Federal Court  Cour fédérale

Date: 20100205

Docket: IMM-3522-05

Citation: 2006 FC 444

Ottawa, Ontario, February 5, 2010

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

A. B.
B. B.
C. B.
D. B.

Applicant(s)

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent(s)

AMENDED REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicants seek relief from a decision of the Immigration and Refugee Board (Board) dated May 19, 2005 wherein the Board denied their respective claims for refugee protection under sections 96 and 97 of the *Immigration and Refugee Protection Act* (IRPA).

Background

[2] The primary Applicant, A. B., and his family came to Canada from Zimbabwe in 2001. Mr. A. B. is 46 years of age. All of the Applicants had legal status here. Mr. A. B. and his spouse, B. B., entered Canada with work visas and their children received education visas. In the course of moving from one job to another, Mr. A. B. underwent a medical examination and was diagnosed as HIV positive. Since April of 2004, he has been receiving anti-retroviral therapy and he has responded well to that treatment. A report submitted in evidence to the Board from his treating specialist, Dr. Stan Houston, confirmed that, with adequate treatment, it is likely that Mr. A.B.'s illness could be effectively controlled in the long-term and that he could continue to be gainfully employed. Dr. Houston also commented on the prevailing health care conditions in Zimbabwe and the prospects for Mr. A.B. should he return there:

> I am familiar with the situation in Zimbabwe having lived and worked in that country for four years, most recently in 2000 and 2001. I have maintained a close interest in the conditions in Zimbabwe through following the press and through contact with people who remain there. Only three weeks ago, we had the opportunity for a first-hand account of the current situation in Zimbabwe through the visit to Edmonton by Archbishop Pius Ncube and constitutional lawyer Brian Kagoro.
>
> Conditions for almost everyone, excepting the very wealthy and those with connections to the ruling party, are very difficult indeed in Zimbabwe in 2004. Unemployment is somewhere between 60-80%. The health service has virtually collapsed with basic drugs out of stock and a large proportion of the country's doctors having fled. Moreover, there is intense persecution of anyone who is politically active in opposition to the government or in some cases, if they fail to join the ruling party.
>
> Availability of antiretroviral drugs with appropriate care and supervision is negligible at the present time. From a medical point of view, [omitted] health would be expected to slip rapidly back to the level he was at prior to treatment initiation and his life expectancy,

> based on his CD4 cell count, would probably be in the range of two to five years.

[3] Mr. A. B.'s claim for refugee protection was brought both as a convention refugee under section 96 and as a person in need of protection under section 97 of the IRPA. His convention refugee claim was based upon evidence of stigma, discrimination and mistreatment of persons in Zimbabwe suffering from HIV/AIDS. As a person in need of protection, Mr. A. B. claimed that, should he return to Zimbabwe, he would face a risk to life caused by the unwillingness of the government to provide adequate care. In the alternative, he sought to challenge the constitutionality of section 97(1)(b)(iv) of the IRPA. All of these claims were rejected by the Board. For ease of reference, I have set out these statutory provisions below:

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.

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

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) 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

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes

standards, and	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.

[4] The Applicants' arguments to this Court were concerned generally with the Board's treatment of the evidence, the Board's treatment of the "risk to life" issue and the health care exclusion under section 97 of the IRPA, and the Board's handling of their constitutional challenge to section 97(1)(b)(iv) of the IRPA.

[5] The Board found that Mr. A. B. met the requirement in section 96 of the IRPA for membership in a particular social group (i.e. persons fearing persecution because of an unchangeable characteristic). It went on to consider his evidence of fear of persecution from stigma, discrimination and mistreatment and rejected much of that evidence as speculation. Among its findings concerning his alleged fear of persecution were the following:

a. The adult claimants would not face serious restrictions on their right to earn a livelihood.

b. The economic situation in Zimbabwe was not ideal and had probably not improved since the claimants' departure in 2002 but that situation was one which affected the population generally.

c. Mr. A. B. does not know what treatment will be available to him and his fears in that regard are speculative.

d. Mr. A. B.'s fears of social ostracism were vague speculation.

e. Mr. A. B.'s fear about a lack of medical confidentiality was speculation.

f. On the whole, Mr. A. B.'s testimony regarding his fears about the treatment available to him was general, lacking in specific detail, often reflective of the documentary evidence and speculative.

