Federal Court Cour fédérale

Date: 20211201

Dockets: IMM-1685-20
IMM-7417-19

Citation: 2021 FC 1335

Ottawa, Ontario, December 1, 2021

PRESENT: The Honourable Madam Justice Strickland

Docket: IMM-1685-20

BETWEEN:

SAIMA SHAHID
SHAHID MASOOD BUTT

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION CANADA

Respondent

Docket: IMM-7417-19

AND BETWEEN:

FARIDA NUSRAT

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Saima Shahid and Shahid Masood Butt are married, they are Ahmadi Muslims, citizens of Pakistan and the Applicants in Court file IMM-1685-20. They seek judicial review of two decisions of a Minister's Delegate, both dated February 17, 2020, which decisions found that, pursuant to s 101(1)(c.1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], Ms. Shahid and Mr. Butt's respective claims for refugee protection were not eligible for referral to the Refugee Protection Division [RPD], of the Immigration and Refugee Board. Farida Nusrat is also an Ahmadi Muslim, a citizen of Pakistan and is the Applicant in Court file IMM-7417-19. She seeks judicial review of a decision of a Minister's Delegate, dated March 3, 2020, which found that, pursuant to s 101(1)(c.1) of the IRPA, Ms. Nusrat's claim for refugee protection was not eligible for referral to the RPD.

[2] By Order dated September 28, 2021, these matters were set down to be heard together.

Background

[3] Before making a refugee claim in Canada, each of Ms. Shahid, Mr. Butt and Ms. Nusrat [collectively, the Applicants] made a refugee claim in another country with which Canada has information-sharing agreements related to immigration matters.

[4] Mr. Butt and Ms. Shahid claim that, as Ahmadis, they were concerned about persecution by the Pakistani state and by orthodox Muslims. In May 2017, they left Pakistan and travelled to New Zealand. They had been denied visas to Australia, where their two sons live, but mistakenly

believed that if they were afforded refugee protection in New Zealand then they could re-settle with their sons in Australia, or vice versa. Mr. Butt and Ms. Shahid made asylum claims in New Zealand. However, they claim that Mr. Butt could not find work and, with no family there, he found living in New Zealand difficult and he became depressed. Therefore, on the advice of Mr. Butt's doctor, they left New Zealand and returned to Pakistan despite their continuing fear of persecution there. Letters from New Zealand Immigration indicate that Mr. Butt and Ms. Shahid departed New Zealand on September 28, 2017 and, as a result, their as yet undetermined claims were deemed to be withdrawn. In December 2019, Mr. Butt and Ms. Shahid left Pakistan and came to Canada. Mr. Butt and Ms. Shahid submitted refugee claims in Canada in January 2020. The Minister's Delegate found, pursuant to s 101(1)(c.1) of the IRPA, because they had made prior refugee claims for protection in New Zealand, their respective claims for refugee protection were not eligible for referral to the RPD.

[5] Ms. Nusrat similarly claims that as an Ahmadi she has faced persecution by the Pakistani government due to her faith and suffered discrimination by non-government actors. Ms. Nusrat claims that in 2013 she obtained a visa allowing her to travel to the United Kingdom [UK]. Documentation that she attaches as exhibits to her affidavit filed in support of her application for judicial review indicates that she travelled to London on May 17, 2014. She made a claim for refugee protection on June 3, 2014, which was refused on October 8, 2014, and an appeal of that decision was not successful. Ms. Nusrat claims that she then was able to obtain a five-year European Union family resident permit because she was supported by her daughter who was living and working in Ireland. For reasons that are unclear, Ms. Nusrat claims that she lost that status. Meanwhile, she had obtained a visa to travel to Canada and did so in May 2019 to visit

her son. A month later, she and her son traveled back to Pakistan. She claims that given the situation for Ahmadis in Pakistan, she subsequently returned to Canada. She arrived on or about August 1, 2019 and made a refugee claim on September 19, 2019. The Minister's Delegate found, pursuant to s 101(1)(c.1) of the IRPA, because Ms. Nusrat made a prior refugee claim for protection in the UK, her claim for refugee protection was not eligible for referral to the RPD.

