Date: 20050527

Docket: IMM-2228-04

Citation: 2005 FC 739

BETWEEN:

CHEA SAY

VOUCH LANG SONG

Applicants

and

THE SOLICITOR GENERAL FOR CANADA

Respondent

REASONS FOR ORDER

GIBSON J.:

INTRODUCTION

[1] These reasons follow the hearing of an application for judicial review of a decision of a Pre-Removal Risk Assessment Officer (the "Officer") dated the 22nd of January, 2004 in which the Officer determined that the Applicants would not be subject to risk of torture, risk to life or risk of cruel and unusual treatment or punishment if returned to their country of nationality or habitual residence.

[2] This application for judicial review was one of three such applications, heard together at Toronto on the 25th and 26th of April, 2005, in which the issue of institutional bias or lack of independence on the part of Pre-Removal Assessment Officers during the period from the 12th of December, 2003 to the 8th of October, 2004 when such Officers were situated, in an organizational sense, within the Canada Border Services Agency of the Government of Canada, was raised. That issue is addressed in these reasons, and the analysis in that respect will simply be incorporated by reference into the reasons on one (1) of the two (2) related applications for judicial review.

BACKGROUND

[3] Chea Say, the male Applicant, and Vouch Lang Song, the female Applicant, are husband and wife. They are citizens of Cambodia. They fled Cambodia to Canada in 1993 and claimed refugee protection. Their claim to refugee protection was rejected in July of 1996. In the case of the male Applicant, his claim was rejected

on the ground that he was excluded from refugee protection by virtue of Article 1F(*a*) of the *United Nations Convention Relating to the Status of Refugees*, which is to say, on the particular circumstances of his case, on the ground that there were serious reasons for considering that he had committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes. Further, the male Applicant's testimony was found not to be credible in several key respects. The female Applicant based her claim on that of the male Applicant. In the result, her claim was also rejected. Indeed, she was found to not have even a subjective fear of persecution.

[4] In May of 1997, judicial review of the decision rejecting the Applicants' claim to Convention refugee status was dismissed. Justice Lutfy, as he then was, in rejecting the Applicants' application for judicial review, summarized the background to their claim in the following terms:

> Between 1982 and 1993, the [male] applicant was a member of the Cambodian police service which he joined to avoid military conscription. He always served in the training unit of the police force. In 1985, after three years as a constable, he was appointed vice-president of the training unit. After receiving promotions in rank in 1990 and 1992, he became a major and president of the training unit in 1993, shortly before arriving in Canada. It was in 1986 that he acquired information which led him to conclude that the government of the State of Cambodia was, in his words, ruthless and corrupt.

[5] The male Applicant became an outspoken critic of the ruthless record of the Government of Cambodia. He alleged reprisals against himself. In fear of further reprisals, the Applicants fled Cambodia leaving behind their children and a number of other family members.

[6] Under the former *Immigration Act*[1], the Applicants were deemed to have submitted Post-Determination Refugee Claimants in Canada Class applications. Their deemed applications were denied. Once again, judicial review of those decisions was sought. Additionally, a stay of removal pending determination of their judicial reviews was sought. Their application for a stay of removal was denied and leave in relation to judicial review of their PDRCC negative decisions was denied. The latter denials were dated the 15th of January, 1998.

[7] The Applicants did not attend at the time and place scheduled for their removal. In the result, warrants for their arrest were issued on the 20th of November, 1997.

[8] In March of 1998, applications for leave to remain in Canada on humanitarian and compassionate grounds were filed on behalf of the Applicants. When notice of change of their address was filed in connection with those applications in November of 2003, they were promptly arrested.

[9] Finally, the Applicants filed a PRRA application on the 22nd of December, 2003. The negative decisions here under review followed.

[10] At the date of hearing of this application for judicial review, the Applicants were still in Canada.

[11] Essentially no new evidence specific to the circumstances of the Applicants, that is to say, evidence that was not before the Convention Refugee Determination Division of the Immigration and Refugee Board when the Applicants' Convention refugee claims were determined, was before the Officer whose decision is here under review.

THE DECISION UNDER REVIEW

[12] In respect of the male Applicant, the Officer described the risks identified on his behalf in the following terms:

> Counsel's written submissions state that the applicant fears returning to Cambodia because as a former police officer who openly criticized his superiors he faces a risk of persecution, a risk of torture, and a risk to his life or of cruel and unusual punishment or treatment at the hands of the Cambodian authorities.
>
> Counsel's submissions contend that the applicant is a deserter from the Cambodian police force and has spoken out against them [sic] specifically human rights abuses committed by the force. The risk is throughout the country.
>
> Counsel's submissions contend that the applicant's fears are personal. He fears abuse, torture and even death at the hands of the state agents in Cambodia because of his perceived political opinion.
>
> Counsel's submissions contend that as the applicant is a deserter and as someone who has criticised the practices and techniques of the Cambodian security officials he is vulnerable to disproportionate sanctions if he is sent back to Cambodia.
>
> Counsel's submissions contend that the applicant is a person in need of protection under section 97 of the *Immigration and Refugee Protection Act* ... . His fears are based on having disobeyed orders and demonstrating his disloyalty to the CPP on a number of occasions, an attempt has already been made on his life, he spoke out against human rights abuses committed by fellow police officers, police came to his home looking for him on several occasions, the Cambodian authorities routinely torture and persecute those suspected of having allegiance to parties other than the CPP.[2]
>
> [emphasis added]