[6] The Board's review of the evidence concerning the relevant country conditions led to the following findings:

a. The medical report from Dr. Houston was general in nature and of limited value when assessing the health services in Zimbabwe at the time of the hearing.

b. Political upheaval, violence, instability, poverty and drought had drawn Zimbabwe to the brink of political and economic collapse.

c. The HIV/AIDS pandemic had eroded the capacity of the health care system and other national institutions.

d. Zimbabwe has a health care system in place for its citizens but it was not for the Board to judge the health care delivery system in the context of Canada or to attach blame for its shortcomings when the forces at play were many and complex.

e. Zimbabwe's health care system offered treatment for victims of HIV/AIDS but it was not for the Board to judge that system in the context of Canada or to attach blame for its shortcomings.

f. President Mugabe's comments in the mid 1990's that homosexuals are "worse than pigs and dogs" and "a scourge planted by the white man on a pure continent" were his own and did not represent state policy. Those who oppose Mugabe would not take his comments seriously.

g. The documentary evidence submitted established that stigma against persons with HIV/AIDS existed in Zimbabwe.

h. The situation for most persons with HIV/AIDS in Zimbabwe was difficult and fraught with obstacles causing anxiety and distress.

i. There was no reliable evidence indicating that people with HIV/AIDS were publicly humiliated or that they were victims of violence.

j. Stigma directed towards HIV/AIDS victims existed in Zimbabwe and in most other countries including Canada to lesser or greater degree.

k. It would not be necessary in most situations for Mr. A. B. to disclose his HIV status.

l. There was not sufficient, credible or trustworthy evidence to establish that Mr. A.B.' condition would become public knowledge leading to mistreatment of any kind.

m. There was no evidence that people suffering from HIV/AIDS would be victims of a sustained or systemic violation of a fundamental right such as serious restrictions on the right to earn a livelihood, the right to practice religion, access to normally available education facilities or to medical treatment.

n. The totality of the evidence did not establish that the mistreatment or discrimination of persons suffering with HIV/AIDS was systemic or that they would be subjected to acts of discrimination amounting to persecution.

o. The documentary evidence pointed out that the epidemic crossed all social groups but that the middle and lower classes were the most affected and it suggested that the economically marginalized would be unable to afford therapies.

p. It may be difficult for the adult applicants to find or create employment but there were viable options open to them.

q. The economic crisis in Zimbabwe was a situation indiscriminately affecting all citizens to a certain degree and was not grounds for a well-founded fear.

r. It was not inevitable that people would become aware of Mr. A. B.'s condition.

s. There was not sufficient and trustworthy evidence to establish that the treatment that Mr. A. B. faced by reason of his HIV positive status would amount to persecution.

t. Mr. A. B. had not established on a balance of probabilities that he would be denied treatment upon his return to Zimbabwe.

u. He did not know what treatment would be available to him and his fears in that respect were speculative.

v. The spread of infectious disease and, in particular, HIV/AIDS, appeared to be compromising the country's institutions.

w. Although there were instances of discrimination and condemnation, persons with HIV/AIDS were not, as a group, being persecuted.

[7] The Board went on to specifically address the issue of Mr. A. B.'s access to medical treatment in Zimbabwe. In that regard, it made the following findings:

a. The preponderance of evidence did not indicate systemic discrimination or selective withholding of treatment from victims with HIV/AIDS in Zimbabwe.
b. There was no reason to believe that Mr. A. B. would be singled out and deliberately denied treatment.
c. A health care system exists and is available to all citizens of Zimbabwe.
d. The health care provided in Zimbabwe did not meet the standards of some countries, such as Canada, but it is available to all.
e. There was not a reasonable chance that medical treatment would be systemically denied or withheld from victims of HIV/AIDS including Mr. A. B.
f. The principle claimant and his family might encounter some incidents of discrimination and might be shunned by some citizens of Zimbabwe but they had failed to establish that there was a reasonable chance that they would face housing or employment difficulties or serious restrictions on the right to earn a livelihood by reason of Mr. A. B.'s medical status.
g. There was not sufficient credible and trustworthy evidence to establish that non-infected family members of an HIV/AIDS positive person would be seriously mistreated or that they would face discrimination amounting to persecution.
h. The claimant was not at risk of persecution by reason of his membership in a particular social group defined as persons in Zimbabwe with HIV/AIDS.

[8] On the basis of all of the above, the Board concluded that Mr. A. B. and the other members of his family had failed to establish their status as convention refugees pursuant to section 96 of the

IRPA. The Board went on to consider their entitlement as persons in need of protection pursuant to section 97 of the IRPA. In that regard, the Board held that:

a. There was no evidence to indicate that the Applicants would be tortured or mistreated by a public official or person acting in an official capacity if they were returned to Zimbabwe.
b. There was no documentary evidence to suggest any support of violence or any other actions against HIV/AIDS victims that would meet the level of torture and to which the state acquiesced.
c. The Applicants had failed to demonstrate that there existed substantial grounds to believe that they would be subjected personally to a danger of torture if they were to return to Zimbabwe.
d. There was medical treatment available in Zimbabwe for Mr. A. B.
e. The harm envisaged by Mr. A. B. and his family did not meet the definition of cruel and unusual treatment or punishment – albeit that their circumstances were sad and difficult.

