Date: 20040630

Docket: A-422-03

Citation: 2004 FCA 250

CORAM: DÉCARY J.A.

LÉTOURNEAU J.A.

PELLETIER J.A.

BETWEEN:

ROU LAN XIE

Appellant

(Applicant)

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

(Respondent)

Heard at Winnipeg, Manitoba, on June 3, 2004.

Judgment delivered at Ottawa, Ontario, on June 30, 2004.

REASONS FOR JUDGMENT BY:
PELLETIER J.A.

CONCURRED IN BY:
DÉCARY J.A.

LÉTOURNEAU J.A.

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REASONS FOR JUDGMENT

[1] Section 98 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act) provides that persons who are excluded from Convention refugee status under sections E or F of Article 1 of the *United Nations Convention Relating to the Status of Refugees* (the Convention) are also excluded from refugee protection under the Act. One of those exclusions, found at paragraph 1F(b), applies to persons about whom there are serious reasons for considering that they have committed a serious non-political crime outside the country of refuge. This appeal raises questions about the application of that exclusion in cases where a claimant faces a risk of torture if returned to her country of origin. The appellant argues that the effect of the decision of the Supreme Court of Canada in *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1 (*Suresh*), is that the exclusion should not be applied where a person's removal from Canada would expose her to a risk of torture, save for "exceptional circumstances" which do not include an allegation of the commission of purely economic crimes. The respondent's position is that the question of removal from Canada is premature since the effect of the exclusion is simply to

deny the appellant refugee protection. The question of removal will be dealt with in the course of the appellant's Pre-removal Risk Assessment (PRRA) where all of the appellant's arguments about the risk of torture can be made. In my view, the respondent's position is correct in law and the appeal should therefore be dismissed.

THE FACTS

[2] This question arises in the context of the appellant's claim for refugee protection. The appellant is a citizen of the People's Republic of China where she was a senior official in the Guangzhou Commission for Foreign Economic Relations and Trade. She claims that she feared she was about to be targeted for her refusal to participate in corrupt practices, so she fled China in August 1999. She arrived in Canada in 2001 after having sojourned in various countries, including a 19 month stay in Venezuela. Upon her arrival, she made a claim for refugee protection.

[3] In the course of processing her claim, two facts emerged. The first is that the appellant and her daughter had to their names bank accounts containing approximately $2.7 million dollars. The second is that at the request of the Chinese authorities, an international warrant for the arrest of the appellant has been issued in which it is alleged that she embezzled over "CNY 7 million" from the Chinese state.

[4] After carefully considering the appellant's account of the reasons for her flight from China, a single member of the Refugee Protection Division (the Board) found that the appellant lacked credibility. In particular, the Board did not believe that the appellant was forced to flee China to avoid persecution for refusing to participate in corrupt practices and for criticizing the state's economic policies. Nor, given her modest circumstances in China, did the Board believe the appellant's explanation for her wealth. On the basis of the appellant's unexplained wealth and the outstanding warrant for her arrest, the Board applied the exclusion found at paragraph (b) of section F of Article 1 of the Convention, which excludes from the status of Convention refugee any person with respect to whom there are "serious reasons for considering that ... he has committed a serious non-political crime outside the country of refuge...".

[5] Notwithstanding its conclusion that the exclusion applied, the Board went on to consider the appellant's claim for refugee protection. Given its findings as to credibility, it found that there was no *nexus* between the appellant's conduct and the Convention grounds for the granting of refugee status, and therefore the appellant was not a Convention refugee. On the other hand, it considered that, in light of the offence with which the appellant was charged, she faced a risk of torture at the hands of the Chinese authorities if she were returned to China. The Board's conclusion was that, but for the exclusion, the appellant was a person in need of protection. However, having applied the exclusion, the Board rejected the appellant's claim for refugee protection.