Decisions Under Review

[6] In forms entitled "Minister's Delegate's Review" and dated February 17, 2020, the Minister's Delegate noted that Ms. Shahid and Mr. Butt are, respectively, not citizens or permanent residents of Canada; were not in possession of a permanent resident visa or other document required by the regulations; and, have made a claim for refugee protection and intend to remain and live in Canada. Results of systemic biometric immigration information sharing with New Zealand confirmed that they were each fingerprinted there on August 17, 2017 in connection with OnShore Asylum applications made in New Zealand. Their claims were therefore found to be ineligible to be referred to the RPD pursuant to s 101(1)(c.1) of the IRPA. The respective decisions state that Removal Orders were issued against each of Ms. Shahid and Mr. Butt and would come into force in accordance with s 49(2) of the IRPA.

[7] The March 3, 2020 Minister's Delegate Review concerning Ms. Nusrat also states that she is not a citizen or permanent resident of Canada; she is not in possession of a permanent resident visa or other document required by the regulations; and, she has made a claim for refugee protection and intends to remain and live in Canada. It sets out that a sharing request was submitted to the UK, a partner country. The response received confirmed that Ms. Nusrat, before

making a claim for refugee protection in Canada, made a claim for refugee protection in the UK on June 3, 2014, which was refused on October 8, 2014. Accordingly, her claim was found to be ineligible to be referred to the RPD pursuant to s 101(1)(c.1) of the IRPA. The decision states that Removal Order had been issued and would come into force in accordance with s 49(2) of the IRPA.

Issues

[8] The issue identified by the Applicants in both IMM-7417-19 and IMM-1685-20 is:

i. Does s 101(1)(c.1) of the IRPA violate s 2(e) of the *Canadian Bill of Rights,* SC 1960, c 44 [*Bill of Rights*]?

[9] In IMM-7417-19, Ms. Nusrat raises a second issue being:

ii. Does s 101(1)(c.1) of the IRPA violate s 15(1) of the *Canadian Charter of Rights and Freedoms* [*Charter*] and, if so, is s 101(1)(c.1) saved by s 1 of the *Charter*?

Standard of review

[10] The parties submit and I agree that these issues are to be reviewed on a standard of correctness.

[11] Constitutional questions are exceptions to the presumption that administrative decisions will be reviewed on the reasonableness standard. As necessitated by respect for the rule of law, they are to be reviewed on the correctness standard (*Canada (Citizenship and Immigration) v*

Vavilov, 2019 SCC 65 [*Vavilov*] at para 53, 69). The *Bill of Rights*, though not a part of the constitution, has been held to have "quasi-constitutional status" (*Veleta v Canada (MCI)*, 2005 FC 572 [*Veleta*] at para 77). Any impugned provision that infringes the *Bill of Rights* will be found to be inoperative, unless the legislation in issue explicitly states that the provision is to operate notwithstanding the *Bill of Rights* (*Hassouna v Canada (MCI)*, 2017 FC 473 [*Hassouna*] at para 67; *The Queen v Drybones*, 1969 CanLII 1 (SCC), [1970] SCR 282). For these reasons, interpretation of the *Bill of Rights*, like interpretation of the *Charter*, should be performed on a standard of correctness (*Quebec North Shore & Labrador Railway Company, Inc. v. New Millennium Capital Corp.*, 2011 FC 765 at para 28).

[12] Further, as submitted by the Respondent, s 2(e) of the *Bill of Rights* is focused on the procedural rights of the claimant, which is another rationale for applying the correctness standard (*Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35).

Relevant Legislation

***Immigration and Refugee Protection Act*, SC 2001, c 27**

> **101 (1)** A claim is ineligible to be referred to the Refugee Protection Division if
>
> …
>
> **(c.1)** the claimant has, before making a claim for refugee protection in Canada, made a claim for refugee protection to a country other than Canada, and the fact of its having been made has been confirmed in accordance with an agreement or arrangement entered into by Canada and that country for the purpose of facilitating information sharing to assist in the administration and enforcement of their immigration and citizenship laws;

…

112 (1) A person in Canada, other than a person referred to in subsection 115(1), may, in accordance with the regulations, apply to the Minister for protection if they are subject to a removal order that is in force or are named in a certificate described in subsection 77(1).

113 Consideration of an application for protection shall be as follows:

…

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

…

113.01 Unless the application is allowed without a hearing, a hearing must, despite paragraph 113(b), be held in the case of an applicant for protection whose claim for refugee protection has been determined to be ineligible solely under paragraph 101(1)(c.1).

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

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

(b) in the case of an applicant described in subsection 112(3), the effect of staying the removal order with respect to a country or place in respect of which the applicant was determined to be in need of protection.

***Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRP Regulations]**

168 A hearing is subject to the following provisions:

(a) notice shall be provided to the applicant of the time and place of the hearing and the issues of fact that will be raised at the hearing;

(b) the hearing is restricted to matters relating to the issues of fact stated in the notice, unless the officer conducting the hearing considers that other issues of fact have been raised by statements made by the applicant during the hearing;

> **(c)** the applicant must respond to the questions posed by the officer and may be assisted for that purpose, at their own expense, by a barrister or solicitor or other counsel; and
>
> **(d)** any evidence of a person other than the applicant must be in writing and the officer may question the person for the purpose of verifying the evidence provided.

***Canadian Bill of Rights*, SC 1960, c 44**

> **2** Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to
>
> …
>
> **(e)** deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;

Canadian Charter of Rights and Freedoms

> 15 (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Does s 101(1)(c.1) of the IRPA infringe s 2(e) of the *Bill of Rights*?

(IMM-1685-20 and IMM-7417-19)

Applicants' position

[13] The Applicants submit that s 2(e) of the *Bill of Rights* requires a two stage or "book-ended process". The first "bookend" being a full oral hearing to consider the merits of the

applicant's refugee claim (referencing *Singh v Canada (Employment and Immigration)*, [1985] 1 SCR 177 at paras 103-110 [*Singh*]), the second "bookend" being the Pre-removal Risk Assessment Application [PRRA] process to prevent *refoulement*. The Applicants submit that s 101(1)(c.1) of the IRPA has the effect of denying refugee claimants the level of procedural fairness required by *Singh* and *Kreishan v Canada*, 2019 FCA 223 [*Kreishan*], thereby breaching s 2(e) of the *Bill of Rights*. They submit that this is because, pursuant to s 101(1)(c.1), they are ineligible to have their cases heard by the RPD. Thus, the PRRA hearing is the Applicants' only opportunity to present their case. They assert that the PRRA process is too limited in scope to fairly allow them to do so. Further, that s 101(1)(c.1) moves cases from the RPD, a specialized and competent independent tribunal, to a body with less specialized expertise and a severe lack of institutional capacity to deal with the high volume of cases that will stem from s 101(1)(c.1).

Respondent's position

[14] The Respondent agrees that the Applicants are entitled to both a fair process to determine their claims for protection and to be protected against *refoulement* but the Respondent rejects the Applicants' "bookend" analogy. The Respondent submits that there is no requirement that both be considered in separate processes. Both requirements, including the oral hearing required by natural justice, are afforded to the Applicants through a single process at the PRRA stage. Section 113.01 of the IRPA requires that, where refugee claimants are ineligible to be heard by the RPD pursuant to s 101(1)(c.1), they will always have an oral hearing to determine their application for protection. Under this "enhanced" PRRA process, applications for protection are assessed by considering the same factors as are considered in a refugee claim. Pursuant to s 114(1)(a), a successful application for protection will grant the applicant refugee protection in

the same manner as if they had succeeded before the RPD. Further, this Court has previously found, in *Seklani v. Canada (MPSEP)*, 2020 FC 778 [*Seklani*] at paras 46-48, that the enhanced PRRA process is sufficient to protect claimants' rights under s 7 of the *Charter*. *Seklani* also held that the enhanced PRRA hearing process respects the principles of fundamental justice. The Respondent submits that the enhanced PRRA process will provide the Applicants with a fair procedure to consider their claims for refugee protection, consistent with the requirements of s 2(e) of the *Bill of Rights*.

Analysis

i. Background – s 101(1)(c.1)

[15] By way of background, on June 21, 2019 the *Budget Implementation Act, 2019, No.1*, SC 2019, c. 29, received Royal Assent [*Budget Implementation Act*]. Section 306 of the *Budget Implementation Act* amended s 101 of the IRPA, adding s 101(1)(c.1) as a new eligibility requirement for those seeking to make refugee claims in Canada. Pursuant to s 101(1)(c.1), claimants who have filed a claim for refugee protection in certain other countries with which Canada has an agreement or arrangement for the purpose of information sharing to assist in the administration and enforcement of their immigration and citizenship laws, are ineligible to have their claims referred to the RPD for determination. Canada has such agreements or arrangements with Australia, New Zealand, the UK and the United States, collectively with Canada referred to as the "Five Eyes" alliance (see: *X (Re)*, 2014 FCA 249 at para 6). Section 308.1 of the *Budget Implementation Act* also introduced s 113.01 of the IRPA. Section 113.01 stipulates that, within the PRRA process, a hearing must be held for claimants whose claim was found to be ineligible

to be referred to the RPD pursuant to s 101(1)(c.1), unless the PRRA application can be granted without a hearing.

