants are not even alleging that health care is not available in Mexico, only that they cannot afford to pay for it. […]
>
> Whether or not one is sympathetic to this family because of the very serious health problems is not the point. The refugee or protected person process is not designed to address health care issues.
>
> Humanitarian and compassionate consideration is not within the mandate of the Refugee Protection Division […]

The appellants did not seek leave of the Federal Court to judicially review the Board's decision on the refugee status and protected person questions.

[10] The appellants subsequently made an application for permanent residence from within Canada based on H&C grounds, pursuant to subsection 25(1) of the IRPA. This H&C application is still awaiting determination.

[11] On February 26, 2004, the appellants made a PRRA application pursuant to section 160 of the *Immigration and Refugee Protection Regulations,* SOR/2002-227 (the "Regulations"). In the PRRA application, the appellants requested that the PRRA officer integrate H&C considerations into the risk assessment.

[12] By letter dated May 19, 2004, the PRRA officer advised the appellants that their application had been rejected. The letter cited the following reason: "It has been determined that you would not be subject to risk of persecution, danger of torture, risk to life or risk of cruel and unusual treatment or punishment if returned to your country of nationality or habitual residence." In the notes of the PRRA officer who assessed the application, he writes that the basis for the refusal is that the appellants had identified only personal circumstances which are excluded from consideration under subparagraph 97(1)(b)(iv). The PRRA officer's notes also indicate that H&C factors cannot be addressed in a risk assessment.

[13] The appellants sought judicial review of the PRRA officer's decision to the Federal Court, which dismissed the application leading to this appeal.

Statutory Framework: Refugee Protection in the IRPA

[14] Paragraph 95(1)(b) of the IRPA confers "refugee protection" on a person whom the Board determines to be a Convention refugee, as defined in section 96, or a "person in need of protection", as defined in section 97. Sections 95, 96 and 97 are as follows:

Conferral of refugee protection	**Asile**
95. (1) Refugee protection is conferred on a person when	**95.** (1) L'asile est la protection conférée à toute personne dès lors que, selon le cas :
(a) the person has been determined to be a Convention refugee or a person in similar circumstances under a visa application and becomes a permanent resident under the visa or a temporary resident under a temporary resident permit for protection reasons;	(a) sur constat qu'elle est, à la suite d'une demande de visa, un réfugié ou une personne en situation semblable, elle devient soit un résident permanent au titre du visa, soit un résident temporaire au titre d'un permis de séjour délivré en vue de sa protection;
(b) the Board determines the person to be a Convention refugee or a person in need of protection; or	(b) la Commission lui reconnaît la qualité de réfugié ou celle de personne à protéger;
(c) except in the case of a person described in subsection 112(3), the Minister allows an application for protection.	(c) le ministre accorde la demande de protection, sauf si la personne est visée au paragraphe 112(3).
(2) A protected person is a person on whom refugee protection is conferred under subsection (1), and whose claim or application has not subsequently been deemed to be rejected under subsection 108(3), 109(3) or 114(4).	(2) Est appelée personne protégée la personne à qui l'asile est conféré et dont la demande n'est pas ensuite réputée rejetée au titre des paragraphes 108(3), 109(3) ou 114(4).
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	(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

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.

réclamer de la protection de chacun de ces pays;

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

Person in need of protection

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

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,

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

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

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

(2) A person in Canada who is a member of a class of persons

(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

prescribed by the regulations as being in need of protection is also a person in need of protection.	par règlement le besoin de protection

[15] Once refugee protection is conferred by subsection 95(1), that person becomes a "protected person" unless or until that person loses his or her status by virtue of a determination that the protection was obtained by fraud or that the person ceases to require protection (see subsection 95(2) of the IRPA). Section 115 of the IRPA provides that a protected person cannot be removed from Canada to a country where he or she would be at risk of persecution, except on grounds of serious criminality or national security, if the person is certified by the Minister to be a danger to the public in Canada, or a danger to the security of Canada.

Pre-removal Risk Assessment Process

[16] Where a person's claim for refugee protection has been rejected by the Board and he or she is subject to a removal order that is in force or is named in a security certificate, that person may, with certain exceptions, apply to the Minister for protection (see section 112 of the IRPA). The mechanism in the IRPA for evaluating such applications is the PRRA.

