Federal Court  Cour fédérale

Date: 20141219

Docket: IMM-371-14

Citation: 2014 FC 1246

Ottawa, Ontario, December 19, 2014

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

ABDLWAHID HAQI

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] Abdlwahid Haqi sought refugee protection in Canada claiming to fear persecution as a result of his activities with the Kurdish Democratic Party of Iran. Before his refugee claim could be heard, Mr. Haqi's case was referred to the Immigration Division of the Immigration and Refugee Board for a determination as to his admissibility. This referral had the effect of suspending the proceedings then pending before the Refugee Protection Division until such time as the Immigration Division decided the question of Mr. Haqi's admissibility.

[2] The Immigration Division subsequently found that Mr. Haqi was inadmissible to Canada for being a member of an organization for which there are reasonable grounds to believe had engaged in the subversion by force of the Iranian government.

[3] After the Immigration Division made its decision, a Canada Border Services Agency officer gave notice under section 104 of the *Immigration and Refugee Protection Act* advising Mr. Haqi and the Refugee Protection Division that Mr. Haqi had been determined to be inadmissible on security grounds with the result that his refugee claim was not eligible for consideration by the Refugee Protection Division. The effect of this notice was to end the suspension of Mr. Haqi's refugee claim and terminate the proceeding.

[4] Mr. Haqi says that the officer had the discretion not to terminate his refugee claim, and that he erred in failing to exercise that discretion. As a consequence, Mr. Haqi seeks an order quashing the section 104 notice, and asks that the matter be remitted to a different CBSA officer for re-determination.

[5] As will be explained below, I am of the view that section 104 does not confer discretion on CBSA officers to decline to give notice terminating a refugee claim once an officer has concluded that the claim is ineligible for consideration by the Refugee Protection Division on security grounds. Consequently, this application will be dismissed.

I. Background

[6] Mr. Haqi is an Iranian citizen of Kurdish ethnicity who came to Canada in 2011, making his claim for refugee protection upon his arrival. Mr. Haqi's refugee claim was based upon his

alleged fear of the Iranian police and intelligence authorities who were concerned about his activities with the Kurdish Democratic Party of Iran (KDPI).

[7] Mr. Haqi disclosed in his Personal Information Form that he had founded and operated a secret cell of the KDPI in Iran. This disclosure led a Canada Borders Services Agency (CBSA) officer to prepare a report under section 44 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, advising that the officer was of the opinion that Mr. Haqi was inadmissible to Canada as a result of his membership in the KDPI. The case was then referred to the Immigration Division (ID) for a determination as to Mr. Haqi's admissibility.

[8] The Refugee Protection Division (RPD) had yet to schedule Mr. Haqi's refugee hearing at the time that it was notified of the referral of the section 44 report to the ID. In accordance with paragraph 103(1)(a) of *IRPA*, this notice had the effect of suspending Mr. Haqi's RPD proceedings. The full text of the relevant statutory provisions is attached as an appendix to these reasons.

[9] Before the ID, Mr. Haqi admitted to having been a long-term member of the KDPI, and further admitted that the KDPI is "an organization" for the purposes of section 34 of *IRPA*, which deals with inadmissibility on security grounds. He submitted, however, that in considering the activities of the KDPI, the term "subversion by force" should be interpreted in the context of the historical oppression of the Kurdish people in Iran.

[10] According to Mr. Haqi, the violent actions of the KDPI were not "illicit" or "for improper purposes", but were justified under international laws relating to armed conflicts. Mr. Haqi

argues, in the alternative, that he only became a member of the KDPI after it had renounced the use of force.

[11] The ID rendered its decision on December 27, 2013, noting that the jurisprudence has established that section 34 of *IRPA* should be broadly interpreted. It further found as a fact that the KDPI had mounted armed attacks on the Iranian government and that it had advocated for, and used, armed conflict with the intent of destabilizing the regime in power in an effort to compel the recognition of the rights of the Kurdish people.

[12] The ID recognized Mr. Haqi's argument that the KDPI was entitled to use force in advancing the Kurdish people's right to self-determination against an oppressive regime. It held, however, that this argument was one that should properly be advanced as a mitigating factor in support of a request for ministerial relief under section 42.1 of *IRPA*.

[13] Having concluded that Mr. Haqi was a member of an organization for which there are reasonable grounds to believe had engaged in the subversion by force of the Iranian government, the ID found that Mr. Haqi was inadmissible to Canada and issued a deportation order against him. This decision was recently upheld by this Court: *Haqi v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 1167, [2014] F.C.J. No. 1214.

[14] On January 7, 2014, a CBSA officer notified the RPD and Mr. Haqi that Mr. Haqi's refugee claim was ineligible for referral to the RPD. The officer noted that in accordance with paragraph 101(1)(f) of *IRPA*, a claim is ineligible to be referred to the RPD where a claimant has been determined to be inadmissible on security grounds.

[15] In accordance with subsection 104(2) of *IRPA*, the service of this notice had the effect of terminating Mr. Haqi's pending proceedings before the RPD. It is this notice that is being challenged by Mr. Haqi in this application for judicial review.

II. The Decision Under Review

[16] The decision at issue in this proceeding is brief, and provides that:

> The Refugee Protection Division is hereby notified that pursuant to section 104 of the *Immigration and Refugee Protection Act*, it has been determined that your claim for refugee protection is ineligible to be considered by the Refugee Protection Section, for the following reasons:
>
> > In accordance with paragraph 101(1)(f), the Immigration Division has ruled that you have been determined to be inadmissible on grounds of security, as described in section 34 of the *Immigration and Refugee Protection Act*.
> >
> > Consequently, pursuant to section 104, this notice terminates consideration of your claim for refugee protection.

III. Issue

[17] According to Mr. Haqi, the issues raised by this case are "the scope of the discretion of an officer to terminate a refugee claim under s. 104 of *IRPA* and whether that discretion was exercised fairly in the present case".

[18] Before addressing the scope of a CBSA officer's discretion, however, a threshold question must first be addressed, which is whether section 104 of *IRPA* does in fact confer any discretion on CBSA officers not to terminate refugee proceedings in cases where the ID has determined that an individual is inadmissible on grounds of security.

[19] Although the CBSA officer's decision does not expressly address this question, it is implicit from the officer's use of the word "consequently" in the last paragraph of the notice that he was of the view that once the ID determined that an individual is inadmissible on security grounds, a refugee claim is ineligible for consideration by the RPD and the termination of any pending RPD proceedings necessarily follows.

IV. Standard of Review

[20] Neither party addressed the question of the applicable standard of review in their submissions.

[21] In accordance with the decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, at paras. 57, 62, [2008] 1 S.C.R. 190, in identifying the appropriate standard of review, the Court must first determine whether the jurisprudence has already satisfactorily determined the degree of deference to be accorded to the particular type of question at issue. If that is the case, it is not necessary to carry out a full standard of review analysis.

[22] In *Tjiueza v. Canada (Public Safety and Emergency Preparedness)*, 2009 FC 1247 at para. 11, [2010] 4 F.C.R. 523, Justice de Montigny held that the issue of whether paragraph 104(1)(b) of *IRPA* conferred any discretion on a CBSA officer with respect to the issuance of a notice terminating refugee proceedings involves a question of law, with the result that the correctness standard of review should apply.

[23] It bears noting, however, that *Tjiueza* was decided in 2009, and that the law has evolved significantly since that time as it relates to the degree of deference owed to statutory decision-makers: see, for example, *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7 at paras. 26-28, [2011] 1

S.C.R. 160; *Hernandez Febles v. Canada (Minister of Citizenship and Immigration)*, 2012 FCA 324, 357 D.L.R. (4th) 343, aff'd 2014 SCC 68, 376 D.L.R. (4th) 387. In light of this more recent jurisprudence, the reasonableness standard of review presumptively applies to the officer's interpretation of his home statute.

