Federal Court  Cour fédérale

Date: 20150622

Docket: IMM-343-14

Citation: 2015 FC 774

Ottawa, Ontario, June 22, 2015

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

YASMEN AL ATAWNAH
DIANA ELATAWNA
KARAM ELATAWNA
RETAL AISHA ELATAWNA

Applicants

And

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS AND THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondents

JUDGMENT AND REASONS

[1] Yasmen Al Atawnah and three of her children sought refugee protection in Canada, claiming to fear persecution in Israel at the hands of family members. Ms. Al Atawnah claims that her brothers want to kill her because she was involved in reporting the honour killing of her sister by her brothers to the Israeli police.

[2] The merits of the family's refugee claims were never decided, however, as the Refugee Protection Division of the Immigration and Refugee Board declared the claims to have been abandoned. The applicants say that they did not intend to abandon their refugee claims, and that it happened as a result of Ms. Al Atawnah's limited English language skills, her unfamiliarity with the refugee process and her lack of legal representation.

[3] The applicants were unable to obtain a Pre-removal Risk Assessment prior to their removal from Canada as a result of paragraph 112(2)(b.1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27. This is a new provision which denies access to the PRRA process to individuals from Designated Countries of Origin who have abandoned their refugee claims if less than 36 months has passed since their application for refugee protection was determined to be abandoned by the Refugee Protection Division.

[4] Through this application, the applicants assert that their rights under section 7 of the *Canadian Charter of Rights and Freedoms*, s. 7, Part I of the *Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 were breached because they were removed from Canada without a fulsome assessment of the risks they claim to face in Israel ever having been carried out by a competent decision-maker. The applicants further seek a declaration that paragraph 112(2)(b.1) of *IRPA* is of no force and effect in the circumstances of this case as it breaches the applicants' section 7 Charter rights. By way of remedy, the applicants ask for a writ of *mandamus* compelling the Minister to return the applicants to Canada at the respondents' expense.

[5] For the reasons that follow, I have concluded that the applicants have not established a breach of their rights under section 7 of the Charter. Their application for judicial review will therefore be dismissed.

I. Background

[6] Ms. Al Atawnah is an Israeli citizen of Bedouin ethnicity and the mother of four children. Ms. Al Atawnah's three daughters accompanied her to Canada on February 9, 2012, while her son and husband remained in Israel.

[7] According to Ms. Atawnah, her sister Zahar was involved in an abusive marriage. After suffering years of domestic violence, Zahar reported her husband to the Israeli police in December of 2011. The police detained Zahar's husband pending an investigation. Zahar and her daughter stayed with Ms. Al Atawnah for a few days, but then moved back to the family home at the insistence of Ms. Al Atawnah's father and brothers, who claimed that it was necessary to preserve the family's "honour".

[8] Ms. Al Atawnah says that when another sister, Shahira, went to the family home looking for Zahar, their brother, Ahmed, initially told Shahira that Zahar had run away with another man. Shahira questioned this explanation, as she noticed that the mattress and blanket were missing from Zahar's room. Ahmed later confessed to Shahira and to Ms. Al Atawnah's son that he had killed Zahar, and that another brother and two male cousins had assisted Ahmed in disposing of her body.

[9] Ms. Al Atawnah claims that Ahmed threatened to kill his sisters if they reported his actions to the police. Despite this, Ms. Al Atawnah convinced Shahira that they should file a

report with the police regarding Ahmed's confession. Ms. Al Atawnah allayed her sister's concerns about going to the police by assuring Shahira that she would file the report in her own name. However, the police would not take the report from Ms. Al Atawnah, and insisted that the report be filed in Shahira's name as she was the one who had actually heard Ahmed's confession.

[10] The police subsequently questioned Ms. Al Atawnah's brothers, father and cousins, and detained some of them. Despite having strong suspicions that Ahmed and another brother named Sliman had indeed killed Zahar, the police ultimately released them. The police told Ms. Al Atawnah that there was nothing further they could do because Zahar's body could not be found.

[11] Ms. Al Atawnah soon learned that her father and brothers blamed her for making the police report and had told family members that they were planning to kill Ms. Al Atawnah and her children. The applicants did not seek protection from the Israeli police in relation to these threats. Instead, Ms. Al Atawnah and her three daughters came to Canada on February 9, 2012.

[12] Ms. Al Atawnah's son initially stayed behind in Israel, where he continued to live with his father. The pair did, however, come to Canada in August of 2012. Ms. Al Atawnah's husband came for a visit, and returned to Israel shortly thereafter. Ms. Al Atawnah's son remained in Canada with his mother because of concerns for his safety. After eight months in Canada, he returned to Israel because he was homesick and missed his father.

[13] Ms. Al Atawnah's husband and son moved from their village to another location in Israel where they continue to live in hiding. Although her husband does not mention any further threats

in his affidavit, Ms. Al Atawnah advised the enforcement officer that her brothers had continued to make threatening phone calls to her husband even after he and her son left their village.

[14] Ms. Al Atawnah states her affidavit that her son was hit by a car, and that the family believes that Ms. Al Atawnah's brothers were responsible for the attack. In contrast, Ms. Al Atawnah told CBSA officials that her brothers had badly beaten her son, and that he was hospitalized as a result. Ms. Al Atawnah's husband's affidavit does not shed any light on the matter, stating only that his "wife's family has tried to harm [his son] at least once and possibly twice".