[13] Submissions on behalf of the female Applicant are summarized by the Officer in the following terms:

> Counsel's written submissions states [sic]:

> As the wife of an individual who deserted from the Cambodian police and who openly criticized the Cambodian authorities for committing human rights abuses, Ms. Song fears that she will be tortured and persecuted if sent back to Cambodia.
>
> Counsel's submissions contend that the applicant fears persecution based on the perceived political opinion of her husband. She is particularly vulnerable as a wife of a deserter and critic of the CPP.
>
> Counsel's submissions contend that the applicant also fears torture, cruel and unusual treatment and even death at the hands of the Government and its agents.
>
> Counsel's submissions contend that the risk to her is not limited to her home province but exists throughout the country. Her fear of the Cambodian authorities is not generalized but personal.[3] [emphasis added]

[14] After a lengthy analysis of the concerns of the Applicants against the evidence before him or her, the Officer concluded in the following terms:

> While I acknowledge that the country conditions are far from favourable, I do not find that the applicants' stated fear would place them at risk of harm in accordance with the *Immigration and Refugee Protection Act*. Consequently, I find that there is not more than a mere possibility that Vouch Lang Song would suffer persecution by the Cambodian authorities on a Convention ground if returned to Cambodia.
>
> Based on the evidence before me, I am satisfied that on a balance of probabilities, the applicants are not likely to be subjected to a danger believed on substantial grounds to exist within the meaning of torture as defined in Article I of the Convention against Torture. Likewise, I am satisfied that on a balance of probabilities, the applicants are not likely to be subjected to a risk to life or a risk of cruel and unusual treatment or punishment if returned to Cambodia.[4]

THE ISSUES

[15] The issue that was unique to this application for judicial review was identified on behalf of the Applicants as the following: whether the Officer erred in law by failing to consider whether the Applicants would be at risk of torture or cruel or unusual punishment by reason that the male Applicant was and remains a deserter from the Cambodian police force.

[16] Although the issue of standard of review was raised in both the Applicants' and Respondent's materials, it was conceded before the Court that the decision of the Federal Court of Appeal in *Li v. Canada (Minister of Employment and Immigration)*[5] is determinative on that issue and no reviewable error was pursued in

that regard. Finally, as earlier noted, the issue of institutional bias or lack of independence and impartiality was before the Court. Counsel for the Applicants phrased the issue in essentially the following terms: was the Applicants' PRRA decision made in violation of natural justice and the principles of fundamental justice under section 7 of the *Canadian Charter of Rights and Freedoms*[6] in that the decision was made by a tribunal that lacked institutional independence?[7]

ANALYSIS

1) Failure to consider desertion by the male Applicant from the Cambodian police force as a separate ground of fear

[17] As noted in the foregoing quotations from the decision under review, the Officer clearly acknowledged that the male Applicant considered himself to have deserted from the Cambodian police force and considered himself, as well as his spouse, to be at risk by reason of that action. Having identified desertion as a cause of concern on behalf of the Applicants, the Officer then went on to analyse the Applicants' fears against the evidence before him within the broader context of the male Applicant's actions which the Officer described in more general terms as actions disclosing a perceived political opinion on the male Applicant's part. I am satisfied that in doing so, the Officer made no reviewable error. The male Applicant alleged that he spoke out against human rights abuses by the police force in which he was an officer and, together with his spouse, was subjected to threats and to alleged violent acts as a result. By reason of those threats and acts, he alleges that he deserted the police force. I am satisfied that the alleged desertion was simply a further act by the male Applicant that was expressive of his perceived political opinion and that it was therefore open to the Officer to incorporate it within his or her analysis of the totality of actions by the male Applicant underlying his and his spouse's fear of return to Cambodia.

2) Institutional bias or lack of institutional independence and impartiality

a) Introduction

[18] Counsel for the Applicants urged before the Court that institutional bias or lack of institutional independence and impartiality undermines public confidence in the rulings and decisions of federal boards, commissions and other like tribunals, including PRRA officers. He urged that public confidence is a cornerstone of an adjudicative process that, on a case by case basis, may affect fundamental rights including those enshrined in section 7 of the *Canadian Charter of Rights and Freedoms* and, more particularly, the right to security of the person that is enshrined in that section. In the circumstances, counsel urged that the appropriate test for determination of whether or not PRRA officers demonstrated bias or a lack of sufficient independence and impartiality in arriving at their decisions and, more particularly, the decision under review, is that of a "reasonable apprehension of bias" or "reasonable apprehension of lack of sufficient independence and impartiality".

b) The appropriate test

[19] In *Committee for Justice and Liberty v. Canada (National Energy Board)*[8], Justice de Grandpré quoted at page 394 the following conclusion of the Federal Court of Appeal in its reasons in support of the judgment appealed from:

> On the totality of the facts, which have been described only in skeletal form, we are all of the opinion that they should not cause reasonable and right minded persons to have a reasonable apprehension of bias on the part of Mr. Crowe, either on the question of whether present or future public convenience and necessity require a pipeline or the question of which, if any, of the several applicants should be granted a certificate.