[16] This is often referred to as an "enhanced" PRRA process. This is because s 113.01 of the IRPA creates an exception to the general rule that in PRRA applications a hearing will only be required where there is new evidence raising a serious issue about the credibility of the applicant, the new evidence is central to the decision with respect to the application for protection and, if accepted, would justify allowing the application for protection (IRPA s 113(b); *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRP Regulations] s 167).

[17] This Court has previously held that "the general purpose of paragraph 101(1)(c.1) of the IRPA is to provide an additional tool to manage and discourage asylum claims in Canada by those who have made claims for refugee protection in information-sharing countries, while maintaining an asylum system that is fair and compassionate to those who seek protection" (*Seklani* at para 60).

[18] While s 101(1)(c.1) of the IRPA is relatively new, the filing of a claim for refugee protection in another "Five Eyes" member state is not the only basis upon which claimants can be found to be ineligible to have their claims referred to the RPD. As stated by Justice Gascon in *Seklani*:

> [10] Paragraph 101(1)(c.1) is the latest addition to a long list of refugee claims which are deemed ineligible to be referred to the RPD. Parliament has previously determined, in subsection 101(1) of the IRPA, that several other categories of asylum claimants are precluded from accessing the IRB. These include: those who have already been conferred refugee protection under the IRPA

> (paragraph 101(1)(a)); those whose claims have already been denied by the IRB (paragraph 101(1)(b)); those whose claims have already been found to be ineligible, withdrawn or abandoned by the IRB (paragraph 101(1)(c)); those who have been recognized as Convention refugees by another country and who can be returned to that country (paragraph 101(1)(d)); those who entered Canada from the United States through a land border port of entry, in application of the STCA between Canada and the United States (paragraph 101(1)(e)); and those who have been found inadmissible to Canada on grounds of security, violating human or international rights, serious criminality or organized criminality, subject to certain exceptions (paragraph 101(1)(f)).

ii. Test - paragraph 2(e) of the *Bill of Rights*

[19] With respect to the Applicants' challenge to s 101(1)(c.1), the parties agree that there is a four-part test to determine if s 2(e) of the *Bill of Rights* is engaged:

1. the applicant must be a "person" within the meaning of s 2(e);
2. the process must constitute a "hearing […] for the determination of [the applicant's] rights and obligations";
3. the process must be found to violate "the principles of fundamental justice"; and
4. the alleged defect in the process in dispute must arise as a result of a "law of Canada" which has not been expressly declared to operate notwithstanding the *Canadian Bill of Rights*.

> (*Canadian National Railway Company v. Western Canadian Coal Corporation*, 2007 FC 371 at para 22)

[20] The Respondent concedes that the first, second, and fourth elements of this test are met. Thus, the determinative question in this matter is whether or not the refugee determination

process afforded to claimants who are ineligible pursuant to pursuant to s 101(1)(c.1) violates the principles of fundamental justice.

iii. Does the process of determining claims of persons who are ineligible under s 101(1)(c.1) violate the principles of natural justice?

[21] The Applicants rely heavily on the Supreme Court of Canada's decision in *Singh.* There the procedural scheme for the determination of whether an individual was a Convention refugee was set out in ss 45-48 and 70-71 of the *Immigration Act, 1976*. The s 45 initial determination involved the claimant being examined under oath by a senior immigration officer. The claim and the transcript of the examination were then provided to a Refugee Status Advisory Committee who would provide their advice, and the Minister would then determine if the person was a Convention refugee.

[22] Under s 70(1) a person whose refugee claim was refused by the Minister could apply for a redetermination of their claim by the Immigration Appeal Board [IAD]. The IAD's duties in considering an application for redetermination were set out in s 71, being that the application would be considered and, if the IAD was of the opinion that there were reasonable grounds to believe that a claim could be stablished upon the hearing of the application, then the IAD was required to allow the application to proceed. In any other case, it was required to refuse to allow the application to proceed and determine that the applicant was not a Convention refugee. If the application were allowed to proceed, the IAD was required to notify the Minister of the time and place where the application was to be heard and afford the Minister the reasonable opportunity to be heard.