[6] The appellant sought judicial review of the Board's decision in the Federal Court. Her application came before Kelen J. who dismissed it at (2003), 239 F.T.R. 59, 2003 FC 1023. The learned judge found that the Board's conclusion as to the appellant's credibility was not patently unreasonable. He also found that the Board was entitled to consider the international warrant in deciding whether there were

serious reasons for considering that the appellant had committed a serious crime. After reviewing the UNHCR Handbook, Federal Court jurisprudence and academic commentary on the subject, Kelen J. held that there was no basis for concluding that a purely economic crime could not be a serious crime within the meaning of the exclusion.

[7] The judge then considered the argument that the Board erred in not weighing the risk of torture against the nature of the crime when applying the exclusion to the appellant. He applied the jurisprudence of this Court in *Gil v. Canada (Minister of Citizenship and Immigration)*, [1995] 1 F.C. 508 (*Gil*) and *Malouf v. Canada (Minister of Citizenship and Immigration)* (1995), 190 N.R. 230 (F.C.A.) (*Malouf*), in which the notion of balancing in the application of the exclusion at Article 1F(b) was rejected. He also dismissed the argument that the decision of the Supreme Court of Canada in *Suresh* had changed the law in this regard. He distinguished *Suresh* on the basis that it was a case dealing with removal from Canada whereas the present case is one where the appellant seeks admission to Canada. He relied upon the Convention, as well as the academic commentary with respect to the Convention, in concluding that a lower standard applies to admission decisions than to removal decisions.

[8] Finally, Kelen J. dealt with the argument that section 7 of the *Canadian Charter of Rights and Freedoms* (the *Charter*) applied to prevent removal of the appellant to a risk of torture by pointing out that the proper forum for such an argument is the PRRA, which is provided for at section 112 (and following) of the Act. Accordingly, the learned applications judge dismissed the application for judicial review.

THE CERTIFIED QUESTIONS

[9] Kelen J. certified two questions:

> 1) Can a refugee claimant be excluded from protection under Article 1F(b) of the *Refugee Convention* for committing a purely economic offence?
>
> 2) In light of *Suresh*, is the Refugee Division required to conduct a balancing of the nature and severity of the claimant's offence against the possibility that he or she might face torture if returned to his or her country of origin?

[10] Before this Court, counsel for the appellant reformulated the questions on the basis of the Board's conclusion that the appellant was at risk of torture if returned to China to face the charges pending against her. While the certified questions do not limit the scope of the appeal (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 12), they represent the application judge's view of the serious question of general importance raised by the application for judicial review. To that extent, counsel's reformulation of the questions treads upon the application judge's discretion. The issues raised by the appellant can be disposed of in the appeal without the necessity of reformulating the questions.

THE APPELLANT'S ARGUMENTS

[11] The appellant raised three issues. She argued that the international warrant ought not to have been admitted into evidence because it was illegally obtained. By allowing the warrant to go into evidence, the Board brought the administration of justice into disrepute. Secondly, she argued that even if the warrant was allowed into evidence, there was no evidence before the Board capable of supporting a conclusion that there were serious reasons for considering that she had committed a serious crime, since neither her unexplained wealth nor the fact of the warrant were evidence of the commission of an offence. The appellant's final argument was that since the Supreme Court had decided in *Suresh* that a person could only be removed from Canada to face a risk of torture in "exceptional circumstances", a purely economic crime could never constitute a serious crime for the purposes of the application of the exclusion because it would not meet the test of "exceptional circumstances". Furthermore, given the absolute prohibition against return to the risk of torture in the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture)*, there is never any question of balancing the seriousness of the crime alleged against a claimant and the risk of the torture. Counsel for the appellant candidly admitted that the issue of return to torture is determinative of this appeal. Finally, there was considerable discussion as to the criteria for determining whether a purely economic crime may be a "serious non-political crime" within the meaning of Article 1F(b) of the Convention. To the extent that his analysis deals with the question of "serious non-political crime" independently of the issue of torture, I adopt Kelen J.'s reasons and conclusion. I do not propose to deal with this issue any further.