[17] Pursuant to section 113, consideration of a PRRA application will be on the basis of the risks identified in sections 96 to 98 of the IRPA. An applicant is required to submit only new evidence that arose after the rejection, or was not reasonably available, or that the applicant could not reasonably have expected in the circumstances to have presented, at the time of rejection (see subsection 113(a) of the IRPA).

[18] A decision to allow a PRRA application will have the effect of conferring refugee protection on the applicant, provided he or she is not inadmissible on grounds of security, serious or organized criminality, or violating international or human rights. In the case of a person inadmissible on any of the above-mentioned grounds, the effect of a positive PRRA decision is to stay the applicant's removal order with respect to the country or place in respect of which the applicant was determined to be in need of protection (see section 114 of the IRPA).

Allegations of Error in the Federal Court's Review of the PRRA Decision

[19] The first issue to be considered in this appeal is whether the Applications Judge erred when he upheld the PRRA officer's decision to deny the appellants' application for protection on the basis that the risks they identified were excluded from consideration under subparagraph 97(1)(b)(iv) of the IRPA. This issue will be considered in two parts: first, what is the proper interpretation of section 97, in particular, the exception in subparagraph 97(1)(b)(iv); and second, did the Applications Judge err in upholding the PRRA officer's finding that the appellants' claims did not disclose a risk to life protected by section 97.

a) The meaning of subparagraph 97(1)(b)(iv) of the IRPA

[20] At issue is the meaning of the phrase "inability of that country to provide adequate health or medical care" in subparagraph 97(1)(b)(iv) of the IRPA. The interpretation of legislation is generally considered to be a question of law. Accordingly, the Applications Judge's interpretation of this provision will be reviewed by the Court on a standard of correctness: *Housen v. Nikolaisen,* [2002] 2 S.C.R. 235 at para. 8.

[21] The Applications Judge found (at para.33):

> I think it is clear that the intent of the legislative scheme was to exclude claims for protection under section 97 based on risks arising from the inadequacy of health care and medical treatment in the claimant's country of origin, including those where treatment was available for those who could afford to pay for it.

[22] The appellants submit that the Applications Judge erred in his interpretation of the exclusion from protection in subparagraph 97(1)(b)(iv) because he did not distinguish between a risk to life owing to a country's unwillingness to provide medical care, and a risk to life resulting from a country's genuine inability to provide medical care. The appellants submit that the exclusion in section 97 is intended to contemplate only the latter.

[23] The appellants argue that in interpreting the exclusion in subparagraph 97(1)(b)(iv), the Court must take into consideration that section 97 is intended to protect risks to life which are premised on another country's violation of international standards. This is because the purpose for creating the expanded ground of protection in section 97 is to ensure Canada's compliance with its international human rights commitments. The appellants refer to the Clause by Clause Analysis of Bill C-11 (later enacted as the IRPA), wherein it states in reference to section 97:

> This new provision applies only to persons who claim refugee protection in Canada. It generally consolidates the existing protection-related grounds which are spread through various provisions of the current Act and regulations and are evaluated under separate procedures. <u>This provision upholds Canada's obligations under international conventions and the *Charter of Rights and Freedoms* and provides a clear definition of a person in need of protection under one provision</u>. [Emphasis added]

[24] The appellants refer to various international conventions and declarations to argue that the right of access to medical care is a legally recognized human right in international law. On this basis, the appellants argue that, to maintain the purpose of section 97, the exception in subparagraph 97(1)(b)(iv) must be interpreted narrowly so as to exclude from protection *only* those from countries which are truly unable to provide needed medical treatment to their nationals.

[25] The appellants' proposed interpretation leaves open, therefore, the possibility for persons to obtain refugee protection where they can show that they face a human rights violation on account of their country's unwillingness, not its inability, to provide them with life-saving medical treatment. The appellants submit that such unwillingness to provide health care exists when that country has the financial ability to provide emergency medical care, but chooses, as a matter of public policy, not to provide such care freely to its underprivileged citizens. This, in the appellants' view,

is a violation of international standards and precisely the type of risk to life that is contemplated by section 97.