[9] The Board then considered whether Mr. A. B. would be subjected to a risk to his life because of a lack of medical treatment if he was obliged to return to Zimbabwe and it found that no such risk was present.

[10] Finally, the Board observed that Mr. A. B.'s concern about receiving adequate health care and support services would be more appropriately considered in another venue, specifically under

section 25 of the IRPA based upon humanitarian and compassionate considerations. Since that was not a matter within the Board's jurisdiction, it could not take that provision into consideration.

Issues

1. Did the Board err in its treatment of the evidence?
2. Did the Board err in its application of section 97 of the IRPA to the evidence?
3. Did the Board err in its handling of the Applicants' constitutional challenge to section 97(1)(b)(iv) of the IRPA?

Analysis

[11] The Applicants criticized the Board for rejecting much of their evidence of a fear of discrimination and persecution and for characterizing most of their testimony as speculative. Because these are fact-based issues, the standard of review is patent unreasonableness: see *Aguebor v. Minister of Employment and Immigration* [1993] F.C.J. No. 732, (1993) 160 NR 315 (FCA) at para. 4.

[12] It is correct that the Board throughout described Mr. A. B.'s testimony about the availability of medical care and the level of social stigmatization in Zimbabwe as "speculation". This loose characterization of evidence as speculation was unfortunate because, in one sense, it can be read as a conclusion that the evidence had no probative value whatsoever: see *Canada (Minister of Employment and Immigration) v. Satiacum* (1989) 99 N.R. 171, [1989] F.C.J. No. 505 (FCA) at page 9. Clearly this was evidence which had some value and, indeed, in some areas the Board

relied upon it. Taken in context, however, I think that the Board was only saying that it ascribed little weight to this evidence because it was either somewhat dated or was anecdotal in nature.

[13] While the Board's negative characterization of most of the evidence offered by the Applicants seems somewhat harsh, it does not rise to the level of capriciousness or perversity. It is not the role of this Court to re-visit credibility and other evidentiary findings which are properly based upon a weighing of the evidence.

[14] The Board had before it a large amount of conflicting documentary evidence about the social and health care conditions in Zimbabwe for persons suffering from HIV/AIDS. The Board chose to accept much of the evidence which downplayed the circumstances of stigma and discrimination and which cast the Zimbabwe health care system in a somewhat positive light. While others reviewing this same evidence could easily have come to different conclusions, the Board's factual findings and inferences cannot be characterized as patently unreasonable because they are supported by an evidentiary foundation. I am, therefore, unable to accept the Applicants' evidence-based arguments as a basis for setting aside the Board's decision.

[15] The Applicants also argue that the Board made two legal errors in the application of section 97 of the IRPA to the evidence. Firstly, they say that the Board erred in its treatment of the issue of "risk to life" and, secondly, they assert that the Board interpreted the health exclusion in section 97(1)(b)(iv) too broadly. These arguments raise issues of law and of mixed fact and law for which the standards of review are, respectively, correctness and reasonableness: see *Pushpanathan v.*

Canada (Minister of Citizenship and Immigration), [1998] S.C.J. No. 46, [1998] 1 S.C.R. 982; 160 D.L.R. (4th) 193.

[16] There certainly is a problem with the Board's approach to the issue of whether Mr. A. B. faced a risk to his life if he returned to Zimbabwe. The Board made no specific findings about the level or quality of care that would be available to Mr. A. B. should he be required to return. It apparently felt that its only obligation was to determine that some sort of health care system existed and that Mr. A. B. would have fair access to it. The Board's conclusion on that point was as follows:

> The panel find that there is a health care system in place to treat the victims of HIV/AIDS. Once again, 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.

[17] Having failed to make specific findings about the level of care available to Mr. A. B., the Board lacked a factual foundation to determine whether his life would be at risk were he to return to Zimbabwe. Nevertheless, the Board concluded that his life would not be at risk in the following passage:

> Would the claimant personally be subjected to a risk to his life because of a lack of medical treatment if returned to Zimbabwe at this time?
>
> It was submitted that the claimant is a person in need of protection because there is a risk to his life. This risk to life is by reason of a lack of adequate health care and treatment for his HIV positive condition. The panel refers again to its findings that medical treatment would not be denied the claimant and finds as a result that the claimant has not established that he does face a risk to his life.