[15] Shahira also continues to live in Israel, in a village about 25 kilometres from her brothers. Ms. Al Atawnah says that Shahira's husband's family is protecting her.

II. The Applicants' Refugee Claim

[16] Ms. Al Atawnah has two sisters living in Canada - Suzan and Enas. Suzan has been granted refugee protection based upon her own claim of domestic violence, and Enas was accepted as a permanent resident in Canada on humanitarian and compassionate grounds.

[17] With Enas' assistance, Ms. Al Atawnah filed her family's claims for refugee protection on February 10, 2012, the day after they arrived in Canada. They then filed Personal Information Forms for the family on March 8, 2012, again without the assistance of counsel.

[18] Enas then took Ms. Al Atawnah to see the lawyer who had represented Enas in her own immigration matters. Although this lawyer explained to how to apply for Legal Aid to Ms. Al Atawnah, she evidently made a mistake in her application and there was a delay in processing the family's Legal Aid application.

[19] In the meantime, Ms. Al Atawnah received a notice from the Board advising that her refugee hearing would be held on May 6, 2013. Enas then contacted the lawyer, who explained that the family had not yet retained him, and that, in any event, he was not available on the date set for the hearing. The lawyer offered to write to the Board to see if the hearing could be adjourned.

[20] In his letter to the Board, the lawyer explained the situation, and offered a range of alternate dates for the hearing. He also offered to appear briefly on May 6 to speak to the matter, if necessary.

[21] On May 1, 2013, the Board denied the request to adjourn the hearing. In determining that the applicants had not acted diligently in pursuing their refugee claims, the Board noted that the applicants had had over a year to retain counsel and prepare for their refugee hearing. The presiding member further found that the applicants had not identified any exceptional circumstances that would justify an adjournment.

[22] The applicants have not provided an affidavit from the lawyer who sought the adjournment on their behalf, nor have they claimed that he did not advise them in a timely manner that their request for an adjournment had been denied. There is also no suggestion in the evidence that counsel ever told the applicants that they would not have to attend on May 6, 2013 for their refugee hearing.

[23] What the applicants do say is that based upon what Enas had told her, Ms. Al Atawnah was under the impression that the hearing date would be changed, and that she did not have to attend before the Board on May 6, 2013. It was only shortly after the May 6 hearing date had

come and gone that Ms. Al Atawnah received a copy of the Board's May 1, 2013 decision refusing the adjournment in the mail. This correspondence advised Ms. Al Atawnah that the Board would hold an abandonment hearing on May 27, 2013.

[24] The purpose of an abandonment hearing is "to determine, given all of the circumstances and taking into account all relevant facts, whether the applicant's behaviour evidences, in clear terms, a wish or intention not to proceed with his or her claim". *Gonzalez v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 1248 at para. 21, [2009] F.C.J. No. 1600; *Sarran v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 62 at para. 4, [2014] F.C.J. No. 235.

[25] Ms. Al Atawnah attended the May 27, 2013 abandonment hearing without counsel, and attempted to show cause why her family's refugee claims should not be declared to have been abandoned. The applicants' current counsel states that Ms. Al Atawnah advised the Board member that she was ready to proceed with her refugee hearing at that time. However, Ms. Atawnah's affidavit is silent on this point, and there is nothing in the Board's reasons to indicate that this was in fact the case.

[26] The Board member did not accept Ms. Atawnah's explanation for missing the May 6 hearing and declared the family's claims to have been abandoned. The Board provided Ms. Al Atawnah with a copy of its decision, which advised her of the family's right to seek judicial review of the abandonment decision. The applicants did not, however, seek judicial review of the Board's decision, and some eight months went by without any action on their part.

III. Events Following the Board's Abandonment Decision

[27] Ms. Al Atawnah states in her affidavit that even after receiving the Board's abandonment decision, she still did not understand that her family's refugee claims would not be heard. She also says that she did not attempt to consult with counsel regarding the abandonment decision, as the lawyer had made it clear that he had not been retained to represent Ms. Al Atawnah and her children.

[28] The applicants have not, however, provided any information with respect to the status of their application for Legal Aid. They also have not suggested that they made any efforts to follow up on their application for Legal Aid for the refugee claims that Ms. Al Atawnah says she thought were still ongoing. Nor is there any suggestion that the applicants made any efforts to find another lawyer to represent them in connection with their refugee claims.

[29] Ms. Al Atawnah says that it was only in December of 2013, when she received a call-in notice for a pre-removal interview from the Greater Toronto Enforcement Centre, that she finally understood what was happening. Even then, it appears that Ms. Al Atawnah made no attempt to follow up with Legal Aid or secure legal assistance at this point.

[30] At her second pre-removal interview on January 8, 2014, Ms. Al Atawnah told Canada Border Services Agency officials how afraid she was of returning to Israel, which led the CBSA to detain her on the basis that she was unlikely to appear for removal. The CBSA also provided Ms. Al Atawnah with a Direction to Report advising that she and her family would be removed from Canada on January 26, 2014.

[31] After community members posted bail, Ms. Al Atawnah was released from detention. She then retained her current counsel, who filed a request for a deferral of the family's removal until such time as the risks that the family faced in Israel could be "properly assessed by a competent decision-maker". Counsel also filed an emergency application for a PRRA, and commenced this application for judicial review challenging the legislative scheme, and a second application with respect to the deemed refusal of the request to defer. These applications were accompanied by motions to stay the applicants' removal.