Following a brief paragraph noting his concurrence with the Federal Court of Appeal's reading of the facts, Justice de Grandpré continued at pages 394 and 395:

> The proper test to be applied in a matter of this type was correctly expressed by the Court of Appeal. As already seen by the quotation above, the apprehension of bias must be a reasonable one held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically--and having thought the matter through--conclude. Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly."
>
> I can see no real difference between the expressions found in the decided cases, be they 'reasonable apprehension of bias', 'reasonable suspicion of bias', or 'real likelihood of bias'. The grounds for this apprehension must, however, be substantial and I entirely agree with the Federal Court of Appeal which refused to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience".
>
> This is the proper approach which, of course, must be adjusted to the facts of the case. The question of bias in a member of a court of justice cannot be examined in the same light as that in a member of an administrative tribunal entrusted by statute with an administrative discretion exercised in the light of its experience and of that of its technical advisers.
>
> The basic principle is of course the same, namely that natural justice be rendered. But its application must take into consideration the special circumstances of the tribunal. As stated by Reid, Administrative Law and Practice, 1971, at p. 220:
>
> ... 'tribunals' is a basket word embracing many kinds and sorts. It is quickly obvious that a standard appropriate to one may be inappropriate to another. Hence, facts which may constitute bias in one, may not amount to bias in another.

[20] Bias or absence of bias or sufficient independence and impartiality or lack of sufficient independence and impartiality is, of course, an aspect of procedural

fairness. In *Bell Canada v. Canadian Telephone Employees Associations*[9], Chief Justice McLaughlin and Justice Bastarache, for the Court, wrote at paragraph [21]:

> The requirements of procedural fairness -- which include requirements of independence and impartiality -- vary for different tribunals. As Gonthier J. wrote in *IWA v. Consolidated-Bathurst Packaging Ltd.*, ...: "the rules of natural justice do not have a fixed content irrespective of the nature of the tribunal and of the institutional constraints it faces". Rather, their content varies. As Cory J. explained in *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, ... the procedural requirements that apply to a particular tribunal will "depend upon the nature and the function of the particular tribunal" ... . As this Court noted in *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, ... , administrative tribunals perform a variety of functions, and "may be seen as spanning the constitutional divide between the executive and judicial branches of government"... . Some administrative tribunals are closer to the executive end of the spectrum: their primary purpose is to develop, or supervise the implementation of, particular government policies. Such tribunals may require little by way of procedural protections. Other tribunals, however, are closer to the judicial end of the spectrum: their primary purpose is to adjudicate disputes through some form of hearing. Tribunals at this end of the spectrum may possess court-like powers and procedures. These powers may bring with them stringent requirements of procedural fairness, including a higher requirement of independence ... [citations omitted]

[21] Counsel for the applicants urged that PRRA Officers are closer to the judicial end of the spectrum in that their primary purpose is to adjudicate issues of risk on *refoulement* of persons, many of whom have claimed Convention refugee status and some of whom will have been granted Convention refugee status only to later lose that status. Whether or not persons who apply for a Pre-Removal Risk Assessment have claimed Convention refugee status, they may well allege that their security of the person is at issue and that, by virtue of section 7 of the *Charter*, they are entitled not to be deprived of that security of the person "...except in accordance with the principles of fundamental justice." Thus, counsel urged, the independence and impartiality, or lack of institutional bias, on the part of PRRA Officers must be seen to be substantial.

[22] Against the foregoing, I will approach the allegations now before the Court of lack of independence or impartiality, or institutional bias, on a standard of reasonable apprehension of bias or lack of independence or impartiality, not viewed through the eyes of a person of "very sensitive or scrupulous conscience", but rather taking into account the guidance from the Supreme Court of Canada as quoted above. That guidance directs me to bear in mind that grounds for a reasonable apprehension of bias or perception of a lack of institutional independence and impartiality must be "substantial". I am satisfied that this is particularly true on the facts of this matter where I am further satisfied that substantial deference is owed to Government decisions that relate to appropriate organization of public servants devoted to the administration of the vast range of responsibilities of the Government of Canada.

c) Background

[23] The Pre-Removal Risk Assessment ("PRRA") Program was first created on the coming into force of the *Immigration and Refugee Protection Act*[10] on the 28th of June, 2002. The program is described in a Regulatory Impact Analysis Statement relating to draft regulations under the proposed immigration and refugee protection regulations that was published in the Canada Gazette, Part I, on the 15th of December, 2001. The description of the Program in that document is attached as a Schedule to these reasons.