ANALYSIS

Admissibility of the warrant

[12] I begin by disposing of the first two issues raised by the appellant. The basis for the allegation that the international warrant was illegally obtained is the diplomatic note which accompanied the warrant. In that note, the Foreign Affairs Bureau of the Public Security Ministry of the People's Republic of China acknowledged that:

> On April 23, the Public Security Agency in the Guangdong Province of our country received a note from your consulate in Guangzhou, stating that a Chinese woman by the name of XIE Rou Lan was in the process of making a refugee claim in Canada, but said person was not in possession of any valid identity documents, and requested verification as to whether XIE was facing any allegations of criminal offence(s) in China.

[13] The Board expressed its discomfiture over the fact that Canadian consular officials had disclosed that a particular individual was making a refugee claim:

> I would add that I have concern as to how the claimant's presence in Canada came to the attention of the Chinese authorities ... It would appear that the Canadian government informed the alleged persecutor of the refugee claim, something that should not have happened. Indeed, the Minister's

Representative was at pains to make it clear at the hearing that this should not have occurred.

[14] But the fact that something "should not have occurred" does not mean that it is either illegal or unlawful. When pressed as to the basis for the allegation that the warrant was illegally obtained, counsel argued that by bringing the appellant to the attention of the Chinese authorities, the government had increased the risk of torture in the event of her return. Given the requirement in the *Convention against Torture* that the subscribing parties take steps to prevent torture, the government had breached its treaty obligations which, for present purposes, ought to be treated as an unlawful act.

[15] It is pure speculation as to whether the disclosure of the appellant's refugee claim increased the risk of torture. From what one can gather from the Board's reasons, the risk of torture arises in the course of detention during the criminal investigation. There is nothing before us to suggest that the disclosure that a refugee claim has been made would affect that particular risk, or would create a risk of torture on its own.

[16] Even if one assumes that the Chinese diplomatic note is an accurate report of the course of events, the apparent lapse by the consular service does not provide a basis for saying that the warrant was illegally obtained evidence. Consequently, the question of exclusion of the warrant on the ground that it would bring the administration of justice into disrepute does not arise.

Evidence of criminality

[17] Counsel also argued that even if the warrant is admitted into evidence, there is no evidence which would lead one to consider that the appellant has committed a serious crime outside Canada. This is so for two reasons. The first is that reliance upon the warrant itself is contrary to the presumption of innocence. The second is that neither the warrant nor the appellant's unexplained wealth are evidence of criminality.

The presumption of innocence

[18] Counsel argued that reliance upon the allegations in the warrant offended the presumption against innocence since the warrant contained nothing but unproven allegations which have no evidentiary value until proven in a court of law. The presumption of innocence cannot apply to the issuance of the documents initiating criminal proceedings because the presumption is inconsistent with an allegation of wrongdoing. One does not issue a warrant for the arrest of a person without a reasonable belief that the person has committed a criminal offence. The presumption of innocence applies to those who must determine whether the person is, in fact and in law, guilty of the crime alleged against her.

[19] The role of the presumption of innocence was set out succinctly by Jean-Louis Baudouin in a report of a panel discussion on the effectiveness of the justice system and the deterioration of the presumption of innocence (*"L'efficacité de la*

justice vs La détérioration de la présomption d'innocence", Revue du Barreau, Tome 38, Numéro 4, Juillet-Août 1978):

> The criminal justice investigation system, in operational terms, does not now operate, nor has it in the past, on the presumption of innocence but rather on the basis of a moral certitude ("conviction intime") of guilt, which in some ways resembles a kind of presumption of guilt, not in a legal sense but in a common sense kind of way. So it is that for the police to arrest someone, there must be reasonable and probable grounds to believe that the accused has committed a crime. The arrest is therefore based upon the moral certitude that the accused is culpable. When the Crown subsequently lays a charge, it presumes or anticipates the ultimate conviction of the accused. This so-called presumption of guilt is therefore a functional premise. It informs the operation of the penal system by designating those who are to be subject to the system, as opposed to those who are not.
>
> The presumption of innocence operates on another level. It requires those who are to decide on the guilt of the accused to perform a logical *tour de force* relative to the preceding steps in the process. It requires them to ignore probabilities, to discard the logical conclusions drawn earlier in the proceedings. The presumption of innocence accordingly is not functional. It is legal, ideological and normative. The accused must be treated by the Court "as though" he is innocent even though all earlier operations point to his guilt.
>
> (Translation by the Court.)