[32] The applicants' stay materials refer to a further motion being brought to re-open the family's refugee claims. It appears, however, that no such motion was ever brought, and the applicants have not provided any explanation for their failure to do so.

[33] On January 21, 2014, an enforcement officer determined that a deferral of removal was not warranted in the applicants' case.

[34] I will review the enforcement officer's reasons in some detail because the scope of the officer's powers is at issue in this proceeding. It must, however, be kept in mind that this is **not** an application for judicial review of the officer's decision, but a Constitutional challenge to the legislative scheme. The applicants never amended their application for judicial review of the deemed refusal of their deferral request to encompass the enforcement officer's actual decision, nor did they perfect their application for judicial review of the deemed refusal, with the result that the enforcement officer's decision is now final.

[35] It is clear from a review of the officer's reasons that the officer had concerns with respect to the credibility of certain aspects of Ms. Al Atawnah's story, including her explanation of the circumstances that led the Board to declare her family's refugee claims to have been abandoned.

[36] The officer was aware that the applicants had "not had a risk assessment conducted by a competent decision-maker", but concluded that the family had nevertheless been given "due legal process", and that it was Ms. Al Atawnah's own actions or inactions that led to the family's refugee claims being found to have been abandoned.

[37] The officer noted that in accordance with paragraph 112(2)(b.1) of *IRPA*, the applicants were not eligible for a PRRA until May of 2016. The officer further observed that it was beyond his or her authority to perform an "adjunct PRRA evaluation". The officer did, however, go on to consider the applicants' allegations of risk in some detail.

[38] The officer questioned why Ms. Al Atawnah's husband and son stayed behind in Israel if there was a grave threat to the family's safety. The officer also noted that the police report produced in support of the applicants' allegations of risk was in the name of Ms. Al Atawnah's sister, and not in her own name. In addition, the officer questioned why Ms. Al Atawnah claimed to be afraid that she would be killed at the airport upon her arrival in Israel, given that her brothers would have had no way of knowing the date of her return from Canada unless she were to tell them herself.

[39] The officer observed that his or her "discretion [was] extremely limited", and that it was "not within [his or her] authority to assess the merits of a decision made by the RPD". The officer further found that there was "insufficient new and resounding evidence" to show that the

applicants would face a risk of death, extreme sanction or inhumane treatment if they were to return to Israel.

[40] The officer was aware of Ms. Al Atawnah's assertion that she never intended to abandon her family's refugee claims. However, the officer noted that the onus was on Ms. Al Atawnah to act with reasonable diligence, and the officer was not convinced that a linguistic barrier was sufficient reason for Ms. Al Atawnah not to understand what was happening with her family's refugee claims. Consequently, the request to defer the family's removal was refused.

[41] On January 24, 2014, this Court dismissed the applicants' motions to stay their removal, with Justice McVeigh finding that neither of their applications for judicial review raised a serious issue. The family was removed from Canada on January 26, 2014. They say that they have been living in hiding since their return to Israel, and that they face an ongoing threat to their lives.

[42] On January 27, 2014, the applicants' application for an emergency PRRA was returned to the applicants' counsel, along with a letter informing the applicants that the family was not eligible for a PRRA by operation of paragraph 112(2)(b.1) of *IRPA*.

[43] The applicants' application for judicial review of the enforcement officer's deemed refusal to defer their removal was dismissed on March 28, 2014 because of the failure of the applicants to perfect the application. The applicants did, however, perfect this application, and leave was granted by this Court on January 9, 2015. A Notice of Constitutional Question challenging the constitutionality of paragraph 112(2)(b.1) of *IRPA* was subsequently served by the applicants in accordance with the provisions of section 57 of the *Federal Courts Act*, R.S.C., 1985, c. F-7.

[44] Ms. Al Atawnah continues to insist that she never intended to abandon her family's refugee claims, and that her confusion regarding the process resulted from her limited English language skills, her lack of legal representation and her reliance on her sister's advice.

[45] As previously noted, both the Board and the enforcement officer found that Ms. Al Atawnah did not act with reasonable diligence in pursuing her family's refugee claims, and both of those decisions are now final. It is, however, important to observe that neither decision-maker found that Ms. Al Atawnah understood that the result of her failure to appear for her May 6, 2014 refugee hearing could be that her family could be removed from Canada without a fulsome risk assessment by a competent decision-maker. Nor did either decision-maker find that Ms. Al Atawnah had consciously intended to abandon her family's refugee claims.

IV. The Relief Sought by the Applicants

[46] Through this application, the applicants seek the following relief:

1. A declaration that their removal from Canada to Israel, a country where risk is alleged, breaches section 7 of the *Charter*, section 3 of *IRPA*, and Canada's international obligations because a competent decision-maker did not conduct a risk assessment that meets the requirements of fundamental justice;

2. A declaration that paragraph 112(2)(b.1) of *IRPA* "is in the circumstances of this case, of no force and effect under section 52 of the *Constitution Act, 1982*" because it breaches the applicants' section 7 Charter rights by denying them a proper risk assessment by a competent decision-maker that meets the requirements of fundamental justice, thereby exposing the

applicants to a risk of torture, cruel, inhumane and degrading treatment, and a risk to life;

3. A writ of *mandamus* to compel the Minister to return the applicants to Canada at the respondents' expense pursuant to the Court's remedial authority under subsection 24(1) of the *Charter* or subsection 52(2) of *IRPA*.