[26] The respondent, on the other hand, argues for a broad interpretation of the exclusion in subparagraph 97(1)(b)(iv) so as to exclude virtually any risk to life on account of a person's health care needs. The respondent argues that there is no distinction between a country's unwillingness and its inability to provide such health care. Moreover, there is no evidence that Parliament intended section 97 of the IRPA to confer the new human rights as advocated by the appellants. The respondent points out that Canada has never assumed the obligation of offering refugee protection to persons who base their claims solely on the inability or unwillingness of their own national governments to meet health and medical care needs.

[27] The Canadian jurisprudence on this issue is limited. There are only three recent decisions of the Federal Court which have considered this issue in varying depth. In *Mazuryk v. Canada (Minister of Citizenship and Immigration)* (2002), 112 A.C.W.S. (3d) 745 (F.C.T.D.), the applicant from the Ukraine claimed a risk to life on account of her deteriorating medical condition. She was suffering from Parkinson's disease and thyro-toxicosis. The Ukraine's inability to provide her with the medication and the medical services she required, at a cost that she could afford, was the basis of her claim under the earlier legislation. Dawson J. found, at para.25, that the risk to life in this case was not a risk which the Post-determination Refugee Claimants in Canada (PDRCC) Class (now the PRRA) is designed to provide protection against.

[28] Likewise, in *Singh v. Canada (Minister of Citizenship and Immigration),* [2004] 3 F.C.R. 323 (T.D.), the applicant claimed a risk to life on account of kidney failure and the inability of India to provide her with access to dialysis at a cost she could afford. The PRRA officer denied her application. On judicial review, the parties disputed the scope of the exclusion in subparagraph 97(1)(b)(iv), focusing primarily on the meaning of the phrase "adequate health or medical care" in subparagraph 97(1)(b)(iv). Russell J. stated the following (at paras.23 and 24):

> I believe the honest answer to this issue is that it is not entirely clear what Parliament's intent was in this regard, and that we are left to deal with a statutory provision that, on the facts of this Application, is somewhat ambiguous. The Applicants' arguments would mean accepting that Parliament intended to exclude risks based upon the non-availability of adequate health care but not risks associated with a particular applicant's ability to access adequate health care. Bill C-11 tells us that lack of "appropriate" health or medical care are not grounds for granting refugee protection under the IRPA and that these matters are more appropriately assessed by other means under the statute.
>
> This leads me to the conclusion that the Respondent is correct on this issue. A risk to life under s. 97 should not include having to assess whether there is appropriate health and medical care available in the country in question. There are various reasons why health and medical care might be "inadequate." It might not be available at all, or it might not be available to a particular applicant because he or she is not in a position to take advantage of it. If it is not within their reach, then it is not adequate to their needs. [Emphasis added]

Russell J., nevertheless, concluded that the PRRA officer was “correct and committed no reviewable error”.

[29] Most recently, in *Travers v. Canada (Minister of Citizenship and Immigration)* (2006), 53 Imm. L.R. (3d) 300 (F.C.T.D.), the applicant was diagnosed as HIV positive and claimed a risk to his life caused by the unwillingness of Zimbabwe to provide him with adequate medical care. Barnes J., in upholding the Board’s denial of the application for refugee protection, held at para.25:

> I am in agreement with the decisions in *Singh* and *Covarrubias.* Given the findings of the Board in this case that Mr. Travers would not face discrimination or persecution in his access to treatment in Zimbabwe (such as it is), I do not believe that he can bring himself within the protection of section 97 of the IRPA. Even in countries with the most deficient health care systems, there will usually be access to quality medical care for persons with the means to pay for it. […]

[30] Barnes J. nevertheless opened the door to some claimants on the basis of unavailable health care (para.27):

> Notwithstanding my conclusions above and despite the Respondent’s capable arguments, I am not satisfied that the section 97(1)(b)(iv) exclusion is so wide that it would preclude from consideration all situations involving a person’s inability to access health care in his country of origin. Where access to life-saving treatment would be denied to a person for persecutorial reasons not otherwise caught by section 96 of the IRPA, a good case can be made out for section 97 protection. […]

[31] Having considered the parties’ arguments and the limited authorities, I am of the view that the provision in issue is meant to be broadly interpreted, so that only in rare cases would the onus on the applicant be met. The applicant must establish, on the balance of probabilities, not only that there is a personalized risk to his or her life, but that this was not caused by the inability of his or her country to provide adequate health care. Proof of a negative is required, that is, that the country is not unable to furnish medical care that is adequate for this applicant. This is no easy task and the language and the history of the provision show that it was not meant to be.