[24] At the same time, the issue in this case is a question of pure statutory interpretation. There is no privative clause in *IRPA*, and CBSA officers have no expertise in statutory interpretation. These factors suggest that the presumption that the reasonableness standard should apply has been rebutted in this case.

[25] At the end of the day, however, it may be that this is a situation where the distinction between the correctness and reasonableness standards of review is more illusory than real. This is because there are only two possible answers to the question of statutory interpretation posed by this case: a CBSA officer acting under paragraph 104(1)(b) of *IRPA* either has discretion to decline to issue a notice terminating a refugee claim where a person has been found to be inadmissible on security grounds, or does not possess any such discretion. Consequently, the "range of possible acceptable outcomes which are defensible in respect of the facts and the law" is very narrow in this case.

[26] Indeed, in *British Columbia (Securities Commission) v. McLean*, 2013 SCC 67, [2013] 3 S.C.R. 895, the Supreme Court held that if the usual tools of statutory interpretation suggest that there is a single reasonable interpretation of a statutory provision, and the other possible interpretation is adopted, that interpretation must be unreasonable.

[27] I would, moreover, come to the same conclusion by applying either standard of review, as I am satisfied that the officer's implicit interpretation of the legislation at issue was both reasonable and correct.

V. The Significance of this Court's Decision in *Tjiueza*

[28] The only previous judicial consideration of the notice provisions of subsection 104(1) of *IRPA* appears to be Justice de Montigny's decision in *Tjiueza*, where he concluded that a CBSA officer has no discretion to decline to issue a notice under section 104 of *IRPA* following a finding of inadmissibility on security grounds by the ID. The respondent says there is no reason for me to depart from the reasoning in *Tjiueza*, which is dispositive of the issues raised by Mr. Haqi.

[29] Mr. Haqi submits that there have been two significant changes to the law since *Tjiueza* was decided, with the result that I should revisit the interpretation of section 104 adopted in *Tjiueza* as it relates to the question of discretion.

[30] Before addressing Mr. Haqi's arguments regarding recent changes in the law, however, I must first consider what it was that this Court actually decided in *Tjiueza*. It is then necessary to have regard to the principles of judicial comity in order to determine the implications of the *Tjiueza* decision for this case.

A. *The Tjiueza Decision*

[31] *Tjiueza* involved an applicant who was a member of the Caprivi Liberation Movement (CLM) in Namibia, an organization that was alleged to have engaged in the subversion by force of the Namibian government. A CBSA officer prepared a report under subsection 44(1) of *IRPA*

indicating that the officer was of the opinion that Mr. Tjiueza was inadmissible to Canada as a result of his membership in the CLM. Mr. Tjiueza's case was then referred to the ID for an admissibility hearing, and Mr. Tjiueza's refugee claim was suspended pursuant to paragraph 103(1)(a) of *IRPA*.

[32] The ID subsequently deemed Mr. Tjiueza to be inadmissible on security grounds. In coming to this conclusion, the ID acknowledged that there was no evidence that Mr. Tjiueza participated in, supported or had prior knowledge of any violent acts that the CLM may have committed. After the ID issued its decision, a CBSA officer gave notice under paragraph 104(1)(b) of *IRPA* terminating Mr. Tjiueza's refugee claim.

[33] The issue in *Tjiueza* was whether the CBSA officer had any discretion not to issue the section 104 notice, and, if so, whether he failed to properly exercise that discretion.

[34] Mr. Tjiueza noted, as does Mr. Haqi, that subsection 104(1), uses permissive language, providing that "[a]n officer *may*, with respect to a claim that is before the Refugee Protection Division ... give notice that an officer has determined that ...(b) the claim is ineligible under paragraph 101(1)(f)" [my emphasis]. According to both Mr. Tjiueza and Mr. Haqi, the use of the permissive "may" means that even if an applicant's claim is ineligible to be referred to the RPD under paragraph 101(1)(f) of *IRPA*, a CBSA officer nevertheless has discretion as to whether or not to issue a notice terminating the claim.

[35] Citing section 11 of the *Interpretation Act*, R.S. 1985, c. I-21, Justice de Montigny accepted that the word "may" normally entails an element of discretion. He went on, however, to conclude that "this cannot be determinative in the case at bar if only because the French version

of section 104(1) ("L'agent donne un avis...") is more imperative and appears to direct the officer to give a notice in the circumstances set out in paragraphs (a) to (d)": *Tjiueza*, above at para. 13.

[36] Justice de Montigny further concluded that subsection 104(1) of *IRPA* could not be considered in isolation, and that a close examination of the entire statutory scheme revealed Parliament's intention to remove discretion where a refugee claimant is determined to be inadmissible.

[37] Justice de Montigny noted that section 101 of *IRPA* identifies the grounds on which claims will be ineligible to be referred to the RPD for determination. In accordance with paragraph 101(1)(f) of the Act, a claim will be ineligible if "the claimant has been determined to be inadmissible on grounds of security...": *Tjiueza*, above at para. 14.

[38] Justice de Montigny observed that in accordance with subsections 100(1) and (3) of *IRPA*, "an officer must determine whether a refugee protection claim is eligible to be referred to the RPD within 3 working days after receipt of the claim. If no determination is made within 3 days, the claim is deemed to be referred to the RPD". He went on to observe that paragraph 100(2)(a) of the Act "provides that the officer shall suspend consideration of the eligibility of the person's claim if a report has been referred, pursuant to s. 44, for an admissibility hearing to determine whether the person is inadmissible on grounds of security": at *Tjiueza*, above para. 15.

[39] Once a refugee claim has been referred to the RPD, Justice de Montigny observed that section 103(1)(a) of *IRPA* "allows an officer to give notice to the RPD that a matter has been referred to the ID to determine whether the claimant is inadmissible on certain grounds,

including security" and that this notice "has the effect of suspending the RPD proceedings": *Tjiueza*, above at para. 16.

[40] Justice de Montigny noted that "[t]he grounds on which an RPD hearing may be suspended are limited, and do not include all the grounds on which a claim might be ineligible", and that "[t]he suspension of a claim prevents the RPD from making a decision before the claim's eligibility has been determined": *Tjiueza*, above at para. 16.

[41] As Justice de Montigny noted, once RPD proceedings have been suspended under section 103(1)(a) of *IRPA* as a result of notice having been given under section 104 of the Act, "they may only be continued again if an officer notifies the RPD that the suspended claim is eligible": *Tjiueza*, above at para. 17.

[42] Insofar as section 104 of *IRPA* is concerned, Justice de Montigny noted that this provision allows CBSA officers to terminate RPD proceedings where an officer "determines that the claim is ineligible, or that an ineligible claim was referred to the RPD based on misrepresentation or the withholding of material facts". He further noted that the power to terminate a pending RPD proceeding "does not depend on the RPD proceedings having first been suspended": *Tjiueza*, above at para. 18.

[43] With this understanding of the statutory scheme, Justice de Montigny then addressed the proper interpretation of subsection 104(1) of *IRPA*. Because of the importance of his analysis to the case at hand, I will reproduce the relevant portions of his decision in its entirety:

> 20 Mr. Tjiueza argues that section 104 of *IRPA* gave Officer Gross discretion as to whether or not to notify the RPD that his claim was ineligible, thereby terminating Mr. Tjiueza's RPD proceedings. Mr. Tjiueza's argument, if accepted, would result in

the absurd result that his RPD proceedings would be suspended indefinitely.