[24] Responsibility for the program was vested in the Minister of Employment and Immigration on the coming into force of the *Immigration and Refugee Protection Act* but authority for individual program decisions was delegated to officers in the Minister's department of government, that is to say, the Department of Citizenship and Immigration.

[25] For ease of reference, the following brief paragraph is extracted from the much more extensive description of the program that is set out the Schedule to these reasons:

> The policy basis for assessing risk prior to removal is found in Canada's domestic and international commitments to the principle of non-refoulement. This principle holds that persons should not be removed from Canada to a country where they would be at risk of persecution, torture, risk to life or risk of cruel and unusual treatment or punishment. Such commitments require that risk be reviewed prior to removal.
>
> La justification, au niveau des politiques, de l'examen des risques avant renvoi se trouve dans les engagements nationaux et internationaux du Canada en faveur du principe de non-refoulement. En vertu de ce principe, les demandeurs ne peuvent être renvoyés du Canada dans un pays où ils risqueraient d'être persécutés, torturés, tués ou soumis à des traitements ou peines cruels ou inusités. Ces engagements exigent que les risques soient examinés avant le renvoi.

[26] Almost everyone who is subject to a removal order that is in force is entitled to apply under the program for a pre-removal risk assessment. Applicants include those who have had claims to Convention refugee status denied by the Immigration and Refugee Board, those found to be ineligible for consideration of a Convention refugee claim and those who have had an earlier negative pre-removal risk assessment decision but who were not removed from Canada within six (6) months of the date of that earlier decision. For some, the pre-removal risk assessment is the only risk assessment made on the facts of their particular circumstances. For others, given the sometimes very lengthy delays between negative Convention refugee status decisions and completion of arrangements for their removal, the pre-removal risk assessment is an opportunity to have the impact of changed country conditions, whether in general or specifically to their circumstances, assessed.

[27] While a first-time application for a pre-removal risk assessment is being reviewed and assessed, a statutory stay of removal of the Applicant is in effect by virtue of section 232 of the *Immigration and Refugee Protection Regulations*[11].

[28] While the Applicant does not concede that the administration of the PRRA program while it was within the mandate of the Department of Employment and Immigration was free of institutional bias or was sufficiently impartial and independent, that question is not before the Court on this application for judicial review.

[29] The Canada Border Services Agency ("CBSA") was created within the Canadian Public Service on the 12th of December, 2003. A Notice published by the Government on that day read in part as follows:

> On Friday, December 12, 2003, the Government announced the creation of the Canada Border Services Agency (CBSA), which will be part of the Department of Public Safety and Emergency Preparedness. On this second anniversary of the signing of the Canada United States Smart Border Declaration, the CBSA will build on its success to ensure the twin goals of economic security and public safety. The CBSA will continue to use the principles of risk management to expedite the flow of low-risk people and goods [and] to focus efforts on high-risk travellers and commercial traffic more effectively.

[30] On the same day, by Order in Council PC 2003-2063, under the authority of the *Public Service Rearrangement and Transfer of Duties Act*[12], control and supervision of portions of the Public Service in the Department of Citizenship and Immigration were transferred to the CBSA. Those portions were the following:

(i) that portion of the International Region performing intelligence and interdiction functions overseas on a full-time basis,

(ii) that portion of the Departmental Delivery Network Branch responsible for the Immigration Warrant Response Centre,

(iii) the Vancouver Enforcement Office and the Intelligence Unit, Vancouver,

(iv) the Enforcement Directorate, Toronto,

(v) the Enforcement Directorate, Montreal and the Intelligence Unit, Montreal, and

(vi) those portions of the offices in Canada, other than ports of entry, that deal on a full-time basis with enforcement (removals, detention, investigations, pre-removal risk assessments, hearings, appeals, interventions and war crimes) and intelligence; and ... [emphasis added]

[31] It was not in dispute before the Court that there was no public consultation regarding the foregoing transfer of the pre-removal risk assessment function from the Department of Employment and Immigration to the CBSA. That portion of the

reorganization drew criticism from Amnesty International, the Canadian Council for Refugees, the US Committee for Refugees and other refugee advocates.