[20] The Board was entitled to presume that the warrant for the appellant's arrest was issued in the belief that she was guilty of misconduct. The presumption of innocence would apply to the proof of that misconduct, but it does not apply so as to prevent the Board from taking the Chinese state's belief in her guilt into account in deciding if there are serious reasons to consider that she committed the crime with which she is charged.

Probative value of the evidence of criminality

[21] Counsel went on to argue that even if the warrant was received in evidence, it contained only allegations and no proof as to the commission of an offence. Counsel distinguished this case from *Legault v. Canada (Secretary of State)* (1997), 219 N.R. 376 (*Legault*), in which this Court held that an adjudicator could rely upon an indictment and an arrest warrant to conclude that there were reasonable grounds to conclude that the claimant had committed a serious offence outside Canada. According to counsel, the warrant and indictment in *Legault* contained detailed particulars of the crimes alleged against the claimant, as opposed to the skeletal details contained in the warrant in question here.

[22] In deciding what weight to give to the warrant, the Board was entitled to consider that it named the appellant, it referred to a specific criminal offence, as well as the time and place when the offence was alleged to have been committed, and stipulated a maximum sentence. All of those details could reasonably lead the Board to give the warrant a certain amount of weight. Counsel sought to make much of the

fact that the maximum sentence was wrongly stated to be life imprisonment when, in actual fact, the maximum penalty is the death penalty. The disposition in question provides for a maximum penalty of imprisonment in excess of 10 years to life, and to the death penalty in "especially serious cases" (Appeal Book at p. 119). Rather than being an error, the statement of the maximum punishment in the warrant may simply reflect the Chinese state's view that the appellant's case is not serious enough to warrant the death penalty. No useful purpose is served by speculating as to the intentions of the Chinese authorities at this stage.

[23] Counsel also argued that just as the warrant was not evidence of criminality, neither was the appellant's unexplained wealth. Wealth for which there is no explanation is not criminal; it is merely unexplained. It is not a crime to have unexplained wealth, and not all those who have unexplained wealth have acquired it by criminal means. I agree that unexplained wealth is not, in and of itself, evidence of criminality. However, in the context of an allegation of embezzlement of millions of dollars, unexplained wealth acquires a certain probative value. It may not be sufficient proof of criminality but it cannot be said that it is no proof at all. In the end, it is the combination of the warrant alleging embezzlement of a significant sum of money and the appellant's possession of a sum of money of a comparable order of magnitude for which she has no satisfactory explanation which is probative, even though each element taken by itself would not necessarily be so. For those reasons, the Board did not err in concluding that there were serious reasons to consider that the appellant had committed a serious crime. The fact that this evidence falls far short of the standard of proof in criminal cases is of no moment since the issue is not whether the appellant committed the crime of which she is accused. The issue is whether there are serious reasons for considering that she did. The evidence before the Board is capable of supporting that conclusion.

Suresh and removal to the risk of torture

[24] As noted above, the appellant's principal argument is that since Canadian law prohibits the return of a person to face a risk of torture other than in "exceptional circumstances", a person cannot be excluded from refugee protection for purely economic crimes because those crimes will never amount to "exceptional circumstances". It is implicit in the appellant's argument that she treats the exclusion from refugee protection as tantamount to removal from Canada.

[25] The difficulty with the appellant's argument is that it runs counter to the scheme of the Act. It is an attempt to confer upon the Refugee Protection Division a discretion which the Act specifically confers upon the Minister.