V. Standard of Review

[47] In a case such as this the standard of review is presumed to be correctness: *Erasmo v. Canada (Attorney General)*, 2015 FCA 129 at para. 30, [2015] F.C.J. No. 638; *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 58, [2008] 1 S.C.R. 190.

VI. Analysis

[48] The principle of non-*refoulement* enshrined in 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 (entered into force 22 April 1954) prohibits the removal of refugees to a country where they are at risk of being subjected to human rights violations: *Németh v. Canada (Justice)*, 2010 SCC 56 at para. 19, [2010] 3 S.C.R. 281. As the Supreme Court of Canada noted in *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para. 44, [2002] 1 S.C.R. 3, deportation to torture may also violate the rights protected by section 7 of the Charter.

[49] Section 7 of the Charter provides that "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice".

[50] The onus is on the applicants to prove the violation of their constitutional rights: *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35 at para. 30, [2005] 1 S.C.R. 791. This violation must be proved on a balance of probabilities: *(Prime Minister) v. Khadr*, 2010 SCC 3 at para. 21, [2010] 1 S.C.R. 44.

[51] I understand the parties to agree that the test to be applied in determining whether or not there has been a violation of section 7 of the Charter is the two-part test established by the Supreme Court of Canada in cases such as *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, at paras. 75-76, 81, [2002] 4 S.C.R. 429, and *R. v. Malmo-Levine*, 2003 SCC 74, at para. 83, [2003] 3 S.C.R. 571. That is, the applicants must demonstrate:

1. That the government action in issue deprives individuals of their right to life, liberty, security of the person; and

2. If so, that this deprivation was not carried out in accordance with the principles of fundamental justice.

[52] I do not understand the respondents to deny that the applicants' section 7 rights have been engaged through the legislative scheme. Nor do the respondents assert that by abandoning their refugee claims, the applicants waived any right they may have had to have their risk assessed through a PRRA. Indeed, I understand the parties to agree that principles of fundamental justice require that foreign nationals in Canada who claim a risk of death, torture, or cruel or inhumane treatment or extreme sanction be provided with the opportunity to have their risk assessed prior to their removal. Where the parties disagree is with respect to whether the legislative scheme, specifically paragraph 112(2)(b.1) of *IRPA*, accords with the principles of fundamental justice.

[53] The respondents say that it does, as the applicants were indeed provided with an opportunity to have their risk assessed prior to their removal through the RPD process, but that they failed to act with reasonable diligence on this regard.

[54] In contrast, the applicants submit that fundamental justice requires that they be afforded a full risk assessment by a competent official prior to their removal from Canada, as well as sufficient time to make their case to that official (including an interim stay of their removal, if necessary), and that no adverse credibility findings be made against them in the absence of an oral hearing.

[55] The applicants assert that paragraph 112(2)(b.1) of *IRPA* is arbitrary and overbroad, and that its effect on individuals such as the applicants is grossly disproportionate to the state interests that the legislation seeks to protect.

[56] A law may be said to be "arbitrary" where there is no direct connection between the object of the law and the limit that it poses on the life, liberty or security of the person: *Canada (Attorney General) v. Bedford,* 2013 SCC 72 at para. 111, [2013] 3 S.C.R. 1101. A law may be said to be "overbroad" if it is "so broad in scope that it includes some conduct that bears no relation to its purpose": *Bedford,* above at para. 112. A law is "grossly disproportional" if the effects of the law on an individual's life, liberty or security of the person is "so grossly disproportionate to its purposes that they cannot rationally be supported": *Bedford,* above at para. 120.

[57] While there may be "significant overlap" between these principles, the question ultimately is whether the law is "inadequately connected to its objective or in some sense goes

too far in seeking to attain it": *Bedford*, above at para. 107, citing Hamish Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (Toronto: Irwin Law, 2012), at 151.

[58] Paragraph 112(2)(b.1) was part of a package of amendments to *IRPA* that came about as a result of the coming into force of the *Balanced Refugee Reform Act*, S.C. 2010, c. 8, on July 29, 2012. The parties agree that the legislative purposes behind the enactment of paragraph 112(2)(b.1) of *IRPA* include the simplification of the refugee process, the elimination of duplicative or redundant risk assessments, the prevention of abuse of the refugee system, and the expediting of removals.

[59] The applicants say that the legislation is overbroad, as there was no potential for duplication in their case, given that they had never had a risk assessment prior to the enforcement officer's consideration of their request to defer their removal from Canada.

[60] The applicants concede, however, that delaying removals to allow for PRRAs to be carried out for individuals whose refugee claims have been deemed abandoned would inevitably delay the removals process. While the applicants submit that these risk assessments could be done on very short timelines (thereby limiting delays in the removals process), it cannot be said that the creation of the PRRA bar bears no relationship to Parliament's goals of expediting removals and simplifying the process. The legislation is thus not overbroad.

[61] The applicants also say that the 36-month PRRA bar in paragraph 112(2)(b.1) of *IRPA* is arbitrary. According to the applicants, the rationale behind a 12- or 36-month PRRA bar is that country conditions that have already been assessed are unlikely to change during those

timeframes. If no risk assessment has ever been carried out, however, then the conditions in an individual's country of origin are likely to be the same on the day after their refugee claim was declared to be abandoned as they will be 12 or 36 months hence.