[32] The ability of the different countries of the world to provide adequate health care varies dramatically. Some might contend that even countries such as Canada, the United Kingdom and the United States, though financially able, are not providing “adequate” health care to some of their people. These countries might respond that they are “unable” to provide more care, given their other financial obligations. Some might disagree and argue that these countries would, if they altered their priorities, be able to provide more. Whether this reluctance to provide more means that a country is unable to provide more is not a task that Courts can easily assess, except in cases such as the denial of health care on persecutorial grounds or other similar bases. This will be a difficult evidentiary hurdle to overcome.

[33] Let me expand on my reasons for this view. “Inability” is defined in the Oxford English Dictionary as the “condition of being unable; want of ability, physical, mental or moral; lack of power, capacity, or means.” The dictionary meaning does not assist

very much except to show that inability has a broad meaning including not only financial capacity, but vague terms such as mental and moral ability.

[34] The legislative history furnishes some guidance. In the clause-by-clause Analysis of Bill C-11 (later enacted as the IRPA) it provides as an explanatory note to section 97:

> […] Cases where a person faces a risk due to lack of adequate health or medical care can be more appropriately assessed through other means in the Act and are excluded from this definition. Lack of appropriate health or medical care are not grounds for granting refugee protection under the Act.

[35] A country's political decision not to provide a certain level of health care does not necessarily mean that the country is "unwilling" to provide that health care to its nationals. To interpret the exclusion as the appellants suggest would oblige a PRRA officer to engage in an unseemly analysis of another state's medical system in relation to its fiscal capacity and current political priorities. It would effectively require a finding that another country's public policy decision not to provide a certain level of health care is inadequate by Canadian standards. As the Board stated in the decision under review in *Travers, supra,* "it is not for the panel to judge the health care delivery system in the context of Canada or to attach blame for its shortcomings when the contributing forces are many and complex."

[36] The appellants are, in essence, seeking to expand the law in section 97 so as to create a new human right to a minimum level of health care. While their efforts are noble, the law in Canada has not extended that far. McLachlin C.J. and Major J., in concurring reasons in the decision of *Chaoulli v. Québec (Attorney General),* [2005] 1 S.C.R. 791 at para.104*,* stated that the *Canadian Charter of Rights and Freedoms* (the "Charter") does not confer on Canadians a freestanding constitutional right to health care. If that is so, then a freestanding right to health care for all of the people of the world who happen to be subject to a removal order in Canada would not likely be contemplated by the Supreme Court.

[37] The appellants' interpretation would, by necessary implication, impose an obligation on the Canadian government to provide ongoing emergency medical care to failed refugee claimants suffering from life-threatening illnesses where they can show that their native country has the financial ability, in a technical sense, to provide the needed medical care, but chooses not do so for whatever reason, justifiable or not. Such an interpretation would place a significant burden on the already overburdened Canadian health care system, which, in my opinion, could not have been intended by Parliament in enacting this provision.

[38] In my view, the words "inability to provide adequate medical services" must include situations where a foreign government decides to allocate its limited public funds in a way that obliges some of its less prosperous citizens to defray part or all of their medical expenses. Any other interpretation would require this Court to inquire into the decisions of foreign governments to allocate their public funds and possibly second-guess their decisions to spend their funds in a different way than they would choose. In other words, this Court would have to decide that foreign governments must provide free medical services to their citizens who cannot pay for them to the

detriment of other areas for which the governments are responsible. This cannot have been intended by Parliament without more specific language to that effect.