21 Indeed, on its face, the language of s. 103 suspends RPD proceedings indefinitely unless they are resumed under s. 103(2). Section 103(1) says that proceedings "are suspended" on notice by the officer that the matter has been referred to the ID. They are not suspended "pending" or "until" the ID's decision. Section 103(2) states that "On notice by an officer that the suspended claim was determined to be eligible", the RPD proceedings will continue. The statute provides no other method to have a proceeding continue. Thus, it appears that if an officer does not expressly determine a claim to be either eligible or ineligible, the RPD proceedings will remain suspended. I agree with the respondent that Parliament could not have intended to give the officer the discretion to suspend RPD proceedings indefinitely.

22 It seems more logical to interpret ss. 103 and 104 together as a statutory scheme that envisions an officer suspending RPD proceedings only until he can gather enough information, via the ID's decision, to make a determination of eligibility. The scheme then envisions the officer ending the suspension either by giving notice to the RPD that the suspended claim has been determined to be eligible under s. 103(2), or by giving notice that the claim is ineligible as a result of the ID decision under s. 104.

23 For these reasons, while section 104 of *IRPA* does generally give an officer discretion as to whether or not to re-determine the eligibility of a claim, that discretion does not exist in the case of a claim that has been suspended under s. 103 of *IRPA*. In the case of a claim that has been suspended, any discretion that may exist regarding re-determining the eligibility of a claim would have been exercised in making the decision under section 103 to suspend the RPD proceedings. Once a claim is suspended, *IRPA* only provides for two possible results: either the proceedings are continued because an officer notifies the RPD that the claim is eligible, or the proceedings are terminated because an officer notifies the RPD that the claim is not eligible.

24 Some guidance as to Parliament's intentions may also be gleaned from Citizenship and Immigration Canada's manual PP1: *Processing Claims for Refugee Protection in Canada*, which states as follows (at p. 49):

> An officer "may" proceed with a redetermination of eligibility if there is information to indicate that the claimant should not have been found eligible to

> make a claim or is no longer eligible to make a claim. [Section] 104 allows an officer to redetermine the eligibility of a claim and to notify the RPD that the claim is no longer eligible, thus ending their jurisdiction over the case. Although redetermination is discretionary, if there is evidence to prove that a person is ineligible, redetermination should be the preferred course of action. However, there may be situations where it is appropriate to have the RPD make a decision on the claim.

25 This manual therefore confirms that the officer generally has discretion under s. 104. However, it states that the officer would only exercise this discretion because situations may arise where the RPD ought to make a decision on the claim (for example in cases involving exclusion clauses). Since a claim that has been suspended under s. 103 will remain suspended indefinitely, the RPD will never make a decision on this sort of claim. Thus it seems that the discretion in s. 104 was never meant to apply in this situation.

26 This interpretation is consistent with the provisions of *IRPA* and the objectives of this act that require refugee protection claims to be dealt with efficiently and expeditiously. In particular, s. 162(2) of *IRPA* requires the RPD "to deal with all proceedings before it as informally and quickly as the circumstances and the considerations of fairness and natural justice permit".

27 Furthermore, this interpretation is supported by the fact that an indefinite suspension would not give any practical benefit to the applicant. The applicant still would not have his refugee claim determined by the RPD. As a result, he would not be entitled to permanent resident status and the associated rights and privileges. He would remain subject to the removal order issued by the ID. He would also remain subject to the restriction on persons found inadmissible for security reasons that a Pre-Removal Risk Assessment (PRRA) application cannot result in refugee protection. In short, if the officer exercised a discretion under s. 104 not to terminate the RPD proceeding, it would offer no practical benefit to the applicant. It seems absurd that Parliament would grant an officer a discretion whose exercise would serve no practical purpose. It would run counter to s. 12 of the Interpretation Act, supra, which states that "[e]very enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects".

[44] Having concluded that the CBSA officer dealing with Mr. Tjiueza's case had no discretion not to deliver a section 104 notice terminating Mr. Tjiueza's refugee proceeding, Justice de Montigny determined that there was no need to address Mr. Tjiueza's arguments regarding the scope of the officer's discretion and the fairness of the process.

[45] Justice de Montigny concluded his analysis by observing that "[n]eedless to say, even though Mr. Tjiueza's claim cannot be heard by the RPD, he may still have his risk assessed by making a [Pre-removal Risk Assessment] application": at para. 28.

[46] Although Justice de Montigny certified a question for the Federal Court of Appeal in *Tjiueza* relating the interpretation of subsection 104(1) of *IRPA*, no appeal was taken from that decision.

[47] Having reviewed what it was that *Tjiueza* decided, I must determine what the effect of that decision is for this case. This first requires a consideration of the principle of judicial comity.

VI. Judicial Comity

[48] Under principles of *stare decisis*, judges of one Court are not bound by decisions of members of their own Court. However, in accordance with the principle of judicial comity, judges should follow the decisions of their colleagues involving the interpretation of statutory provisions unless there is good reason to depart from a prior decision.

[49] As the Federal Court of Appeal observed in *Allergan Inc. v. Canada (Minister of Health)*, 2012 FCA 308, at para. 43, [2012] F.C.J. No. 1467, the doctrine of judicial comity is intended to promote certainty in the law by preventing judges of the same court deciding the same issue differently.

[50] That said, it is also well-established that a judge of this Court may depart from a colleague's interpretation of a statutory provision where the judge is convinced that a departure is necessary, and can articulate cogent reasons for doing so: *Allergan Inc*., above at para. 48.

[51] There are a number of reasons why a judge may choose not to follow the interpretation given to a statutory provision by another judge of this Court. It may be that intervening decisions have affected the validity of the prior decision, or that the earlier decision failed to consider a binding precedent or relevant statute. A judge may also depart from an earlier decision where that decision was "unconsidered", that is where the exigencies of a proceeding require an immediate ruling without an opportunity to fully consult the authorities, or where following the earlier decision would result in an injustice: *Almrei v. Canada (Minister of Citizenship & Immigration)*, 2007 FC 1025 at paras. 61-62, [2007] F.T.R. 49, *Baron v. Canada (Public Safety and Emergency Preparedness)*, 2008 FC 341 at para. 52, 324 F.T.R. 133.

[52] Where any of these circumstances are found to exist, a judge may depart from the earlier decision "provided that clear reasons are given for the departure and, in the immigration context, an opportunity to settle the law is afforded to the Federal Court of Appeal by way of a certified question": *Baron*, above at para. 52.

[53] Given that Justice de Montigny has already provided a carefully considered opinion in *Tjiueza* as to whether an officer has discretion under section 104 of *IRPA*, the question is whether Mr. Haqi has demonstrated good reason to diverge from Justice de Montigny's interpretation of the statutory provision in issue. This question will be considered next.

VII. Has There Been a Material Change in the Law Since *Tjiueza*?

[54] Mr. Haqi argues that changes in Canada's immigration law since Justice de Montigny rendered his decision in December of 2009. In support of this contention, he points to the Supreme Court's decision in *Ezokola v. Canada (Minister of Citizenship and Immigration)*, 2013 SCC 40, [2013] 2 S.C.R. 678, and the enactment of the *Protecting Canada's Immigration System Act*, S.C. 2012, c. 17 (*PCISA*), submitting that these developments in the law require this Court to reconsider its earlier interpretation of subsection 104(1) of *IRPA* and come to a different determination.

[55] According to Mr. Haqi, as a result of *Ezokola* and *PCISA*, *IRPA*'s eligibility provisions no longer reflect exclusion under the *United Nations Convention Relating to the Status of Refugees*, 28 July 1951, [1969] 189 U.N.T.S. 137, Can. T.S. 1969 No. 6 as closely as they did at the time Justice de Montigny rendered his decision in *Tjiueza*.

[56] The respondent says that any changes to the law resulting from *Ezokola* and *PCISA* have no impact on the issue in this case, and that I should therefore adopt Justice de Montigny's interpretation of subsection 104(1) of *IRPA*.