[62] From this is it apparent that what the applicants take issue with is not the *length* of the PRRA bar, but the fact that there is a bar at all. There is clearly a rational connection between the imposition of a PRRA bar on individuals who have abandoned their refugee claims and the limits that paragraph 112(2)(b.1) of *IRPA* imposes on the section 7 rights of the applicants.

[63] The more difficult question is whether the effect of paragraph 112(2)(b.1) on individuals such as the applicants is grossly disproportionate to the state interests that the legislation seeks to protect.

[64] The applicants submit that it is grossly disproportionate, as any modest increase in efficiency that may be realized as a result of the enactment of paragraph 112(2)(b.1) of *IRPA* is greatly outweighed by risks that they face.

[65] The applicants point out that in *Ragupathy v. Canada (Minister of Public Safety and Emergency Preparedness)*, [2006] F.C.J. No. 1717 at para. 27, 303 F.T.R. 178, this Court observed that "[a] timely risk assessment is Canada's safeguard against deportation to torture or similar treatment". The Court went on to observe that "the performance of a risk assessment before removal is the mechanism by which effect is given to section 7 of the Charter and various international human rights instruments to which Canada is a party": at para. 27.

[66] However, neither the *Refugee Convention* nor the section 7 Charter jurisprudence mandates a particular structure or process for the determination of risk-based claims: *Toth v.*

Canada (Minister of Public Safety and Emergency Preparedness), 2012 FC 1051, at para. 2, 417 F.T.R. 279. As the Supreme Court observed in *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, at para. 20, [2007] 1 S.C.R. 350, "[s]ection 7 of the Charter requires not a particular type of process, but a fair process having regard to the nature of the proceedings and the interests at stake". Fairness does not, however, require a perfect process: *Canada (Citizenship and Immigration) v. Harkat*, SCC 37, at para. 43 [2014] 2 S.C.R. 33.

[67] The question, then, is whether the processes that were available to the applicants were sufficient to protect their section 7 Charter rights. I agree with the respondents that in answering this question, we cannot look at paragraph 112(2)(b.1) of *IRPA* in isolation, but must have regard to the system as a whole: *Németh*, above at para. 51.

[68] The applicants submit that in the absence of a prior risk assessment, they were entitled to have their risk assessed by a "competent decision-maker" such as a PRRA officer. Paragraph 112(2)(b.1) of *IRPA* denies them access to a PRRA, and enforcement officers do not have either the mandate or the training to properly assess evidence of risk, nor are they in a position to make findings with respect to the credibility of allegations of risk.

[69] In support of their argument, the applicants point to CBSA's Operational Manual, which provides that enforcement officers are "**NOT** to conduct a full assessment of the alleged risk, nor come to a conclusion on whether the person is at risk" [emphasis in the original]. Rather, officers consider and assess the risk-related evidence that has been submitted and to decide whether deferring removal is warranted so as to allow for a full assessment of risk.

[70] The applicants point out that decisions on requests to defer are often made under very short timelines, with limited opportunity for enforcement officers to consider the important interests at stake. This is especially so since the amendment to subsection 48(2) of *IRPA* which now imposes a duty on enforcement officers to effect removal "as soon as possible", rather than "as soon as practicable", as was previously the case.

[71] The applicants do not, however, suggest that they had insufficient time to prepare their request for a deferral of their removal, nor have they pointed to any evidence or submissions that they were unable to provide to the enforcement officer as a result of time constraints.

[72] The applicants also acknowledge that this Court has already found the "PRRA bar" contained in paragraph 112(2)(b.1) of *IRPA* to be constitutionally valid in *Peter v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2014 FC 1073, [2014] F.C.J. No. 1132, a constitutional challenge to paragraph 112(2)(b.1) that was brought in the context of an application for judicial review of an enforcement officer's decision refusing to defer Mr. Peter's removal to Sri Lanka.

[73] The applicants submit that the facts in this case are materially different from those in *Peter* as there has been **no** prior assessment of the applicants' risk in this case, whereas the applicant in *Peter* had already had a refugee hearing, and the focus of the enforcement officer was on "whether there [was] sufficient new probative evidence of the applicant's exposure to a risk of death, extreme sanction, or inhumane treatment": *Peter*, at para. 254.

[74] However, a review of the decision in *Peter* reveals that in assessing whether paragraph 112(2)(b.1) of *IRPA* violated Mr. Peter's section 7 rights, consideration was given by the Court

to the role played by enforcement officers in assessing new evidence of risk asserted at the removals stage, including evidence relating to risks that had not previously been the subject of a full risk assessment: see, for example, paras. 246-7, 254, 262 and 266.

[75] One of the issues in *Peter* was whether the evolution in the country conditions within Sri Lanka following the conclusion of the civil war created a new, different or greater risk than the risk assessed by the Refugee Protection Division. Thus the question was whether the applicant in *Peter* was at risk in Sri Lanka as a result of *current* country conditions. While it is true that Mr. Peter had had the benefit of a refugee hearing, the RPD had not assessed the conditions facing Tamils in Sri Lanka as of the date of the application for judicial review.

[76] More important for our purposes, however, is the fact that Mr. Peter also identified a risk factor in his request to defer his removal that he had not raised before the RPD, and which had thus **not** been assessed by the Board. That is, Mr. Peter alleged for the first time in his request to defer that he would face a serious risk of harm in Sri Lanka because he had worked as a driver for a non-governmental organization. Allegedly on the advice of his interpreter, Mr. Peter had not provided any information regarding his employment with the NGO or the problems that he experienced as a result of this employment in either his PIF or at his refugee hearing: *Peter*, above at para. 14.