[18] To my thinking, the correct approach to the application of section 97 of the IRPA in a context like this one is to first decide if there is sufficient evidence to establish that an applicant's life would be at risk and then to determine if the health care exclusion applies. In this case, the Board appears to have wrongly conflated the two parts of the test.

[19] The fact that some level of health care would not be denied to Mr. A. B. in Zimbabwe does not establish that his life would not be at risk by returning there. If the Board had clearly concluded that the quality of care available to Mr. A. B. was such that his life could likely be maintained, its risk to life finding would be difficult to challenge. Here, though, the Board expressly declined to qualitatively assess the treatment programs which would be available to Mr. A. B. The Board's conclusion that Mr. A. B. would not face a risk to life if he returned to Zimbabwe is, therefore, patently unreasonable because the Board deliberately declined to make the necessary evidentiary findings to support it: see *Canada (Minister of Citizenship and Immigration) v. Mugesera* [2005] S.C.J. No. 39, 2005 SCC 40 at para. 43.

[20] The Board's error with respect to the risk to life issue does not end the matter because of the requirement to consider the scope of the health care exclusion in section 97(1)(b)(iv) of the IRPA. Whether or not Mr. A. B.'s life would be at risk in Zimbabwe, he was still required to establish that his claim was not barred because of the application of that exclusion (i.e. that the risk to life is not caused by the inability of the state to provide adequate health or medical care).

[21] The Applicants say that there was considerable evidence before the Board to establish that treatment in Zimbabwe for HIV/AIDS was significantly and adversely affected by corruption and discrimination. Because of those practices, they say that Mr. A. B.'s treatment for the illness would be hindered, not because of the inability of the state to provide adequate care but because of its unwillingness to provide that care. This, they say, takes Mr. A. B. outside of the section 97(1)(b)(iv) exclusion.

[22] For its part, the Respondent says that section 97 of the IRPA was never intended to afford protection for health related risks to life and that whatever such protection exists in the IRPA is to be found in either section 96 (convention refugee) or section 25 (humanitarian and compassionate). The Respondent relies heavily upon the decisions of this Court in *Singh v. Canada (Minister of Citizenship and Immigration)* [2004] 3 F.C.R. 323, [2004] F.C.J. No. 346, 2004 FC 288 and *Covarrubias v. Canada (Minister of Citizenship and Immigration)* [2005] F.C.J. No. 1470, 2005 FC 1193.

[23] I have carefully considered the decisions in *Covarrubias* and *Singh*, above. *Covarrubias* dealt with a refugee applicant who suffered from serious kidney disease and who required dialysis three (3) times per week. While that treatment was available in Mexico, the cost was beyond the means of the applicant. Without dialysis, the applicant would die within a week. The issue before Justice Richard Mosley was the same as the issue before me – that is, whether the unwillingness of a state to provide affordable medical treatment in a terminal illness case took a claimant outside of the

97(1)(b)(iv) health care exclusion. Justice Mosley relied upon the reasoning in *Singh* and held 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. I agree with Justice Russell's interpretation of the statute. Thus I find that the PRRA officer did not err in applying the exclusion to Mr. Ramirez and the application cannot succeed on that ground.

After a thorough analysis of the law, Justice Mosley went on to reject a constitutional challenge to the health care exclusion in section 97 of the IRPA. It is noteworthy, however, that a question was certified in *Covarrubias* which put in issue the constitutionality of the section 97 health care exclusion and I understand that that appeal remains outstanding.

[24] The *Singh* case, above, also involved a refugee claimant who was suffering from renal failure. There, too, the claimant was unable to access the required treatment in India because of impecuniosity. While recognizing that section 97(1)(b)(iv) suffered from a degree of imprecision, Justice James Russell held at para. 24:

> This leads me to the conclusion that the respondent is correct on this issue. A risk to life under section 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.

[25] I am in agreement with the decisions in *Singh* and *Covarrubias*. Given the findings of the Board in this case that Mr. A. B. 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. That was the view of Mr. A. B.'s Canadian specialist, Dr. Houston, who confirmed that treatment for HIV/AIDS was available in Zimbabwe for those with the necessary resources.

[26] While there was evidence before the Board to the effect that access to treatment for HIV/AIDS in Zimbabwe was frequently denied on discriminatory grounds, the Board chose not to adopt that evidence. It is not for me to reject those findings simply because I might have come to a different conclusion. Certainly, there is a rational basis for the Board's conclusion on this point because its supporting evidentiary findings were not capriciously made.