[32] On the 8th of October, 2004, by Order in Council PC 2004-1154, once again pursuant to the *Public Service Arrangement and Transfer of Duties Act*, "...control and supervision of the portions of the Public Service within the Canada Border Services Agency that carry out pre-removal risk assessments..." was transferred back to the Department of Citizenship and Immigration. A related news release stated:

> Responsibility for pre-removal risk assessments returns to CIC as this activity is more closely aligned with the protection aspect of CIC's mandate. [emphasis added]

[33] It is for the period of time from the 12th of December, 2003, to 8th of October, 2004, close to ten (10) months, that it is here alleged that administration of the PRRA Program lacked sufficient independence and impartiality or was subject to institutional bias, in favour of enforcement or removal, over protection of those potentially at risk of removal to persecution, torture, risk to life or risk of cruel and unusual treatment or punishment.

d) The positions of the parties

[34] Not surprisingly, the only evidence adduced on behalf of the Applicants tending to demonstrate institutional bias or want of impartiality and independence was anecdotal at best. That being said, actual evidence of institutional bias or lack of independence or impartiality is not the test. Rather, as earlier noted, the test is the perception in the mind of a reasonably informed observer.

[35] By contrast, counsel for the respondent adduced evidence that PRRA decision-makers, generally speaking, had security of tenure in that the vast majority of them were indeterminate or permanent employees during the ten (10) months in question and as such, additionally, had reasonable security of remuneration. Further, they received reasonably extensive training both at entry level and during the course of their service which included training regarding the importance of maintaining both the perception and reality of their independence and impartiality in decision-making. Immediate supervisors of those charged with doing PRRA assessments and reaching risk-of-removal conclusions were themselves without "enforcement" or "removal" responsibilities. Such persons, it was urged, acted as insulators or, in the modern idiom, "firewalls" between PRRA decision-makers and those whose functions were directly related to enforcement and removal. Little evidence was provided regarding security of resourcing for the PRRA program both at human resource and the technical and research resource levels. It was not in dispute that policy guidance continued to be provided to the PRRA Program Officers from within Citizenship and Immigration and not from the CBSA.

e) Conclusions

[36] In *R. v. Lippé*[13], Chief Justice Lamer, writing for himself and Justices Sopinka and Corey, described at page 144 the test for determining which occupations

will raise a reasonable apprehension of a bias on an institutional level in the following terms:

> Step One: Having regard for a number of factors including, but not limited to, the nature of the occupation and the parties who appear before this type of judge, will there be a reasonable apprehension of bias in the mind of a fully informed person in a substantial number of cases?
>
> Step Two: If the answer to that question is no, allegations of an apprehension of bias cannot be brought on an institutional level, but must be dealt with on a case-by-case basis. [emphasis in the original]

[37] Justice Gonthier, writing for the majority of the Court, noted at page 152:

> I have had the benefit of the reasons for judgment of the Chief Justice. I agree with his conclusions and agree substantially with the reasons upon which they rest.

[38] I am satisfied that what Chief Justice Lamer described as "...a reasonable apprehension of bias on an institutional level...", and in the case there before the Court, he was dealing with a Court as an institution, applies equally to what is sometimes described as "structural bias" or "systemic bias" and to a reasonable apprehension of lack of independence and impartiality in the totality of members of an institution such as public officials charged with a largely adjudicative function, and, more specifically, such as members of the PRRA decision-making group.

[39] On the evidence before the Court in this matter, I conclude that there would not be a reasonable apprehension of bias, in the mind of a fully informed person, in a substantial number of cases. That is not to say that there could not well be a reasonable apprehension of bias, as a matter of first impression, in the mind of a less than fully informed person, in a substantial number of cases. The mandate of the CBSA was portrayed in the substantial amount of public information surrounding its establishment as a security and enforcement mandate, a mandate quite distinct from a "protection" mandate. But the evidence before the Court indicates that its mandate was, at least in the period in question, rather multi-faceted and that there was a conscious effort to insulate the PRRA Program from the enforcement and removal functions of the CBSA. Thus, I conclude that a "fully informed person" would not have a reasonable apprehension that bias would infect decision-makers in the PRRA Program in a "...substantial number of cases".

[40] Justice Snider was speaking of the structure in place when PRRA officers were organizationally within the CBSA. In an earlier decision of my colleague Justice Snider in *Nalliah v. Canada (Solicitor General)*[14], she stated at paragraph [20] of her reasons:

> ... While *Baker*... stated that, to satisfy the requirements of procedural fairness, the affected person must have access to an impartial process, appropriate to the statutory, institutional and social context of the decision, the evidence before me tends to show that the Government has developed a structure within which the PRRA Officers' function meets this standard. [citation omitted]

[41] Justice Snider was speaking of the structure in place when PRRA officers were organizationally within the CBSA. I share Justice Snider's conclusion. The fact that the Government within ten (10) months of transferring the PRRA Program from the Department of Citizenship and Immigration to the CBSA, determined to transfer it back because, following consultations, it concluded the function was more in the nature of a protection function than an enforcement and removal function does not, I conclude, lead to a presumption that while the program was with CBSA, it was subject to institutional bias or lack of impartiality and independence. Rather, I am satisfied that it reflects the fact that the Government concluded that, in the minds of those concerned with protection of persons subject to removal from Canada, as a matter of first impression, the situation of the Program in CBSA raised apprehensions.