[77] Thus, contrary to the applicants' assertion in the case before me, Justice Annis did indeed turn his mind to a scenario where an enforcement officer would act as the sole assessor of a risk factor. While the RPD had assessed some of the applicant's risk allegations in *Peter*, there had never been any assessment of the risk allegedly faced by Mr. Peter in Sri Lanka as a result of his work as a driver for an NGO prior to the issue being raised before the enforcement officer.

[78] In concluding that paragraph 112(2)(b.1) of *IRPA* did not breach the applicant's rights under section 7 of the Charter, the Court observed in *Peter* that enforcement officers could assess new evidence of risk, and that "the availability of the removals process generally provides a complete answer to the constitutionality challenge to section 112(2)(b.1)": above at para. 86.

[79] This conclusion is consistent with the jurisprudence that has developed regarding the role of enforcement officers in assessing allegations of risk that have not previously been assessed. For example, in *Canada (Minister of Public Safety and Emergency Preparedness) v. Shpati*, 2011 FCA 286 at paras. 43-44, [2012] 2 F.C.R. 133, the Federal Court of Appeal held that enforcement officers were obliged to consider risks that had not previously been assessed if they exposed the applicant to "a risk of death, extreme sanction or inhumane treatment; see also *Wang v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 148 at para. 48, [2001] 3 F.C. 682.

[80] The Federal Court of Appeal noted that the applicant in *Shpati* had not produced any evidence of a new risk that had not been assessed through the PRRA process. The Court inferred that "if Mr. Shpati had such evidence, the officer would have considered whether it warranted deferral and exercised his discretion accordingly": at para. 41. The Court noted that such an approach was consistent with its earlier decision in *Baron v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81, [2010] 2 F.C.R. 311, and was "an accurate statement of the law": *Shpati*, above at para. 42.

[81] The Federal Court of Appeal thus found that it was incumbent on enforcement officers to assess the sufficiency of the evidence adduced by a person seeking a deferral of their removal to allow for a full risk assessment in cases where there is a new allegation of risk that had not

previously been assessed. Indeed, as Justice Zinn observed in *Etienne v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2015 FC 415, [2015] F.C.J. No. 408, enforcement officers are not just required to consider "new" risks that only arose after a refugee determination or other process. Enforcement officers are "also required to consider risks that have never been assessed by a competent body": at para. 54. See also *Toth*, above, at para. 23.

[82] An enforcement officer can therefore defer removal to allow for a fulsome risk assessment where an applicant facing removal adduces sufficient evidence of a serious risk in his or her country of origin, and that risk has not previously been assessed. Conversely, if an enforcement officer refuses to defer removal and an applicant believes that the officer erred in assessing the sufficiency of the evidence of a new risk, or otherwise treated the applicant unfairly such that the applicant's section 7 Charter rights have been infringed, the individual can seek judicial review of the officer's decision in this Court and bring a motion to seek a stay his or her removal pending disposition of the application.

[83] This approach has now been incorporated into CBSA's Operational Bulletin: PRG-2014-22, entitled *Procedures relating to an officer's consideration of new allegations of risk at the deferral of removal stage*. The Operational Bulletin states that enforcement officers should not conduct full assessments of an alleged risk, but are instead to consider and assess the evidence that has been submitted, to determine whether a deferral is required to allow for consideration under section 25.1 of *IRPA* on humanitarian and compassionate grounds.

[84] The significant evidentiary challenge that confronts most applicants seeking a deferral of removal is that their risk factors will have already been thoroughly evaluated by the Refugee Protection Division (and possibly the Refugee Appeal Division as well), or through the PRRA

process, or both: *Peter*, above, at para. 256. Evidence of a significant change in circumstances or an entirely new risk development will therefore usually be required to demonstrate the need for a full risk assessment.

[85] However, individuals whose allegations of risk have never been assessed (such as the applicants in the case before me) will face a lesser burden in demonstrating that their evidence constitutes new evidence of risk. In the absence of a prior risk assessment, almost any evidence of risk adduced by such an applicant could be considered to be "new". Whether it is "sufficient" is a matter for determination by the enforcement officer.

[86] An enforcement officer's assessment of a request to defer is also not the only avenue open to individuals in the position of the applicants. Regard must also be had to the oversight provided by this Court through the stay process. As Justice Annis observed in *Peter*, above, "[t]he oversight function of the Federal Court provides a heightened degree of reliability to the decisions of the enforcement officer": at para. 271. Justice Annis found that this oversight "mitigates to a large extent any concerns of competency or legal standards argued by the applicant": *Peter*, above at para. 271. As the Federal Court of Appeal observed in *Shpati*, above at para. 51, this Court can often consider a request for a stay more comprehensively than can an enforcement officer consider a request to defer.

[87] Moreover, as Justice Annis observed in *Peter*, the role of the Federal Court "extends not only to considering legal issues, such as mootness or the Charter, but most obviously to assessing the reasonableness of the officer's decision on risk": at para. 175.