[57] Before addressing these arguments, it is helpful to have a clear understanding of the terms "eligibility", "admissibility" and "exclusion", as they are used in *IRPA*:

> i. "Eligibility" refers to whether a refugee claim is eligible for referral to the RPD. The eligibility regime is set out at sections 100 to 104 of *IRPA*, where Parliament has clearly indicated that not every refugee claim should be considered by the RPD. If a claim is ineligible, for example, on security grounds, the RPD does not have jurisdiction to hear or determine the claim.
>
> ii. "Inadmissibility" refers to whether foreign nationals or permanent residents may enter and/or remain in Canada. The grounds for inadmissibility are set out in sections 33 to 42.1 of

> *IRPA*. Those inadmissible to Canada include members of organizations involved in the subversion by force of a government.
>
> iii. "Exclusion" relates to whether a claimant satisfies the definition of a "refugee" in light of Articles 1(E) and 1(F) of the *Refugee Convention*, which are incorporated by reference into *IRPA* through 98 of the Act. Articles 1(E) and 1(F) exclude certain persons from the refugee definition, including (as was the case in *Ezokola*), persons complicit in war crimes and crimes against humanity.

[58] Each of these terms has a distinct meaning, and can operate independently of the others. Most of the eligibility grounds under section 101 of *IRPA* have nothing to do with admissibility. For example, a refugee claim may be *ineligible* for referral to the RPD because the person making the claim arrived in Canada from a safe third country. The exception is ineligibility under paragraph 101(1)(f), which as previously noted, makes a claim *ineligible* to be referred to the RPD where a claimant has been determined to be *inadmissible* on security grounds.

[59] Similarly, a person may be *excluded* under Article 1(E) of the *Refugee Convention*, not for reasons relating to his or her *admissibility* to Canada, but because the individual already has citizenship in another country. In a similar vein, a person may become *inadmissible* to Canada under section 36 of *IRPA* as a result of their serious criminality in this country, conduct that would not lead to *exclusion* of the individual under Articles 1(E) or 1(F) of the *Refugee Convention*.

[60] With this understanding of the relevant terminology, I will now address Mr. Haqi's arguments.

A. *The Impact of Ezokola*

[61] Mr. Haqi argues that prior to the Supreme Court's decision in *Ezokola*, a person found to be inadmissible under section 34 of *IRPA* would likely also be excluded from the refugee definition under Article 1(F) of the *Refugee Convention*. However, Mr. Haqi says that he could not be found to have voluntarily made a significant and knowing contribution to the KDPI's actions under the stricter *Ezokola* test for complicity, and would thus not be excluded from the protection of the *Refugee Convention*.

[62] Mr. Haqi submits that in light of the broad interpretation given to section 34 of *IRPA*, in order to comply with Canada's international obligations, CBSA officers must have the discretion to consider whether exclusion is indeed possible before terminating a refugee claim. He further submits principles of fairness require claimants to be afforded an opportunity to make submissions in this regard.

[63] According to Mr. Haqi, recent changes to immigration legislation have significantly limited the remedies available to claimants in his circumstances. These changes include the curtailing of access to humanitarian and compassionate relief for those found inadmissible on security grounds, and restrictions being placed on the availability of ministerial relief under section 42.1 of *IRPA* to applicants who can satisfy the Minister that it is not contrary to the national interest to declare them admissible to Canada.

[64] As a consequence, Mr. Haqi submits that an applicant in his situation faces years of uncertain status, as well as inability to travel or to sponsor family members, all in direct contravention of Canada's obligations under the *Refugee Convention*. Mr. Haqi asserts that this situation causes him stress and violates his rights under section 7 of the *Canadian Charter of*

Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982 c. 11.

[65] It should be noted that Mr. Haqi has not challenged subsection 104(1) of *IRPA* under the *Charter*. Although Mr. Haqi only briefly touched on the issue, I understand him to argue that the legislation should be interpreted in a way that avoids infringing on his *Charter* rights.

[66] While Courts are required to resolve any ambiguity in legislation in a manner that would allow for the legislation to be Charter-compliant, this interpretive principle only applies where the legislation is in fact ambiguous. As will be explained below, I have found no such ambiguity here.

[67] I agree with the respondent that Mr. Haqi's reliance on the Supreme Court's decision in *Ezokola* is misplaced, as *Ezokola* has no bearing on *IRPA*'s eligibility regime generally, or on the interpretation of sections 103 and 104 of *IRPA* in particular. *Ezokola* addressed the scope of the refugee definition, and specifically, exclusion from that definition under Article 1(F) of the *Refugee Convention*, a provision that is only engaged where a refugee claim is eligible for consideration by the RPD, which Mr. Haqi's was not.

[68] I further agree with the respondent that Mr. Haqi appears to have confused the issue of whether the RPD has jurisdiction to consider a refugee claim (*eligibility*) with whether, assuming that the RPD has jurisdiction, a person concerned is in fact a Convention refugee (*exclusion*: the issue in *Ezokola*).

[69] Because the CBSA officer concluded that Mr. Haqi's claim for refugee protection was ineligible for consideration by the RPD as a result of his inadmissibility on security grounds, it

necessarily followed that the RPD had no jurisdiction to consider the question of exclusion and the impact of *Ezokola*.

B. *The Impact of the Protecting Canada's Immigration System Act*

[70] Mr. Haqi also argues that the enactment of *PCISA* requires this Court to reconsider its earlier interpretation of subsection 104(1) of *IRPA* in *Tjiueza* and come to a different conclusion.

[71] Mr. Haqi has not referred to any specific provision of the legislation in support of this argument, submitting instead that "the expanded scope of the ineligibility provisions following the amendments in the *Protecting Canada's Immigration System Act* … along with an ever-expanding application of s. 34 by the Minister, this will only be the first of many refugee claimants facing ineligibility in circumstances where they would not face exclusion under the Convention".

[72] As the respondent notes, the only changes that *PCISA* made to sections 103 and 104 of *IRPA* was to remove references to the "Refugee Appeal Division" from subsections 103(1) and (2). I am not therefore persuaded that the passage of *PCISA* should lead me to a different conclusion to the one reached by Justice de Montigny in *Tjiueza*.

VIII. Final Observations

[73] For these reasons, Mr. Haqi has not persuaded me that the principles of judicial comity should not apply in this case, or that there is a basis for reaching a different conclusion regarding the proper interpretation of subsection 104(1) of *IRPA* than that in *Tjiueza*.

[74] There are, moreover, additional considerations that support Justice de Montigny's conclusion that no discretion is conferred on CBSA officers by subsection 104(1) of *IRPA*.

[75] The first relates to the use of the word "may" in the English version of subsection 104(1) of *IRPA*. As noted earlier, Justice de Montigny accepted that the word "may" normally entails an element of discretion, but concluded that it did not in this instance as the French version of subsection 104(1) is imperative, and directs officers to give notice of the termination of refugee proceedings in the prescribed circumstances: see *Tjiueza*, above at para. 13.

[76] Indeed, as the Supreme Court has observed, if there is a discrepancy between the English and French versions of the same text, where one version is ambiguous and the other is clear and unequivocal, the common meaning of the two versions should be preferred. Where one version is broader than the other, the common meaning should favour the more restricted or limited meaning: *R. v. Daoust*, 2004 SCC 6 at para. 26, [2004] 1 S.C.R. 217.

[77] It also bear noting that use of the word "may" creates a *presumption* of discretion, and not a hard and fast rule. Depending upon the circumstances, "may" can imply the existence of a broad discretion, provide for a limited discretion, or be the imperative equivalent of "shall": *R. v. Lavigne*, 2006 SCC 10 at paras. 22-38, [2006] 1 S.C.R. 392. See also Ruth Sullivan, *Sullivan on the Construction of Statutes* 5th ed. (Markham: LexisNexis, 2008) at 68-74.