[39] This is not to say that the exclusion in subparagraph 97(1)(b)(iv) should be interpreted so broadly as to exclude any claim in respect of health care. The wording of the provision clearly leaves open the possibility for protection where an applicant can show that he faces a personalized risk to life on account of his country's unjustified unwillingness to provide him with adequate medical care, where the financial ability is present. For example, where a country makes a deliberate attempt to persecute or discriminate against a person by deliberately allocating insufficient resources for the treatment and care of that person's illness or disability, as has happened in some countries with patients suffering from HIV/AIDS, that person may qualify under the section, for this would be refusal to provide the care and not inability to do so. However, the applicant would bear the onus of proving this fact.

[40] This interpretation of subparagraph 97(1)(b)(iv) is consistent with the jurisprudence and it is consistent with the description in the publication by Legal Services, Immigration and Refugee Board, "Consolidated Grounds in the *Immigration and Refugee Protection Act*", section 3.1.9., wherein it states:

> […] The inability of a country to provide adequate health or medical care generally can be distinguished from those situations where adequate health or medical care is provided to some individuals but not to others. The individuals who are denied treatment may be able to establish a claim under s. 97(1)(b) because in their case, their risk arises from the country's unwillingness to provide them with adequate care. These types of situations may also succeed under the refugee ground if the risk is associated with one of the Convention reasons. [Emphasis added]

[41] For these reasons, I find that the phrase "not caused by the inability of that country to provide adequate health or medical care" in subparagraph 97(1)(b)(iv) of the IRPA excludes from protection persons whose claims are based on evidence that their native country is unable to provide adequate medical care, because it chooses in good faith, for legitimate political and financial priority reasons, not to provide such care to its nationals. If it can be proved that there is an illegitimate reason for denying the care, however, such as persecutorial reasons, that may suffice to avoid the operation of the exclusion.

b) Does the male appellant's claim in this case meet the requirements of subparagraph 97(1)(b)(iv)?

[42] Bearing in mind the proper interpretation of subparagraph 97(1)(b)(iv), this Court must decide whether the Applications Judge erred in upholding the PRRA officer's decision that the appellant's risk to life does not fit within the protection offered by section 97 of the IRPA. This is a question of mixed fact and law, involving the Applications Judge's interpretation of the evidence as a whole and whether it meets the requirements of section 97. The Applications Judge's decision will not be overturned absent a palpable and overriding error: *Housen, supra,* at para. 36.

[43] Subsection 100(4) of the IRPA provides that the burden of proving that a person is eligible to make a claim for refugee protection rests on the claimant. Accordingly, for the male appellant to meet the requirements of section 97 (so as to be eligible to make a claim for refugee protection), he was required to prove that should he be removed to Mexico, his removal would subject him personally to a danger of torture or a risk to his life or a risk of cruel and unusual treatment or punishment. In establishing a risk to his life, the appellant was required to prove that, among other things, his claim was not barred by the application of the exclusion in subparagraph 97(1)(b)(iv). In other words, the appellant was required to prove, on the balance of probabilities, that his risk to life was factually not caused by the inability of Mexico to provide the medical care he requires.

[44] The male appellant, according to the Applications Judge, did not meet that evidentiary burden. The evidence before the PRRA officer, and the Federal Court, consisted of an affidavit by the female appellant, sworn for the purposes of the stay application, in which she deposes to her husband's medical condition, describes the family's financial circumstances and asserts that they would be unable to pay for dialysis treatment if they returned to Mexico. There were also letters on the record from the male appellant's Canadian physicians stating that the male appellant requires continuous dialysis treatment every 48 hours, as well as medications to maintain his blood chemistry. One of the physician's letters, dated July 13, 2004, stated:

> Please be advised that [Mr. Ramirez] is a patient receiving Life Saving dialysis therapy, three times a week at Humber River Regional Hospital. [Mr. Ramirez], his wife and three young children are to be deported on Saturday July 17th, 2004 to Mexico. We have made many inquiries as to the availability of dialysis in Mexico. My understanding is that he would be forced to purchase this therapy which he can not afford. Consequently, he will die within 1 week after his last dialysis treatment. [Emphasis added]

[45] The Applications Judge found, at para.47, that there was no evidence before him as to what the physician's understanding of the Mexican health care system was based upon and that the letter amounted to hearsay without any evidentiary support. Therefore, the letter was not sufficiently reliable to prove the truth of the content of the statements. There was also insufficient evidence, according to the Applications Judge, to even establish that the male appellant's life was, at that time, at risk due to lack of adequate medical care in Mexico.