[88] As Justice Zinn further observed in *Toth*, above, at para. 24, if clear and convincing evidence of a real risk of harm has been presented in support of a deferral request, then an applicant "may persuade a judge of this Court that he is likely to succeed on judicial review of the rejected deferral request". In the alternative, an applicant "may convince a judge that he has a *prima facie* case that his removal will deprive him of his right to liberty, security and perhaps life as protected by section 7 of the Charter". Justice Zinn concluded that "neither possible avenue entails that the limitation on the right to a PRRA as found in paragraph 112(2)(b.1) of IRPA is constitutionally invalid". In his view, "[t]he fact that an applicant who is prevented from accessing the PRRA process due to the 12 month bar [or 36 months in this case] has these other alternatives available to him *strongly suggests* […] *that section 112(2)(b.1) of IRPA is not invalid*": at para. 24 (my emphasis).

[89] Although Justice Zinn's comments in *Toth* were made in the context of an order refusing a motion for a stay and have to be read in that context, I nevertheless find Justice Zinn's logic to be compelling.

[90] As Justice Annis noted in *Peter*, enforcement officers are required to assess the sufficiency of the evidence that has been provided with respect to the alleged risk of harm: at paras. 247, 266. If an applicant is able to adduce sufficient probative evidence of a risk that had not previously been assessed, then a deferral of removal will be granted in order that the risk can receive due consideration.

[91] This makes sense. One can easily imagine the potential for abuse if applicants were automatically entitled to have their removal from Canada deferred to allow for a PRRA every time they raised a new allegation of risk that had not previously been assessed. Such automatic

entitlement would create an incentive for refugee claimants to raise their allegations of risk in a piecemeal fashion, rather than a comprehensive fashion during the refugee or PRRA processes, in order to delay their removal from Canada. Requiring that individuals who raise new issues of risk at the very last minute be able to meet a base threshold of evidentiary sufficiency before their removal from Canada will be deferred is thus entirely reasonable.

[92] The applicants also take issue with the enforcement officer's assessment of the evidence that they adduced regarding the risk that they claimed to face in Israel. The applicants suggest that they were denied fundamental justice in the removals process because the officer made veiled credibility findings regarding aspects of their story and treated them unfairly by denying them an opportunity to address the officer's concerns.

[93] I agree with the applicants that enforcement officers should limit themselves to considering the sufficiency of the evidence before them, and that they should not make negative credibility findings, veiled or otherwise, on the basis of written submissions. The Supreme Court has held that in light of the important interests at stake in risk-based claims, where a serious issue of credibility arises, "fundamental justice requires that credibility be determined on the basis of an oral hearing": *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177 at para. 59, [1985] S.C.J. No. 11.

[94] That said, it must once again be kept in mind that this application is **not** an application for judicial review of the merits of the enforcement officer's decision refusing to defer the applicants' removal from Canada. The question in this application is not whether the applicants' section 7 Charter rights were violated by the way that this particular enforcement officer assessed

their evidence of risk, but whether the PRRA bar in paragraph 112(2)(b.1) of *IRPA* is constitutionally invalid.

[95] Answering this question requires consideration of the legislative structure as a whole, and whether the processes afforded to the applicants by the legislation are sufficient to protect their section 7 Charter rights. By arguing that the enforcement officer erred in this case by making negative credibility findings without first giving the applicants an opportunity to address the officer's concerns, the applicants are essentially trying to mount a collateral attack on the enforcement officer's decision – a decision that is now final.

VII. Conclusion

[96] As was noted earlier, this Court has already determined in *Peter* that the PRRA bar created by paragraph 112(2)(b.1) of *IRPA* does not violate section 7 of the Charter. The applicants submit that *Peter* is distinguishable from the present case, as the RPD had already assessed the risks faced by the applicant in *Peter*, whereas in this case, paragraph 112(2)(b.1) of *IRPA* allowed for the applicants' removal from Canada without any evaluation of the risks that they face in their country of origin having been carried out by a competent decision-maker.

[97] Enforcement officers may, however, be confronted with new allegations of risk in a number of different ways. As in this case, allegations of risk may be raised at the removals stage by individuals who have never had any form of prior risk assessment. Alternatively, as was the case in *Peter*, failed refugee claimants who have already had their risk assessed by the RPD may raise entirely new allegations of risk at the removals stage. Or, as was also the case in *Peter*, a failed refugee claimant may ask an officer to defer removal as a result of changes in country

conditions allegedly creating a more serious risk to the individual than was the case at the time that those conditions were assessed through the refugee determination process.

[98] At the end of the day, however, each of these situations ultimately raises the same question, which is whether removing an individual from Canada without first having a PRRA officer assess a new risk factor violates the individual's section 7 Charter rights. This Court has already determined in *Peter* that it does not, and despite the careful and capable submissions of the applicants' counsel, I have not been persuaded that I should come to a different conclusion in this case, notwithstanding the difference in the factual situation in which the Charter issue arises.

[99] I do accept that the nature and importance of the rights at stake in cases such as this suggests the need for strong procedural safeguards. I further acknowledge that enforcement officers are not mandated to carry out full-blown risk assessments, that there is no provision for a hearing at the removals stage, and no right of appeal from a decision refusing to defer removal. That said, one of an enforcement officer's core responsibilities is to assess the sufficiency of new evidence and decide whether deferral to the risk assessment process is appropriate. The applicants have not provided evidence that would indicate that enforcement officers are not competent to carry out that task.

[100] Moreover, one cannot look at the deferrals process in isolation in assessing whether the applicants' Charter rights were respected by the statutory scheme. Having reviewed the scheme as a whole, I am satisfied that the applicants were removed from Canada in accordance with a statutory scheme that respected their section 7 Charter rights, and that they were not constitutionally entitled to a PRRA before they could be removed from Canada.