[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. This is consistent with the IRB's *Consolidated Grounds in the Immigration and Refugee Protection Act*, section 3.1.9 which states:

> 3.1.9. Risk Not Due to Inadequate Health or Medical Care

> If the risk is caused by the inability of the country of reference to provide adequate health or medical care the claimant will not qualify for protection. A similar requirement in the PRDCC Regulations was explained in the PDRCC Guidelines as reflecting the position that the Regulations were never intended to compensate for disparities between the health and medical care available in Canada and those available elsewhere in the world. The same could be said of s. 97(1)(b)(iv).
>
> 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.

[28] Counsel for the Applicants made several additional points in support of a narrower interpretation of the section 97(1)(b)(iv) health care exclusion. He points out that Parliament has frequently used the phrase “unable or unwilling” in the IRPA (see sections 96, 97, and 39). He says that the failure to use “unwilling” in section 97(1)(b)(iv) was quite deliberate and was intended to narrow the scope of that exclusion. He also points out that it would take very little adjustment to the language of the exclusion to make it beyond doubt that it was intended to cover every situation of risk to life on health grounds.

[29] Secondly, it was argued that legislation which is intended to curtail basic human rights should be narrowly construed.

[30] Finally, counsel for the Applicants argued that the Federal Court of Appeal decision in *De Guzman v. Canada (Minister of Citizenship and Immigration)* [2005] F.C.J. No. 2119, 2005 FCA 436 (at para. 75) clearly endorses an approach to the interpretation of the language of the IRPA to achieve, where possible, harmony with Canada's obligations under international human rights instruments. As an example, he points to the International Covenant on Economic, Social and Cultural Rights which requires states' parties to use their maximum of available resources for the realization of the right to health. He asserts that Canada should extend refugee protection to claimants who would otherwise be returned to places where their governments are in deliberate non-compliance with such international commitments and where their lives would be in jeopardy.

[31] I accept that there may be cases involving risk to life from persecutorial practices in the provision of health care where section 97 relief is warranted but, given the findings of the Board in this case, this is not one of them.

[32] The Applicants raised a final point in argument that remains of concern. They complain – correctly I believe – that the Board's unwillingness to deal with their constitutional challenge to section 97(1)(b)(iv) health care exclusion was in error. The Board declined to deal with that issue by holding that it lacked the necessary factual foundation to make a constitutional ruling.

[33] The Board had ample evidence before it to determine whether Mr. A. B.'s life was at risk by virtue of the obvious weaknesses in the Zimbabwe health care system. Its refusal to make the necessary factual findings on the strength of that evidence constitutes an abdication of its

responsibility and a failure to properly deal with the issues before it. It was hardly fair for the Board to decline to make the evidentiary rulings that were needed to support this constitutional challenge and then to point to that very abdication of responsibility as an excuse. Indeed, it was with respect to this issue of the risk to life that the Board appears to have glossed over the hard realities facing Mr. A. B. should he be forced to return to Zimbabwe.

[34] The Respondent has relied in its argument upon a very compelling decision by the House of Lords in *N(FC) v. Secretary of State for the Home Department* [2005] UKHL 31, 84 BMLR 126. The facts in *N(FC)* are strikingly similar to those at hand. The decision identifies the difficult choices confronting first world countries dealing with foreign nationals who arrive with terminal but otherwise treatable illnesses. These types of cases raise profound humanitarian, legal and social policy issues. The outcome in *N(FC)* was to declare that the individual had no legal right to remain in the United Kingdom despite the likelihood that she would face imminent death upon return to Uganda. It is noteworthy, however, that the Court did not shy away from confronting the harsh realities of what it was ordering beyond extending a modest appeal to the Minister to consider a humanitarian stay. The Court duly observed that, without such a humanitarian gesture by the government, a return of the applicant to her country of origin was effectively "a death sentence" (see para. 66).

[35] To my mind, Mr. A. B. was entitled to a fair and appropriate consideration of his constitutional challenge to section 97(1)(b)(iv) of the IRPA. This is an issue which is pending in the Federal Court of Appeal by virtue of the certified question posed by Justice Mosley in *Covarrubias,*

above. In order to enjoy the potential benefit of that appeal, Mr. A. B. required that the Board appropriately resolve the factual questions which were necessary to support that challenge. I will, therefore, set aside the Board's decision and remit the matter to a differently constituted panel for a re-determination of the case on the merits.

[36] Only the Applicants requested that a question be certified with respect to the scope of the section 97(1)(b)(iv) exclusion; but given my disposition of this case, it is unnecessary to certify that question.

JUDGMENT

THIS COURT ORDERS that the Board's decision is set aside and the matter is remitted for a re-determination by a differently constituted panel.

" R. L. Barnes "
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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