[46] The appellants have failed to demonstrate that the Applications Judge, in reaching this mixed fact and law conclusion, committed a palpable and overriding error in upholding the PRRA officer's decision in this respect. Therefore, this ground of the appeal should fail.

Jurisdiction of a PRRA officer to consider constitutional issues

[47] In the judicial review, the Applications Judge held, at para.24, that the PRRA process is not the appropriate forum to decide complex legal issues including questions of constitutional interpretation. He found that a tribunal which bases its decision on constitutionally invalid legislation commits a jurisdictional error. In reaching this conclusion, the Applications Judge referred to the decision in *Singh,*

supra, wherein Russell J. stated at para.30 that, in the absence of an express grant, "I cannot conclude that it was the intent of the legislator to confer upon PRRA officers an implied jurisdiction to decide constitutional questions of the kind urged upon [a PRRA officer]…"

[48] The appellants submit that the Applications Judge's determination, and by implication the decision in *Singh,* is mistaken. The appellants argue that PRRA officers have jurisdiction to declare inoperative subsections of the IRPA when their operation would result in the violation of a person's rights under the Charter because PRRA officers have an implied jurisdiction to decide questions of law. This implied jurisdiction arises because they are constantly required to interpret legal issues in applying the United Nations *Convention relating to the Status of Refugees,* 22 April 1954, 189 U.N.T.S. 2545, the United Nations *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* 10 December 1984, 1465 U.N.T.S. 85, and the protected person definition in the IRPA, and they have legal advisors to assist them in this task. Moreover, the appellants argue that PRRA officers must be able to consider the constitutional validity of section 97 because of the need for failed refugee claimants to raise such issues in the first forum.

[49] The Supreme Court of Canada, in the decision of *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur,* [2003] 2 S.C.R. 504 ("*Martin*"), clarified the approach to be taken by the Courts in determining whether an administrative body has jurisdiction to subject its legislative provisions to Charter scrutiny. Gonthier J. wrote, at para. 40, that "where the empowering legislation contains an express grant of jurisdiction to decide questions of law, there is no need to go beyond the language of the statute. An express grant of authority to consider or decide questions of law arising under a legislative provision is presumed to extend to determining the constitutional validity of that provision." Absent an explicit grant, Gonthier J. said, a Court must consider whether the legislator intended to confer upon the tribunal implied jurisdiction to decide questions of law arising under the challenged provision. At para.41, he stated:

> […] Implied jurisdiction must be discerned by looking at the statute as a whole. Relevant factors will include the statutory mandate of the tribunal in issue and whether deciding questions of law is necessary to fulfilling this mandate effectively; the interaction of the tribunal in question with other elements of the administrative system; whether the tribunal is adjudicative in nature; and practical considerations, including the tribunal's capacity to consider questions of law. Practical considerations, however, cannot override a clear implication from the statute itself, particularly when depriving the tribunal of the power to decide questions of law would impair its capacity to fulfill its intended mandate. […]

Gonthier J. then went on to say (at para.42) that once a presumption has been raised that a tribunal has authority to decide questions of law, either by explicit or implied grant of authority, it can only be rebutted by "an explicit withdrawal of authority to decide constitutional questions or by a clear implication to the same effect, arising from the statute itself rather than from external considerations."

[50] Neither the IRPA nor the Regulations explicitly grant authority to PRRA officers to decide questions of law. This is in contrast to the Immigration Appeals Division, the Immigration Division and the Refugee Protection Division of the Board, all of which have been granted express jurisdiction to consider questions of law (section 162, IRPA).

[51] This Court must consider whether the PRRA officers have an implied grant of authority, taking into account the factors listed by the Supreme Court of Canada in *Martin.*

[52] The first factor to consider is the statutory mandate of a PRRA officer, and whether deciding questions of law is necessary to fulfilling this mandate effectively. To fulfill its mandate, a PRRA officer is required to do a risk assessment in accordance with sections 96 and 97 of the IRPA. In dong so, PRRA officers are obliged to ensure that Canada complies with its obligations under the Charter and international human rights instruments. Although this requires PRRA officers to interpret the provisions of the IRPA, a risk assessment is factually intensive. In most cases, PRRA officers are not required to make complex legal decisions.