[101] In coming to this conclusion, I note that the legislative regime offered the following to these applicants:

- The opportunity to make a refugee claim and to have that claim referred to the Refugee Protection Division of the Immigration and Refugee Board for an oral hearing. The Board found that the applicants had not acted with diligence in pursuing their refugee claims, and that they had not provided a reasonable explanation for their failure to appear for their refugee hearing;

- Having failed to appear for their refugee hearing, the applicants were entitled to, and had, an abandonment hearing before the Refugee Protection Division where they had the opportunity to demonstrate that they had a continuing intention to pursue their refugee claims. They were unable to do so;

- The opportunity to challenge the abandonment decision through an application for leave and for judicial review in this Court. The applicants chose not to avail themselves of this opportunity;

- The opportunity to bring a motion to re-open their refugee claim if they believed that the Board had treated them unfairly. The applicants chose not to exercise this option;

- Had their request to re-open their refugee claim been refused, the applicants would have had the right to challenge that decision through an application for leave and for judicial review in this Court;

- The right to request a deferral of their removal to allow for a full assessment of the risks faced by the applicants in Israel. This allowed the applicants to have an enforcement officer consider the sufficiency of the evidence they provided regarding the risks that had not previously been assessed in order to determine whether they exposed the applicants to a risk of death, extreme sanction or inhumane treatment in Israel. The applicants sought such a deferral, it was considered by the enforcement officer, and the applicants were provided reasons for why their request was refused;

- The right to challenge the enforcement officer's refusal to defer through an application for leave and for judicial review in this Court. Although the applicants commenced a related application, they did not complete this process;

- The right to bring a motion for a stay of their removal where they had the opportunity to raise any errors allegedly committed by the enforcement officer for consideration by a judge of this Court. The applicants availed themselves of this opportunity and made their arguments. Justice McVeigh refused to stay the applicants' removal on the basis that they had failed to

> demonstrate the existence of a serious issue in their application for judicial review of the officer's decision.

[102] I agree with the respondent that when regard is had to the totality of the processes that were available to these applicants under the statutory scheme in *IRPA*, the effect of the PRRA bar created by paragraph 112(2)(b.1) of the Act on the applicants is not grossly disproportionate to the state interests that the legislation seeks to protect.

[103] As a consequence, the applicants have failed to establish a breach of their section 7 Charter rights, and the application for judicial review is accordingly dismissed.

VIII. Certification:

[104] While my decision in this case is, to some extent, fact-specific, I nevertheless agree with the parties that it does raise a question of law that is appropriate for certification. The constitutional implications of the PRRA bar for individuals who are found to have abandoned their refugee claims is a question of general importance that transcends the interests of these immediate parties and would be determinative of the appeal: *Varela v. Canada (Citizenship and Immigration)*, 2009 FCA 145 at para. 28, [2010] 1 F.C.R. 129.

[105] The applicant proposes the following questions for certification:

> 1. In cases where no prior risk assessment has been conducted, is the availability of a discretionary deferral of removal by an inland enforcement (removals) officer sufficient to meet Canada's obligation to assess risk prior to

removal and address an individual's rights under section 7 of the *Charter of Rights and Freedoms*?

2. Is the 12- or 36-month bar to consideration of a Pre-Removal Risk Assessment under section 112(2)(b.1) of the *Immigration and Refugee Protection Act* in breach of section 7 of the *Charter of Rights and Freedoms*, as it denies access to a risk assessment that meets the requirements of the principles of fundamental justice prior to an individual's removal from Canada?

[106] The respondent proposes the following question for certification:

1. Does the prohibition contained in section 112(2)(b.1) of the *Immigration and Refugee Protection Act* against bringing a Pre-Removal Risk Assessment application until 36 months have passed since the claim for refugee protection was abandoned, violate section 7 of the Charter?

[107] I am not satisfied that the applicants' questions are appropriate for certification. The first question presumes that a discretionary deferral of removal by an enforcement officer is the *only* process relevant to the analysis. As I have previously explained, in assessing whether the operation of paragraph 112(2)(b.1) of *IRPA* has resulted in a breach of the applicants' section 7 Charter rights in this case, one cannot look at the deferrals process in a vacuum, and regard must be had to the legislative scheme as a whole.

[108] The applicants' second question presupposes that the legislative regime does not allow for a risk assessment that meets the requirements of the principles of fundamental justice. With respect, that is the very question that has to be answered.

[109] The question proposed by the respondent is a modified version of one of the questions that was certified in *Peter*, taking into account that the PRRA bar in this case is 36 months rather than 12 months (as was the case in *Peter*), and that the applicants' refugee claim in this case was found to have been abandoned. This question allows for consideration of the legislative regime as a whole in the context of the facts of this case, and is, in my view, appropriate for certification.

JUDGMENT

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

1. Does the prohibition contained in section 112(2)(b.1) of the *Immigration and Refugee Protection Act* against bringing a Pre-Removal Risk Assessment application until 36 months have passed since the claim for refugee protection was abandoned, violate section 7 of the Charter?

"Anne L. Mactavish"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	YASMEN AL ATAWNAH, DIANA ELATAWNA, KARAM ELATAWNA, RETAL AISHA ELATAWNA v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS AND THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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