[78] As explained in *Tjiueza*, a review of the legislative scheme as a whole, coupled with the imperative language of the French version of subsection 104(1) of *IRPA* supports the conclusion that the word "may" should be interpreted as having a mandatory effect. As a result, there is no discretion on the part of CBSA officers not to give notice of the termination of a refugee claim once a claimant has been found to be inadmissible to Canada on security grounds.

[79] Finally, a review of the legislative history of subsection 104(1) of *IRPA* leads to a similar conclusion.

[80] Under paragraph 46.01(1)(e) of the former *Immigration Act*, R.S.C. 1985, c.I-2, a refugee claimant who had been determined to be inadmissible on security grounds was not automatically ineligible for consideration by the predecessor to the RPD. Such claims were ineligible for hearing only if the Minister issued an opinion that it would be contrary to the national interest to have the claim determined.

[81] In 2002, *IRPA* replaced the *Immigration Act*. In enacting subsection 104(1) of *IRPA*, Parliament expressly declined to include a provision comparable to paragraph 46.01(1)(e) of the old Act.

[82] As was noted in the "clause by clause" analysis that accompanied the proposed legislation, "[t]he ineligibility provisions in the [*Immigration Act*] deny access to the refugee determination system to persons found to be inadmissible on grounds of security including terrorism or human rights violations if the Minister is of the opinion that it would be contrary to the national interest to have the claim determined". In contrast, subsection 104(1) was intentionally drafted in order to "better protect the safety and security of Canadians" by eliminating the need for a ministerial opinion.

[83] This change suggests that Parliament's intention was to have ineligibility flow automatically from inadmissibility on security grounds, reflecting the increased prioritization of security concerns in *IRPA*: *Medovarski v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51 at para. 10, [2005] 2 S.C.R. 539.

IX. Conclusion

[84] Having concluded that Mr. Haqi has not established good reason to adopt an interpretation of paragraph 104(1)(b) of *IRPA* different from that adopted by Justice de Montigny in *Tjieuza*, it follows that Mr. Haqi's application for judicial review is dismissed.

X. Certification

[85] Mr. Haqi proposes the following question for certification:

> After an RPD hearing has been suspended under s. 103 of *the Immigration and Refugee Protection Act* if the ID determines that the claimant is inadmissible for security reasons in circumstances which would not lead to the claimant being excluded under Article 1 of the *Convention on the Status of Refugees*, does an officer have discretion, before terminating the claim under s. 104, to wait for a decision as to whether relief under s. 42.1 will be granted by the Minister?

[86] The respondent opposes certification of this or any question, submitting that there is no reason to doubt the correctness of Justice de Montigny's decision in *Tjiueza*. In the alternative, the respondent says that if a question is to be certified in this case, it should be the same question that was certified in *Tjiueza*, which was:

> After an RPD hearing has been suspended under section 103 of the *Immigration and Refugee Protection Act* pending the outcome of an ID hearing and re-determination of a claim's eligibility, if the ID determines that the claimant is inadmissible for security reasons, does the officer have discretion under the *Immigration and Refugee Protection Act* to not re-determine the claim's eligibility and to not notify the RPD of the officer's decision on eligibility, and thereby suspend the RPD hearing indefinitely?

[87] I am of the view that the question of law raised by this case is appropriate for certification as it is a question of general importance that transcends the interests of the immediate parties and

would be determinative of the appeal: *Varela v Canada (Citizenship and Immigration)*, 2009 FCA 145 at para 28, [2009] F.C.J. No 549.

[88] However, the question proposed by Mr. Haqi is problematic in two respects. First, it presupposes that the circumstances giving rise to Mr. Haqi's inadmissibility could not lead to him being excluded under Article 1(F) of the Convention on the Status of Refugees as his complicity in the subversion by force of the Iranian government could not be established on the *Ezokola* test. While it is not for me to make that determination, suffice it to say that I do not think that the issue is quite as clear as Mr. Haqi would suggest.

[89] The more fundamental problem with Mr. Haqi's proposed question is that it presupposes that there *was* a pending application for ministerial relief when the CBSA officer delivered the section 104 notice.

[90] Mr. Haqi's argument that the section 104 notice should have been held in abeyance pending a decision in his application for ministerial relief was raised for the first time at the hearing of his application. Not only was this an entirely new argument, there was, moreover, nothing in the record to indicate that Mr. Haqi had in fact ever filed an application for ministerial relief. Indeed, there was considerable confusion at the hearing as to whether such relief had been requested.

[91] In post-hearing submissions, Mr. Haqi confirmed that no such application had been made, either in January of 2014, when the CBSA officer issued the notice under subsection 104(1) of *IRPA*, or by the time that his application for judicial review was heard in September of 2014. It appears that Mr. Haqi only filed an application for ministerial relief after the hearing of

this application for judicial review - some nine months after the decision at issue in this proceeding. Consequently, the question as formulated by Mr. Haqi simply does not arise on the facts of this case.

[92] I am also concerned that the question proposed by the respondent is somewhat problematic as it presupposes that interpreting subsection 104(1) as conferring discretion on a CBSA officer not to give notice to the RPD has the effect of indefinitely suspending the RPD proceedings. It seems to me that this is something that should be considered in *answering* a question as to the proper interpretation of subsection 104(1), rather than forming part of the question itself.

[93] Consequently I propose to certify a modified version of the question certified in *Tjiueza*, namely:

> After a Refugee Protection Division proceeding has been suspended under paragraph 103(1)(a) of *the Immigration and Refugee Protection Act* pending the outcome of an Immigration Division hearing into a refugee claimant's admissibility, if the Immigration Division determines that the claimant is inadmissible for security reasons under section 34(1)(f) of *IRPA*, does a CBSA officer have any discretion under subsection 104(1)(b) of *IRPA* to not determine the claim's eligibility and to not notify the Refugee Protection Division of the officer's decision on eligibility?

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review is dismissed. The following question is certified:

> After a Refugee Protection Division proceeding has been suspended under paragraph 103(1)(a) of the *Immigration and Refugee Protection Act* pending the outcome of an Immigration Division hearing into a refugee claimant's admissibility, if the Immigration Division determines that the claimant is inadmissible for security reasons under section 34(1)(f) of *IRPA*, does a CBSA officer have any discretion under subsection 104(1)(b) of *IRPA* to not determine the claim's eligibility and to not notify the Refugee Protection Division of the officer's decision on eligibility?