[53] The second factor to consider is the interaction of the tribunal in question with other elements of the administrative system. Here, it is important to note that the decision is of utmost importance to the person concerned. A negative PRRA decision can result in the enforcement of a removal order. As well, there is no right of appeal of a PRRA decision in the IRPA, although, an applicant has the right to seek judicial review of that decision in the Federal Court.

[54] The third factor is whether the tribunal is adjudicative in nature. A PRRA decision is largely administrative. Although section 113 of the IRPA allows an applicant an oral hearing in exceptional circumstances, most decisions are done on the basis of written submissions (see section 161 of the Regulations).

[55] Finally, this Court must address practical considerations, including the tribunal's capacity to consider questions of law. PRRA officers are not all lawyers, although some are lawyers and all are given legal training to carry out a PRRA determination. On this basis, it is reasonable to assume that PRRA officers do not possess the expertise to carry out Charter analyses, and that doing so would likely compromise the efficiency and timeliness of the PRRA process.

[56] This Court recognizes that PRRA officers make extremely important decisions, and for a significant number of people a PRRA assessment may be the final assessment of risk that they receive before being deported. However, based on the above considerations, and on the fact that the IRPA explicitly confers jurisdiction on its other decision-makers to consider questions of law and constitutional issues, I agree with the Applications Judge, and with Russell J. in *Singh,* that a PRRA officer does not have implied jurisdiction to consider questions of law, in particular, the implied jurisdiction to declare inoperative subsections of the IRPA when their operation would result in the violation of a person's rights under the Charter.

[57] Accordingly, this issue in the appeal should fail.

The Certified Question

[58] The certified question in this appeal asks the Court to consider whether, in view of the evidence before it, the exclusion of risk to life caused by the inability of a country to provide adequate medical care to a person suffering a life-threatening illness under section 97 of the IRPA infringes the Charter in a manner that does not accord with the principles of fundamental justice, and which cannot be justified under section 1 of the Charter.

[59] It is well established that Charter analyses should not, and must not, be made in a factual vacuum: *MacKay v. Manitoba,* [1989] 2 S.C.R. 357 at para. 9. That is, the absence of a proper evidentiary basis to support alleged Charter violations is a fatal flaw to any application to declare a law unconstitutional.

[60] As I stated earlier in these reasons, the Applications Judge found that the male appellant has failed to provide sufficient evidence of a risk to his life on account of inadequate medical care should he be deported to Mexico. The Applications Judge found, and I agree, that the appellants' allegations of specific Charter violations are without evidentiary foundation. Hence, there is no factual basis for entering into a Charter analysis here.

[61] In addition, and as the Applications Judge noted, there is an adequate alternative remedy in this case for the appellants, namely, the pending H&C application, judicial review of that decision should the appellants be unsuccessful, and an appeal to the discretion of the Minister. In keeping with the reasons of Martineau J. in *Adviento v. Canada (Minister of Citizenship and Immigration)* (2003), 242 F.T.R. 295 at para. 54, I find that it is inappropriate for the appellants to turn to the Court for relief under the Charter before exhausting their other remedies.

[62] For these reasons, I decline to answer the certified question.

[63] The appeal will, therefore, be dismissed.

"A.M. Linden"

J.A.

"I agree

M. Nadon J.A."

"I agree

B. Malone J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-418-05

(APPEAL FROM A JUDGMENT OF MOSLEY J., DATED SEPTEMBER 1, 2005, NO. (IMM-6045-04)

STYLE OF CAUSE:	Katia Montano Covarrubias, Angel Gabriel Olvera Ramirez, Beeri Noe Olvera Montano, Asael Olvera Montano and Eliezer Ivan Olvera Montano - and - The Minister of Citizenship and Immigration
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	October 17, 2006
REASONS FOR JUDGMENT BY:	Linden J.A.
CONCURRED IN BY:	Nadon J.A. Malone J.A.
DATED:	November 10, 2006

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