[42] Finally, in *Hamade et al v. The Solicitor General of Canada*[15], my colleague Justice Dawson, on an application for a stay of removal, wrote:

> Notwithstanding the low threshold, the Applicants have failed to establish that a serious issue exists. In this regard, the allegation of systemic bias has [been] previously found not to be a serious issue. See: *Awolor v. MCI*, IMM-870-03 and *Ariri v. MCI*, IMM-871-03. While these cases pre-date the most recent re-organization of the Canada Border Services Agency, the evidence before the Court is to the effect that "The PRRA office is structured in such away [sic] to ensure that the independence of the PRRA decision-maker is safeguarded".

[43] I reach the same conclusion on the evidence before the Court, notwithstanding the extensive efforts made on behalf of the Applicants and others who are similarly situated to demonstrate that a reasonable apprehension of systemic bias, in the mind of a fully informed person, is justified.

[44] Based on all of the foregoing, I conclude that this application for judicial review must be dismissed.

f) Post-Script

[45] During the hearing before the Court, counsel for the Respondent raised the issue, albeit from the Court's perspective, without much enthusiasm, of failure on the part of the Applicants or their counsel to raise the issue of institutional bias or lack of independence and impartiality at the first opportunity. In light of my conclusions to this point, I am satisfied that I need not deal with the issue. That being said, if I were required to deal with the issue, I would dismiss it summarily. Responsibility for the PRRA program only vested in the CBSA effective from the 12th of December, 2003. In the early days of the operation of the program under that authority, it would have been extremely difficult, if not impossible, to marshall evidence in support of a concern regarding institutional bias or lack of institutional impartiality or independence. Indeed, even if such evidence could have been marshalled, it is unlikely that it could have been presented with any significant success before a PRRA Officer.

[46] Very shortly after post-December 12th, 2003 PRRA decisions arising under the new administrative regime became reviewable, the issue was, in fact, raised

before this Court. The first challenges before this Court raising the issue were made in January of 2004.

[47] In the result, I am satisfied that the Respondent could not succeed on the basis of a claim of delay in raising the issue of institutional bias or lack of impartiality or independence.

CERTIFICATION OF A QUESTION

[48] Counsel for the Applicants and for the Respondent jointly proposed certification of the following question on this matter:

Did the Pre-Removal Risk Assessment Unit, under the Canada Border Services Agency, possess the requisite degree of institutional independence such that natural justice and fundamental justice were respected?

[49] I am satisfied that the jointly proposed question is a serious question of general importance and that an answer to the question would be clearly determinative on any appeal from the Order reflecting my conclusions herein. The question proposed will be certified.

Ottawa, Ontario

May 27, 2005

[1] R.S.C. 1985, c. I-2.

[2] Applicants' Application Record, page 11.

[3] Applicants' Application Record, page 12.

[4] Applicants' Application Record, pages 18 and 19.

[5] (2005), 41 Imm. L.R. (3d) 157, leave to appeal to the Supreme Court of Canada denied, [2005] S.C.C.A. No. 119.

[6] Part I of the *Constitution Act, 1982* (R.S.C. 1985, Appendix II No. 44), being Schedule B to the *Canada Act, 1982* (U.K.), 1982 c. 11.

[7] Applicant's Application Record in *Nalliah v. The Minister of Citizenship and Immigration and the Solicitor General of Canada*, Court File Imm-9071-04, Volume 2, page 375, paragraph 32.

[8] [1978] 1 S.C.R. 369.

[9] [2003] 1 S.C.R. 884.

[10] S.C. 2001, c. 27.

[11] SOR/2002-227.

[12] R.S., 1985, c. P-34.

[13] [1991] 2 S.C.R. 114.

[14] 2004 FC 1649; [2004] F.C.J. N. 2005 (Q.L.) F.C.

[15] Order dated the 29th of September, 2004, IMM-7864-04.

SCHEDULE

XVII--PRE-REMOVAL RISK ASSESSMENT-- PART 7, DIVISION 3

Description

Section 112 of the *Immigration and Refugee Protection Act* (IRPA) provides that, with certain exceptions, persons in Canada may, in accordance with the Regulations, apply to the Minister for protection if they are subject to a removal order that is in force.

The mechanism provided for the evaluation of such applications is the Pre-Removal Risk Assessment (PRRA). Any person awaiting removal from Canada who alleges risk will not be removed prior to risk assessment. For most applicants a positive determination results in the granting of protection and subsequently, in the granting of permanent residence. However, in the case of applicants described in subsection 112(3) of the IRPA, a positive determination simply stays the execution of the removal order. A negative determination results in removal from Canada.

Subsection 112(3) refers to persons who:

-- have been determined to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality; or

-- have made a claim to refugee protection that was rejected o n the basis of Section F of Article 1 of the Refugee Convention;

-- are named in a security certificate further to subsection 77(I) of the IRPA.

The policy basis for assessing risk prior to removal is found in Canada's domestic and international commitmen ts to the principle of non-refoulement. This principle holds that persons should not be removed from Canada to a country where they would be at risk of persecution, torture, risk to life or risk of cruel and unusual treatment or punishment. Such commitments require that risk be reviewed prior to removal.