"Anne L. Mactavish"

Judge

APPENDIX

***Immigration Act*, R.S.C. 1985, c. I-2, s. 46.01 [repealed]**	***Loi sur l'Immigration*, L.R.C. 1985, ch. I-2, s. 46.01 [abrogés]**
46.01(1) Access criteria	**46.01(1) Critères de recevabilité**
A person who claims to be a Convention refugee is not eligible to have the claim determined by the Refugee Division if the person	La revendication de statut n'est pas recevable par la section du statut si l'intéressé se trouve dans l'une ou l'autre des situations suivantes :
(a) has been recognized as a Convention refugee by a country, other than Canada, that is a country to which the person can be returned	a) il s'est déjà vu reconnaître le statut de réfugié au sens de la Convention par un autre pays dans lequel il peut être renvoyé;
(b) came to Canada, directly or indirectly, from a country, other than a country of the person's nationality or, where the person has no country of nationality, the country of the person's habitual residence, that is a prescribed country under paragraph 114(1)(s);	b) il est arrivé au Canada, directement ou non, d'un pays — autre que celui dont il a la nationalité ou, s'il n'a pas de nationalité, que celui dans lequel il avait sa résidence habituelle — qui figure dans la liste établie en vertu des règlements d'application de l'alinéa 114(1)s);
(c) has, since last coming into Canada, been determined	c) depuis sa dernière venue au Canada, il a fait l'objet :
(i) by the Refugee Division not to be a Convention refugee or to have abandoned the claim, or	(i) soit d'une décision de la section du statut lui refusant le statut de réfugié au sens de la Convention ou établissant le désistement de sa revendication,
(ii) by a senior immigration officer not to be eligible to have the claim determined by the Refugee Division	(ii) soit d'une décision d'irrecevabilité de sa revendication par un agent principal;
(d) has been determined under this Act or the regulations, to be a Convention refugee; or	d) le statut de réfugié au sens de la Convention lui a été reconnu aux termes de la présente loi ou des règlements;
(e) has been determined by an adjudicator to be	e) l'arbitre a décidé, selon le cas
(i) a person described in paragraph 19(1)(c) or subparagraph 19(1)(c.1)(i) and the Minister is of the opinion that the person constitutes a danger to the public in Canada,	i) qu'il appartient à l'une des catégories non admissibles visées à l'alinéa 19(1)c) ou au sous-alinéa 19(1)c.1)(i) et, selon le ministre, il constitue un danger pour le public au Canada,

(ii) a person described in paragraph 19(1)(e), (f), (g), (j), (k) or (l) and the Minister is of the opinion that it would be contrary to the public interest to have the claim determined under this Act,

(ii) qu'il appartient à l'une des catégories non admissibles visées aux alinéas 19(1)e), f), g), j), k) ou l) et, selon le ministre, il serait contraire à l'intérêt public de faire étudier sa revendication aux termes de la présente loi,

(iii) a person described in subparagraph 27(1)(a.1)(i) and the Minister is of the opinion that the person constitutes a danger to the public in Canada, or

(iii) qu'il relève du cas visé au sous-alinéa 27(1)a.1)(i) et, selon le ministre, il constitue un danger pour le public au Canada,

(iv) a person described in paragraph 27(1)(d) who has been convicted of an offence under any Act of Parliament for which a term of imprisonment of ten years or more may be imposed and the Minister is of the opinion that the person constitutes a danger to the public in Canada.

(iv) qu'il relève, pour toute infraction punissable aux termes d'une loi fédérale d'un emprisonnement maximal égal ou supérieur à dix ans, du cas visé à l'alinéa 27(1)d) et, selon le ministre, il constitue un danger pour le public au Canada

46.01(1.1) Idem

A person who claims to be a Convention Refugee on or after the day on which this subsection comes into force is not eligible to have the claim determined by the Refugee Division if

(a) the person had, before that day, claimed to be a Convention Refugee and the person was determined not to have a credible basis for the claim

(b) the person was, before that day, issued a departure notice; and

(c) the person has not left Canada since the departure notice was issued

46.01(1.1) Idem

La revendication du statut de réfugié au sens de la Convention présentée à compter de la date d'entrée en vigueur du présent paragraphe n'est pas recevable par la section du statut si l'intéressé, à la fois :

a) a présenté, avant cette date, une revendication dont il a été déterminé qu'elle n'avait pas de minimum de fondement;

b) a fait l'objet, avant cette date, d'un avis d'interdiction de séjour;

c) est demeuré au Canada depuis la prise de l'avis d'interdiction de séjour.

46.01(2) Application may be suspended

The Minister may, by order, suspend the application of paragraph (1)(b) for such period, or in respect of such classes of persons, as may be specified in the order.

46.01(2) Application facultative

Le ministre peut, par arrêté, suspendre l'application de l'alinéa (1)b) soit pour une période donnée, soit à l'égard de catégories de personnes.

46.01(3) Coming to Canada

For the purposes of paragraph (1)(b),

(a) subject to any agreement entered into pursuant to section 108.1, a person who is in a country solely for the purpose of joining a connecting flight to Canada shall not be considered as coming to Canada from that country; and

(b) a person who comes to Canada from a country shall be considered as coming to Canada from that country whether or not the person was lawfully in that country.

46.01(3) Pays de provenance

Pour l'application de l'alinéa (1)b), le pays de provenance de l'intéressé est celui d'où il est parti pour le Canada, indépendamment du caractère légal ou non de son séjour dans ce pays, sauf, sous réserve de tout accord conclu en vertu de l'article 108.1, s'il ne s'y trouvait qu'en vue d'un vol de correspondance à destination du Canada.

46.01(4) Burden of proof

For the purposes of paragraph (1)(b), where a person who has come to Canada in a vehicle seeks to come into Canada without a valid and subsisting passport or travel document issued to that person and claims to be a Convention refugee, the burden of proving that the person has not come to Canada from the country in which the vehicle last embarked passengers rests on that person.

46.01(4) Charge de la preuve

Dans le cadre de l'alinéa (1)b), il appartient à la personne désireuse d'entrer au Canada qui arrive à bord d'un véhicule et qui, non munie d'un passeport ou d'un titre de voyage en cours de validité qui lui a été délivré, revendique le statut de réfugié au sens de la Convention de prouver qu'elle n'est pas venue au Canada à partir du dernier pays où le véhicule a pris des passagers à bord.

46.01(5) Last coming to Canada

A person who goes to another country and returns to Canada within ninety days shall not, for the purposes of paragraph (1)(c), be considered as coming into Canada on that return.

46.01(6) [Repealed 1992, c. 49, s. 36.]

46.01(7) [Repealed 1992, c. 49, s. 36.]

46.01(5) Séjour à l'étranger

La rentrée au Canada de l'intéressé après un séjour à l'étranger d'au plus quatre-vingt-dix jours n'est pas, pour l'application de l'alinéa (1)c), prise en compte pour la détermination de la date de la dernière venue de celui-ci au Canada

46.01(6) [Abrogés, 1992, ch. 49, art. 36.]

46.01(7) [Abrogés, 1992, ch. 49, art. 36.]

***Immigration and Refugee Protection Act*, S.C. 2001, c. 27**

Security

34. (1) A permanent resident or a foreign national is inadmissible on security grounds for

(a) engaging in an act of espionage that is against Canada or that is contrary to Canada's interests;

(b) engaging in or instigating the subversion by force of any government;

(b.1) engaging in an act of subversion against a democratic government, institution or process as they are understood in Canada;

(c) engaging in terrorism;

(d) being a danger to the security of Canada;

(e) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or

***Loi sur l'immigration et la protection des réfugiés*, L.C. 2001, ch. 27**

Sécurité

34. (1) Emportent interdiction de territoire pour raison de sécurité les faits suivants :

a) être l'auteur de tout acte d'espionnage dirigé contre le Canada ou contraire aux intérêts du Canada;

b) être l'instigateur ou l'auteur d'actes visant au renversement d'un gouvernement par la force;

b.1) se livrer à la subversion contre toute institution démocratique, au sens où cette expression s'entend au Canada;

c) se livrer au terrorisme;

d) constituer un danger pour la sécurité du Canada;

e) être l'auteur de tout acte de violence susceptible de mettre en danger la vie ou la sécurité d'autrui au Canada;

(f) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (a), (b), (b.1) or (c).

(2) [Repealed, 2013, c. 16, s. 13]

Serious criminality

36. (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for

(a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;

(b) having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or

(c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.

Criminality

(2) A foreign national is inadmissible on grounds of criminality for

(a) having been convicted in Canada of an offence under an Act of Parliament punishable by way of indictment, or of two offences under any Act of Parliament not arising out of a single occurrence;

f) être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle est, a été ou sera l'auteur d'un acte visé aux alinéas a), b), b.1) ou c).