[26] Whereas the former *Immigration Act*, R.S.C. 1985, c. I-2, offered asylum only to Convention refugees, and to those who were allowed to remain in Canada on humanitarian and compassionate grounds (including the risk of inhumane treatment upon their return to their country of origin), the present Act extends and consolidates the grounds upon which Canada will accept persons at risk of harm. It does so through the use of the concepts of refugee protection and protected person. Refugee protection is offered to Convention refugees, to persons in need of protection and, with some exceptions, to persons whose application for protection is allowed. Those to whom refugee protection is extended are given the status of protected persons:

95. (1) Refugee protection is conferred on a person when

(*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;

(*b*) the Board determines the person to be a Convention refugee or a person in need of protection; or

(*c*) except in the case of a person described in subsection 112(3), the Minister allows an application for protection.

(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).

95. (1) L'asile est la protection conférée à toute personne dès lors que, selon le cas_:

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) la Commission lui reconnaît la qualité de réfugié ou celle de personne à protéger;

c) le ministre accorde la demande de protection, sauf si la personne est visée au paragraphe 112(3).

(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).

[27] There are three ways in which refugee protection can be obtained. In the first place, refugee protection is extended to persons falling within the definition of Convention refugee, which has not been changed by the new Act. Secondly, refugee protection is also extended to those persons who are found to be in need of protection, a class defined by the risk of harm as opposed to the motivation of those inflicting the harm. The grounds upon which such an application can be made are found at section 97 of the Act, and include those who are in "danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the *Convention Against Torture*":

97. (1) A person in need of protection is a person in Canada whose removal

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi

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.

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.

[28] The third avenue by which a person can be extended refugee protection is by means of an application for protection pursuant to section 112. Persons facing deportation may apply to the Minister for protection on the basis that they face a risk of harm if returned to their country of origin. If the application for protection is granted, such persons acquire refugee protection pursuant to paragraph 95(1)(*c*). The grounds upon which such applications are considered vary according to the process preceding the making of a deportation order against them:

112. (1) A person in Canada, other than a person referred to in subsection 115(1), may, in accordance with the regulations, apply to the Minister for protection if they are subject to a removal order

112. (1) La personne se trouvant au Canada et qui n'est pas visée au paragraphe 115(1) peut, conformément aux règlements, demander la protection au ministre si elle est visée par une mesure de

that is in force or are named in a certificate described in subsection 77(1).	renvoi ayant pris effet ou nommée au certificat visé au paragraphe 77(1).
...	...
(3) Refugee protection may not result from an application for protection if the person	(3) L'asile ne peut être conféré au demandeur dans les cas suivants_:
...	...
(*c*) made a claim to refugee protection that was rejected on the basis of section F of Article 1 of the Refugee Convention; or	*c*) il a été débouté de sa demande d'asile au titre de la section F de l'article premier de la Convention sur les réfugiés;
...	...

[29] Section 95 excludes persons described in subsection 112(3) from refugee protection. Subsection 112(3) lists those persons who are ineligible for refugee protection, including persons who made a claim for refugee protection which was rejected on the basis of section F of Article 1 of the Convention as set out in section 98 of the Act:

98. A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection.	98. La personne visée aux sections E ou F de l'article premier de la Convention sur les réfugiés ne peut avoir la qualité de réfugié ni de personne à protéger.

[30] But exclusion from refugee protection is not exclusion from protection. Section 113 stipulates that persons described in subsection 112(3) are to have their applications for protection decided on the basis of the factors set out in section 97 with additional consideration given to the issue of whether such persons are a danger to the public in Canada or to the security of Canada. Section 97 is the section which identifies the grounds upon which a person may apply to be designated a person in need of protection:

113. Consideration of an application for protection shall be as follows:	113. Il est disposé de la demande comme il suit_:
	...

...

(*c*) in the case of an applicant not described in subsection 112(3), consideration shall be on the basis of sections 96 to 98;

(*d*) in the case of an applicant described in subsection 112(3), consideration shall be on the basis of the factors set out in section 97 and

(i) in the case of an applicant for protection who is inadmissible on grounds of serious criminality, whether they are a danger to the public in Canada, or

(ii) in the case of any other applicant, whether the application should be refused because of the nature and severity of acts committed by the applicant or because of the danger that the applicant constitutes to the security of Canada.

c) s'agissant du demandeur non visé au paragraphe 112(3), sur la base des articles 96 à 98;

d) s'agissant du demandeur visé au paragraphe 112(3), sur la base des éléments mentionnés à l'article 97 et, d'autre part_:

(i) soit du fait que le demandeur interdit de territoire pour grande criminalité constitue un danger pour le public au Canada,

(ii) soit, dans le cas de tout autre demandeur, du fait que la demande devrait être rejetée en raison de la nature et de la gravité de ses actes passés ou du danger qu'il constitue pour la sécurité du Canada.