Section 116 of the IRPA provides the authority for the making of regulations on any matter regarding the Pre-Removal Risk Assessment. In particular, it allows for provisions regarding the procedures to be followed with respect to applications for protection, including the establishment of factors to determine whether an oral hearing is required.

Purpose of these provisions

The pre-removal risk assessment regulations provide a frame-work for the implementation of the PRRA such that Canada's domestic and international obligations are honoured and that the safeguards provided by the *Canadian Charter of Rights and Freedoms* are respected.

In addition, the regulations encourage applicants to exercise diligence in making their applications according to specific objective timelines in order to ensure that the PRRA assessment remains linked in time to removal.

What the regulations do

The regulations on the pre-removal risk assessment:

-- p rovide that potential applicants will be formally notified that they may apply for protection through PRRA prior to removal from Canada;

-- establish the time and the manner in which such notification is given;

-- specify the timeframes for the making of a n application and written submissions in support of the application and provide for a stay of execution of removal order for applications submitted within the time frames until such time as the final determination is made; and

-- provide for the making of subsequent applications without notification once the initial application period has expired or after an initial application has been rejected and specify that such applications do not benefit from a stay of execution of removal order;

-- specify the facto rs that decision-makers shall consider in determining whether an oral hearing is required:

-- the existence of evidence that raises a serious issue of the applicant's credibility and is related to the protection grounds relevant to the case;

-- that the ev idence is central to the decision; and

-- that the evidence, if accepted, would justify allowing the application for protection.

-- establish rules and procedures governing the holding of oral hearings such that:

-- applicants receive advance notice of the issues of fact to be raised at the hearing;

-- the hearing is limited to questions related to the issues identified in the notice;

-- presence of counsel in a supportive role is allowed at the hearing;

-- evidence f rom third parties may be submitted in writing; and

-- the third party may be questioned if the credibility of that evidence requires verification.

-- provide for an application to be declared abandoned when an applicant fails to report for an oral hearing, is given notice to report on a subsequent date and does not report on that date or when the applicant departs from Canada before the PRRA is carried out;

-- provide for applicants to withdraw an application by sending written notice thereof to the department;

-- specify that the effect of abandonment or withdrawal of an application is rejection of the application for protection; and

-- set out special procedures for consideration of an application. For protection by persons described in subse ction 112(3).

For cases described in subsection 112(3), risk assessment is not carried out against the grounds in the *Geneva Convention.* Instead, risk is assessed against a more restrictive set of criteria which includes the grounds identified in the *Convention Against Torture* as well as risk to life, or risk of cruel and unusual treatment or punishment. The

Regulations stipulate that an assessment of risk to the applicant, if he or she were to be returned to the country where risk is alleged, is provided to the Minister. A separate assessment takes into account whether the applicant constitutes a danger to the public in Canada, the nature and severity of acts committed by the applicant and whether the applicant represents a danger to the security of Canada. In deciding whether a stay should be granted, the Minister considers these assessments as well as the applicant's response to the assessments.

In cases where the Minister has grounds to reconsider a previous decision to grant a stay, a similar procedure for the conduct of such re-considerations is established in the Regulations.

The pre-removal risk assessment regulations also provide that written reasons for a protection decision are to be provided to an applicant upon request.

What has changed

The Pre-Removal Risk Assessment is a new mechanism and, as such, has no direct equivalent under the current legislation.

In effect, by having the Immigration and Refugee Board (IRB) examine consolidated protection grounds (the *Geneva Convention*, the *Convention Against Torture* and the risk to life or the risk of cruel and unusual treatment or punishment), the type of assessment carried out under Post Determination Refugee Claimants in Canada Class (PDRCC) regulations is now incorporated into the determination made by the IRB. The use of the same consolidated protection grounds at the PRRA stage makes risk assessment for failed claimants simpler, in that it is limited to the consideration of new evidence and constitutes a file update.

While access to risk assessment through PDRCC was limited to failed claimants, various additional populations now have access to PRRA. Potential applicants include those found to be ineligible for consideration by the IRB, repeat claimants who no longer have access to the IRB, as well as those who have had risk assessed previously under PRRA but who have not been removed from Canada after a negative protection decision. In the latter case, the PRRA will consist of a file update in the event that new evidence is presented.

The PRRA is closely linked in time to removals and is carried out immediately prior to removal.

While PRRA is a paper-based process for most applicants, it does allow for the possibility of oral hearings where the PRRA decision-maker has concerns regarding the credibility of the applicant. The decision to hold a hearing will be made based on the prescribed factors mentioned earlier. Allowing for the possibility of hearings will ensure that PRAA decision-makers have the tools necessary to ensure a fair and effective risk review.

The new regulatory framework formalizes procedural matters for PRRA such that relevant rules and standards are clearly explained in the Regulations themselves, thus enhancing transparency and uniformity of treatment.