(2) [Abrogé, 2013, ch. 16, art. 13]

Grande criminalité

36. (1) Emportent interdiction de territoire pour grande criminalité les faits suivants

a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;

b) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans;

c) commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans.

Criminalité

(2) Emportent, sauf pour le résident permanent, interdiction de territoire pour criminalité les faits suivants :

a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable par mise en accusation ou de deux infractions à toute loi fédérale qui ne découlent pas des mêmes faits;

(b) having been convicted outside Canada of an offence that, if committed in Canada, would constitute an indictable offence under an Act of Parliament, or of two offences not arising out of a single occurrence that, if committed in Canada, would constitute offences under an Act of Parliament;

b) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable par mise en accusation ou de deux infractions qui ne découlent pas des mêmes faits et qui, commises au Canada, constitueraient des infractions à des lois fédérales;

(c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an indictable offence under an Act of Parliament; or

c) commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable par mise en accusation;

(d) committing, on entering Canada, an offence under an Act of Parliament prescribed by regulations

d) commettre, à son entrée au Canada, une infraction qui constitue une infraction à une loi fédérale précisée par règlement.

Application

Application

(3) The following provisions govern subsections (1) and (2):

(3) Les dispositions suivantes régissent l'application des paragraphes (1) et (2) :

(a) an offence that may be prosecuted either summarily or by way of indictment is deemed to be an indictable offence, even if it has been prosecuted summarily;

a) l'infraction punissable par mise en accusation ou par procédure sommaire est assimilée à l'infraction punissable par mise en accusation, indépendamment du mode de poursuite effectivement retenu;

(b) inadmissibility under subsections (1) and (2) may not be based on a conviction in respect of which a record suspension has been ordered and has not been revoked or ceased to have effect under the Criminal Records Act, or in respect of which there has been a final determination of an acquittal;

b) la déclaration de culpabilité n'emporte pas interdiction de territoire en cas de verdict d'acquittement rendu en dernier ressort ou en cas de suspension du casier — sauf cas de révocation ou de nullité — au titre de la Loi sur le casier judiciaire;

(c) the matters referred to in paragraphs (1)(b) and (c) and (2)(b) and (c) do not constitute inadmissibility in respect of a permanent resident or foreign national who, after the prescribed period, satisfies the Minister that they have been rehabilitated or who is a member of a prescribed class that is deemed to have been rehabilitated;

c) les faits visés aux alinéas (1)b) ou c) et (2)b) ou c) n'emportent pas interdiction de territoire pour le résident permanent ou l'étranger qui, à l'expiration du délai réglementaire, convainc le ministre de sa réadaptation ou qui appartient à une catégorie réglementaire de personnes présumées réadaptées;

(d) a determination of whether a permanent resident has committed an act described in paragraph (1)(c) must be based on a balance of probabilities; and

d) la preuve du fait visé à l'alinéa (1)c) est, s'agissant du résident permanent, fondée sur la prépondérance des probabilités;

(e) inadmissibility under subsections (1) and (2) may not be based on an offence

e) l'interdiction de territoire ne peut être fondée sur les infractions suivantes :

(i) designated as a contravention under the Contraventions Act,

(i) celles qui sont qualifiées de contraventions en vertu de la Loi sur les contraventions,

(ii) for which the permanent resident or foreign national is found guilty under the Young Offenders Act, chapter Y-1 of the Revised Statutes of Canada, 1985, or

(ii) celles dont le résident permanent ou l'étranger est déclaré coupable sous le régime de la Loi sur les jeunes contrevenants, chapitre Y-1 des Lois révisées du Canada (1985),

(iii) for which the permanent resident or foreign national received a youth sentence under the Youth Criminal Justice Act.

(iii) celles pour lesquelles le résident permanent ou l'étranger a reçu une peine spécifique en vertu de la Loi sur le système de justice pénale pour les adolescents.

Exception — application to Minister

42.1 (1) The Minister may, on application by a foreign national, declare that the matters referred to in section 34, paragraphs 35(1)(b) and (c) and subsection 37(1) do not constitute inadmissibility in respect of the foreign national if they satisfy the Minister that it is not contrary to the national interest.

Exception — demande au ministre

42.1 (1) Le ministre peut, sur demande d'un étranger, déclarer que les faits visés à l'article 34, aux alinéas 35(1)b) ou c) ou au paragraphe 37(1) n'emportent pas interdiction de territoire à l'égard de l'étranger si celui-ci le convainc que cela ne serait pas contraire à l'intérêt national.

Exception — Minister's own initiative

(2) The Minister may, on the Minister's own initiative, declare that the matters referred to in section 34, paragraphs 35(1)(b) and (c) and subsection 37(1) do not constitute inadmissibility in respect of a foreign national if the Minister is satisfied that it is not contrary to the national interest

Exception — à l'initiative du ministre

(2) Le ministre peut, de sa propre initiative, déclarer que les faits visés à l'article 34, aux alinéas 35(1)b) ou c) ou au paragraphe 37(1) n'emportent pas interdiction de territoire à l'égard de tout étranger s'il est convaincu que cela ne serait pas contraire à l'intérêt national.

Considerations

(3) In determining whether to make a declaration, the Minister may only take into account national security and public safety considerations, but, in his or her analysis, is not limited to considering the danger that the foreign national presents to the public or the security of Canada.

Considérations

(3) Pour décider s'il fait la déclaration, le ministre ne tient compte que de considérations relatives à la sécurité nationale et à la sécurité publique sans toutefois limiter son analyse au fait que l'étranger constitue ou non un danger pour le public ou la sécurité du Canada

Report on Inadmissibility

Constat de l'interdiction de territoire

Preparation of report

Rapport d'interdiction de territoire

44. (1) An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister.

44. (1) S'il estime que le résident permanent ou l'étranger qui se trouve au Canada est interdit de territoire, l'agent peut établir un rapport circonstancié, qu'il transmet au ministre.

Referral or removal order

Suivi

(2) If the Minister is of the opinion that the report is well-founded, the Minister may refer the report to the Immigration Division for an admissibility hearing, except in the case of a permanent resident who is inadmissible solely on the grounds that they have failed to comply with the residency obligation under section 28 and except, in the circumstances prescribed by the regulations, in the case of a foreign national. In those cases, the Minister may make a removal order.

(2) S'il estime le rapport bien fondé, le ministre peut déférer l'affaire à la Section de l'immigration pour enquête, sauf s'il s'agit d'un résident permanent interdit de territoire pour le seul motif qu'il n'a pas respecté l'obligation de résidence ou, dans les circonstances visées par les règlements, d'un étranger; il peut alors prendre une mesure de renvoi.

Conditions

Conditions

(3) An officer or the Immigration Division may impose any conditions, including the payment of a deposit or the posting of a guarantee for compliance with the conditions, that the officer or the Division considers necessary on a permanent resident or a foreign national who is the subject of a report, an admissibility hearing or, being in Canada, a removal order

(3) L'agent ou la Section de l'immigration peut imposer les conditions qu'il estime nécessaires, notamment la remise d'une garantie d'exécution, au résident permanent ou à l'étranger qui fait l'objet d'un rapport ou d'une enquête ou, étant au Canada, d'une mesure de renvoi.

Exclusion — Refugee Convention

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.

Exclusion par application de la Convention sur les réfugiés

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.

Referral to Refugee Protection Division

100. (1) An officer shall, within three working days after receipt of a claim referred to in subsection 99(3), determine whether the claim is eligible to be referred to the Refugee Protection Division and, if it is eligible, shall refer the claim in accordance with the rules of the Board.

Examen de la recevabilité

100. (1) Dans les trois jours ouvrables suivant la réception de la demande, l'agent statue sur sa recevabilité et défère, conformément aux règles de la Commission, celle jugée recevable à la Section de la protection des réfugiés

Burden of proof

(1.1) The burden of proving that a claim is eligible to be referred to the Refugee Protection Division rests on the claimant, who must answer truthfully all questions put to them.