[31] If an application for protection is allowed, the consequences vary with the person's status:

114. (1) A decision to allow the application for protection has

(*a*) in the case of an applicant not described in subsection 112(3), the effect of conferring refugee protection; and

(*b*) in the case of an applicant described in subsection 112(3), the effect of staying the removal order with

114. (1) La décision accordant la demande de protection a pour effet de conférer l'asile au demandeur; toutefois, elle a pour effet, s'agissant de celui visé au paragraphe 112(3), de surseoir, pour le pays ou le lieu en cause, à la mesure de renvoi le visant.

respect to a country or place in respect of which the applicant was determined to be in need of protection.

[32] For all except those described in subsection 112(3), a successful application for protection results in the grant of refugee protection and the status of protected person. For persons described in subsection 112(3), the result is a stay of the deportation order in force against them. One consequence of the distinction is that protected persons have access to the status of permanent residents and are subject to the principle of non-refoulement:

...

21. (2) Except in the case of a person described in subsection 112(3) or a person who is a member of a prescribed class of persons, a person whose application for protection has been finally determined by the Board to be a Convention refugee or to be a person in need of protection, or a person whose application for protection has been allowed by the Minister, becomes, subject to any federal-provincial agreement referred to in subsection 9(1), a permanent resident if the officer is satisfied that they have made their application in accordance with the regulations and that they are not inadmissible on any ground referred to in section 34 or 35, subsection 36(1) or section 37 or 38.

...115. (1) A protected person or a person who is recognized as a Convention refugee by another country to which the person may be returned shall not be removed from Canada to a country where they would be at risk of persecution for reasons of

...

21. (2) Sous réserve d'un accord fédéro-provincial visé au paragraphe 9(1), devient résident permanent la personne à laquelle la qualité de réfugié ou celle de personne à protéger a été reconnue en dernier ressort par la Commission ou celle dont la demande de protection a été acceptée par le ministre - sauf dans le cas d'une personne visée au paragraphe 112(3) ou qui fait partie d'une catégorie réglementaire - dont l'agent constate qu'elle a présenté sa demande en conformité avec les règlements et qu'elle n'est pas interdite de territoire pour l'un des motifs visés aux articles 34 ou 35, au paragraphe 36(1) ou aux articles 37 ou 38.

...

115. (1) Ne peut être renvoyée dans un pays où elle risque la persécution du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques, la torture ou des traitements ou peines cruels

race, religion, nationality, membership in a particular social group or political opinion or at risk of torture or cruel and unusual treatment or punishment.	et inusités, la personne protégée ou la personne dont il est statué que la qualité de réfugié lui a été reconnue par un autre pays vers lequel elle peut être renvoyée.

[33] That is the structure of the Act as it relates to the determination of claims for protection. It has two streams, claims for refugee protection and claims for protection in the context of pre-removal risk assessments. Those who are subject to the exclusion in section 98 are excluded from the refugee protection stream but are eligible to apply for protection at the PRRA stage. The basis on which the claim for protection may be advanced is the same, but the Minister can have regard to whether the granting of protection would affect the safety of the public or the security of Canada. If protection is granted, the result is a stay of the deportation order in effect against the claimant. The claimant does not have the same access to permanent resident status as does a successful claimant for refugee protection.

[34] With that in mind, I turn to the certified questions, which I reproduce below for ease of reference:

> 1) Can a refugee claimant be excluded from protection under Article 1F(b) of the *Refugee Convention* for committing a purely economic offence?
>
> 2) In light of *Suresh*, is the Refugee Division required to conduct a balancing of the nature and severity of the claimant's offence against the possibility that he or she might face torture if returned to his or her country of origin?