Alternatives

The procedures concerning the pre-removal risk assessment could have been written in the form of administrative guidelines rather than regulations. However, such guidelines would have suffered from the same shortcoming as those surrounding the PDRCC. They would not be binding on either applicants or decision-makers, they would not be as transparent and they would not ensure uniformity of treatment.

Among the factors considered in arriving at an appropriate mechanism for carrying out the pre-removal risk assessment was the need to ensure a balance between a fair and effective risk assessment process and the integrity of the removal process.

Case law in this area indicated that, although the courts had required a risk assessment before removal, particularly in cases where a significant period of time had passed since the protection decision, they had not stipulated any required format for such an assessment. Legal requirements could have been met by a risk assessment process in which the decision was based on consideration of a paper application supported by the opportunity to make written submissions.

It was recognized, however, that transparency requires such a process to be conducted by independent decision- makers and that the PRRA had to provide for an adequate opportunity to present evidence in order to meet Charter of Rights obligations. Furthermore, the process has to be efficient and designed in such a way that it provides minimum opportunities to delay removal while meeting basic Charter and international human rights obligations.

Benefits and Costs

Benefits

Many of the benefits of these provisions are not readily quantifiable as they are directly linked to fundamental justice, procedural fairness and Canadian values. It is also important to note that the regulations ensure compliance with Canada's internation al commitments and obligations with regard to protection.

The key improvements derived from regulations are procedural fairness, clear rules, and uniformity of process and consistency of decision making. Compliance by the applicant is encouraged through the availability of an automatic stay of removal for those who comply with the rules.

Costs

It is anticipated that PRRA will result in intermediate costs due primarily to its universal availability, the formality of the process and the possibility of oral hearings. The current process, PDRCC, being under-resourced has suffered from significant inventory levels and processing delays.

The new PRRA Officers and Removal Officers will require training to implement and ensure overall consistency and integrity of this new program.

The pre-removal risk assessment regulations have a significant impact on enforcement resources. Removal officers have the task of co-ordinating removal arrangements such that travel documents need to be available and itineraries established in tandem with the PRRA process itself. The scheduling of applications for travel documents and the making of travel arrangements are critical components in ensuring that removal is effected rapidly in the event of a negative PRRA decision.

Given the link in time between PRRA and removals, some applicants, fearing imminent removal, react to receipt of the notice to apply for PRRA by going underground. A similar reaction may result when call-in notices are sent out to applicants required to report for an oral hearing. Although the same phenomenon has been observed under the PDRCC system, the proportion of applicants choosing to flee is expected to increase as applicants will now receive advance notice of the PRRA assessment. As a result, increased use of investigation resources will likely be required in the PRRA context.

Recruitment and training of new PRRA decision-makers must precede implementation.

Consultation

Discussion papers outlining the rationale behind regulatory policy orientations were drafted and distributed to a number of parties for comment.They formed the basis of consultations. Consultations took place both formally and informally and included parties such as the Canadian Council for Refugees (CCR), The United Nations High Commissioner for Refugees (UNHCR) and the Immigration and Refugee Board (IRB).

Notwithstanding the fact that the relevant jurisprudence allows for hearings to take place on paper, external parties raised the concern that oral hearings should be granted to PRRA applicants. Some argued that all applicants should benefit from an oral hearing. The criteria specified in the Regulations help decision-makers to determine whether a hearing is required. These criteria take into account the concerns identified, the importance of the PRRA decision to the individual and the need to provide an appropriate level of control over the number of cases in which an oral hearing is held, in order to ensure the timeliness of the removals process.

Representations from stakeholders argued that individuals should be allowed to make multiple applications for PRRA in the event that circumstances had changed since the time of an earlier protection decision. They also argued that all applications should benefit from automatic stay provisions. The Department agreed with the view that applicants should be able to apply for a new PRRA in the event of a change in circumstances. However, the automatic granting of stays for every application was considered untenable given the potential for applicants wishing to delay removal to use the PRRA recourse as means to this end. Consequently, an initial application for PRRA made within the application period benefits from an automatic stay of execution of the removal order. Any further applications do not benefit from the automatic stay provisions.

In response to comments by those consulted, adjustments made include allowing multiple applications; a six-month bar on applications was dropped.

Compliance and Enforcement

Given that critical dates in the process will be recorded in CIC systems, compliance with timelines for applications, submissions and decisions may be verified by consulting the systems themselves. Applicants who do not exercise diligence with respect to relevant time frames for making an application will not benefit from automatic stay provisions granted to applicants who are in compliance.

Applicants failing to report for an oral hearing may find their applications declared abandoned. Should they subsequently reapply, they will not benefit from automatic stay provisions granted to applicants who are in compliance.

With regard to compliance with the procedural equity and fairness aspects of the Regulations, all decision-makers will receive comprehensive training, which will be a pre-requisite for exercising the role of the PRRA officer. Compliance with these aspects will be subject to verification through quality assurance exercises.

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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