Charge de la preuve

(1.1) La preuve de la recevabilité incombe au demandeur, qui doit répondre véridiquement aux questions qui lui sont posées.

Decision

(2) The officer shall suspend consideration of the eligibility of the person's claim if

(a) a report has been referred for a determination, at an admissibility hearing, of whether the person is inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality; or

(b) the officer considers it necessary to wait for a decision of a court with respect to a claimant who is charged with an offence under an Act of Parliament that is punishable by a maximum term of imprisonment of at least 10 years.

Sursis pour décision

(2) L'agent sursoit à l'étude de la recevabilité dans les cas suivants

a) le cas a déjà été déféré à la Section de l'immigration pour constat d'interdiction de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux, grande criminalité ou criminalité organisée;

b) il l'estime nécessaire, afin qu'il soit statué sur une accusation pour infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans.

Consideration of claim

(3) The Refugee Protection Division may not consider a claim until it is referred by the officer. If the claim is not referred within the three-day period referred to in subsection (1), it is deemed to be referred, unless there is a suspension or it is determined to be ineligible.

Saisine

(3) La saisine de la section survient sur déféré de la demande; sauf sursis ou constat d'irrecevabilité, elle est réputée survenue à l'expiration des trois jours.

Documents and information to be provided

(4) A person who makes a claim for refugee protection inside Canada at a port of entry and whose claim is referred to the Refugee Protection Division must provide the Division, within the time limits provided for in the regulations, with the documents and information — including in respect of the basis for the claim — required by the rules of the Board, in accordance with those rules

Renseignements et documents à fournir

(4) La personne se trouvant au Canada, qui demande l'asile à un point d'entrée et dont la demande est déférée à la Section de la protection des réfugiés est tenue de lui fournir, dans les délais prévus par règlement et conformément aux règles de la Commission, les renseignements et documents — y compris ceux qui sont relatifs au fondement de la demande — exigés par ces règles

Date of hearing

(4.1) The referring officer must, in accordance with the regulations, the rules of the Board and any directions of the Chairperson of the Board, fix the date on which the claimant is to attend a hearing before the Refugee Protection Division

Date de l'audition

(4.1) L'agent qui défère la demande d'asile fixe, conformément aux règlements, aux règles de la Commission et à toutes directives de son président, la date de l'audition du cas du demandeur par la Section de la protection des réfugiés.

Quarantine Act

(5) If a traveller is detained or isolated under the Quarantine Act, the period referred to in subsections (1) and (3) does not begin to run until the day on which the detention or isolation ends.

Loi sur la mise en quarantaine

(5) Le délai prévu aux paragraphes (1) et (3) ne court pas durant une période d'isolement ou de détention ordonnée en application de la Loi sur la mise en quarantaine.

Ineligibility

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

(a) refugee protection has been conferred on the claimant under this Act;

Irrecevabilité

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

a) l'asile a été conféré au demandeur au titre de la présente loi;

(b) a claim for refugee protection by the claimant has been rejected by the Board;

b) rejet antérieur de la demande d'asile par la Commission;

(c) a prior claim by the claimant was determined to be ineligible to be referred to the Refugee Protection Division, or to have been withdrawn or abandoned;

c) décision prononçant l'irrecevabilité, le désistement ou le retrait d'une demande antérieure;

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

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

(e) the claimant came directly or indirectly to Canada from a country designated by the regulations, other than a country of their nationality or their former habitual residence; or

e) arrivée, directement ou indirectement, d'un pays désigné par règlement autre que celui dont il a la nationalité ou dans lequel il avait sa résidence habituelle;

(f) the claimant has been determined to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality, except for persons who are inadmissible solely on the grounds of paragraph 35(1)(c).

f) prononcé d'interdiction de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux — exception faite des personnes interdites de territoire au seul titre de l'alinéa 35(1)c) — , grande criminalité ou criminalité organisée.

Serious criminality

Grande criminalité

(2) A claim is not ineligible by reason of serious criminality under paragraph (1)(f) unless

(2) L'interdiction de territoire pour grande criminalité visée à l'alinéa (1)f) n'emporte irrecevabilité de la demande que si elle a pour objet :

(a) in the case of inadmissibility by reason of a conviction in Canada, the conviction is for an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or

a) une déclaration de culpabilité au Canada pour une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans;

(b) in the case of inadmissibility by reason of a conviction outside Canada, the conviction is for an offence that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.

b) une déclaration de culpabilité à l'extérieur du Canada pour une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans.

Suspension

103. (1) Proceedings of the Refugee Protection Division in respect of a claim for refugee protection are suspended on notice by an officer that

(a) the matter has been referred to the Immigration Division to determine whether the claimant is inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality; or

(b) an officer considers it necessary to wait for a decision of a court with respect to a claimant who is charged with an offence under an Act of Parliament that may be punished by a maximum term of imprisonment of at least 10 years

Sursis

103. (1) La Section de la protection des réfugiés sursoit à l'étude de la demande d'asile sur avis de l'agent portant que :

a) le cas a été déféré à la Section de l'immigration pour constat d'interdiction de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux, grande criminalité ou criminalité organisée;

b) il l'estime nécessaire, afin qu'il soit statué sur une accusation pour infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans.

Continuation

(2) On notice by an officer that the suspended claim was determined to be eligible, proceedings of the Refugee Protection Division must continue

Continuation

(2) L'étude de la demande reprend sur avis portant que la demande est recevable.

Notice of ineligible claim

104. (1) An officer may, with respect to a claim that is before the Refugee Protection Division or, in the case of paragraph (d), that is before or has been determined by the Refugee Protection Division or the Refugee Appeal Division, give notice that an officer has determined that

(a) the claim is ineligible under paragraphs 101(1)(a) to (e);

(b) the claim is ineligible under paragraph 101(1)(f);

Avis sur la recevabilité de la demande d'asile

104. (1) L'agent donne un avis portant, en ce qui touche une demande d'asile dont la Section de protection des réfugiés est saisie ou dans le cas visé à l'alinéa d) dont la Section de protection des réfugiés ou la Section d'appel des réfugiés sont ou ont été saisies, que :

a) il y a eu constat d'irrecevabilité au titre des alinéas 101(1)a) à e);

b) il y a eu constat d'irrecevabilité au seul titre de l'alinéa 101(1)f);

(c) the claim was referred as a result of directly or indirectly misrepresenting or withholding material facts relating to a relevant matter and that the claim was not otherwise eligible to be referred to that Division; or

c) la demande n'étant pas recevable par ailleurs, la recevabilité résulte, directement ou indirectement, de présentations erronées sur un fait important quant à un objet pertinent, ou de réticence sur ce fait;

(d) the claim is not the first claim that was received by an officer in respect of the claimant.

d) la demande n'est pas la première reçue par un agent.

Termination and nullification

Classement et nullité

(2) A notice given under the following provisions has the following effects:

(2) L'avis a pour effet, s'il est donné au titre

(a) if given under any of paragraphs (1)(a) to (c), it terminates pending proceedings in the Refugee Protection Division respecting the claim; and

a) des alinéas (1)a) à c), de mettre fin à l'affaire en cours devant la Section de protection des réfugiés;

(b) if given under paragraph (1)(d), it terminates proceedings in and nullifies any decision of the Refugee Protection Division or the Refugee Appeal Division respecting a claim other than the first claim.

b) de l'alinéa (1)d), de mettre fin à l'affaire en cours et d'annuler toute décision ne portant pas sur la demande initiale.

FEDERAL COURT

SOLICITORS OF RECORD

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