[35] Both questions deal with the role of the Refugee Protection Branch in applying the exclusion for criminality found at Article 1F(b) of the Convention, and incorporated by reference at section 98 of the Act. Question no. 1 deals with the type of crime which is contemplated by the exclusion. Question no. 2 raises the same question but adds the element of a risk of return to torture in light of the decision of the Supreme Court in *Suresh*. On the facts of this case, the question of what constitutes a serious crime arises specifically in the context of a return to torture, hence the appellant's argument that a purely economic offence can never amount to the "exceptional circumstances" referred to in *Suresh*. As a result, I consider that the two questions are simply two aspects of the same issue.

[36] In my view, both questions treat the application of the exclusion as being tantamount to a final removal decision. As the review of the statutory scheme has shown, the purpose of the exclusion is not to remove claimants from Canada. It is to exclude them from refugee protection. Claimants who are excluded under section 98 continue to have the right to seek protection under section 112.

[37] If successful, the appellant's arguments on the issue of balancing, both as to the type of offence which gives rise to the application of the exclusion, and the risk of torture upon return, would remove excluded claimants from the PRRA stream by

giving the Refugee Protection Division the discretion to decide the questions which the Act has specifically reserved to the Minister. The grounds upon which a person may claim to be a person in need of protection before the Refugee Protection Division are the same grounds upon which an excluded claimant may apply to Minister for protection. The only difference is that the Minister may have regard to whether the granting of protection to such a person would pose a risk to the public or would endanger the security of Canada, considerations which are not open to the Refugee Protection Division. From the point of view of statutory interpretation, there is no reason to believe that decisions which are reserved to the Minister should be somehow given to the Refugee Protection Division because there is a risk of torture.

[38] This leads to the question as to whether the decision of the Supreme Court in *Suresh* requires a different reading of the statute. I might point out that the issue of *Suresh* only arises at this point because the Board, having found that the exclusion applied, went on to consider whether the applicant was at risk of torture upon her return to China. In my view, the Board exceeded its mandate when it decided to deal with the appellant's risk of torture upon return with the result that the Minister is not bound by that finding. Once the Board found that the exclusion applied, it had done everything that it was required to do, and there was nothing more it could do, for the appellant. The appellant was now excluded from refugee protection, a matter within the Board's competence, and was limited to applying for protection, a matter within the Minister's jurisdiction. The Board's conclusions as to the appellant's risk of torture were gratuitous and were an infringement upon the Minister's responsibilities.

[39] The decision of the Supreme Court in *Suresh* does not affect the Refugee Protection Division in the application of the exclusion. *Suresh* deals with removal from Canada to face a risk of torture. The exclusion deals with denial of refugee protection. Protection remains available, though subject to considerations of public safety and security of Canada. The weighing which is called for by subparagraphs 113(*d*)(i) and (ii) may well be subject to review to see if those considerations constitute "exceptional circumstances" as contemplated in *Suresh*. But that entire exercise will occur in the context of the Minister's consideration of the application for protection at the PRRA stage. It does not occur in the course of the Refugee Protection Division's application of the exclusions referred to in section 98 of the Act. This conclusion is consistent with prior jurisprudence of this Court as to balancing in the application of the exclusion found in sections E and F of Article 1 of the Convention. See *Gil, supra* and *Malouf, supra*.

[40] I would therefore answer the certified questions in accordance with this analysis. Specifically, I would say that a claimant can be excluded from *refugee protection* by the Refugee Protection Division for a purely economic offence. I stress *refugee* protection because the certified question appears to suggest that the exclusion applies to claims for protection, which is not the case. It applies only to claims for refugee protection. I would also say that in the application of the exclusion, the Refugee Protection Division is neither required nor allowed to balance the claimant's crimes (real or alleged) against the risk of torture upon her return to her country of origin.

[41] For those reasons, I would dismiss the appeal.

"J.D. Denis Pelletier"

J.A.

"I agree.

Robert Décary, J.A."

"I agree.

Gilles Létourneau, J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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