[23] The six panel members of the Supreme Court agreed that this process violated the claimants' rights, but the panel split evenly on the question of whether this should be determined on the basis of s 7 of the *Charter* or s 2(e) of the *Bill of Rights* (Justice Ritchie did not participate in the decision). Writing for those panel members who determined the issue based on s 7 of the *Charter*, Justice Wilson noted (at para 57) that all counsel agreed that at a minimum the concept of "fundamental justice" in s 7 of the *Charter* includes the notion of procedural fairness articulated by Chief Justice Fauteux in *Duke v. The Queen,* 1972 CanLII 16 (SCC), [1972] S.C.R. 917 [*Duke*] where he said, at p 923:

> Under s. 2(*e*) of the *Bill of Rights* no law of Canada shall be construed or applied so as to deprive him of "a fair hearing in accordance with the principles of fundamental justice". Without attempting to formulate any final definition of those words, I would take them to mean, generally, that the tribunal which adjudicates upon his rights must act fairly, in good faith, without bias and in a judicial temper, and must give to him the opportunity adequately to state his case.
>
> (emphasis added)

[24] Justice Wilson found that the absence of an oral hearing need not be inconsistent with fundamental justice in every case. Her concern about the procedural scheme envisaged by ss 45 to 48 and 70 and 71 of the *Immigration Act, 1976* was that refugee claimants would have an inadequate opportunity to state their case and know the case to meet (*Singh* at para 60).

[25] Justice Beetz, writing for those panel members who decided the matter based on s 2(e) of the *Bill of Rights*, stated:

> 101. What the appellants are mainly justified of complaining about in my view is that their claims to refugee status have been finally denied without their having been afforded a full oral hearing at a single stage of the proceedings before any of the

> bodies or officials empowered to adjudicate upon their claim on the merits. They have actually been heard by the one official who has nothing to say in the matter, a senior immigration officer. But they have been heard neither by the Refugee Status Advisory Committee, who could advise the Minister, neither by the Minister, who had the power to decide and who dismissed their claim, nor by the Immigration Appeal Board which did not allow their application to proceed and which determined, finally, that they are not Convention refugees.

[26] Based on Justice Beetz's statement above, the Applicants in this matter submit that they will not be afforded a fair hearing in accordance with the principles of fundamental justice because their claims have been or will be finally determined without access to a "full oral hearing".

[27] However, while pursuant to s. 101(1)(c.1) the Applicants are ineligible for a hearing before the RPD, this does not mean they are denied an oral hearing. They will be afforded an oral hearing at the PRRA stage at which they can put forward their cases.

[28] It is significant to note that the arguments made by the Applicants in this matter have largely been previously addressed by this Court in the context of s 7 of the *Charter* and the enhanced PRRA process.

[29] In *Seklani,* the applicant asserted that s 101(1)(c.1) of the IRPA violated s 7 of the *Charter*. He claimed that removing access to the RPD for all persons who have made prior refugee claims in one of the "Five Eyes" countries increases the risk that a person will be returned to persecution, torture, cruel and unusual treatment or death without having the opportunity to have their risk of *refoulement* meaningfully assessed. He maintained that, since he

had not had his refugee protection claim assessed by the United States – where he had previously made a claim for refugee protection – or any other country, the ineligibility created by s 101(1)(c.1) was arbitrary, overbroad and grossly disproportionate to the objectives of the IRPA. He submitted that the s 7 *Charter* violations resulting from this provision were therefore not in accordance with the principles of fundamental justice (*Seklani* at para 3).

[30] Justice Gascon dismissed the application before him finding that:

> [28] For the following reasons, I conclude that section 7 is not engaged by the RPD bar created by paragraph 101(1)(c.1) as this ineligibility determination does not deprive Mr. Seklani from his right to life, liberty or security of the person, nor does it increase his risk of refoulement. Moreover, the “enhanced” PRRA mechanism to which Mr. Seklani has access offers an adequate process to be granted refugee protection. Finally, Mr. Seklani has not demonstrated that paragraph 101(1)(c.1) of the IRPA is arbitrary, overbroad or grossly disproportionate, and that it violates the principles of fundamental justice.

[31] In reaching this determination, and significantly with respect to the matter now before me, Justice Gascon considered whether the enhanced PRRA process available to ineligible claimants was an adequate alternative forum to assess their refugee claims, in a way that respected the principles of fundamental justice. Because I agree with his reasons, which are clear and comprehensive, and because I could not better state the matter, I have quoted Justice Gascon extensively below. He held that “there are mechanisms to guarantee that Mr. Seklani’s claim for refugee protection will be duly considered and assessed by PRRA officers, by CBSA officers and by this Court, who will serve as gatekeepers to ensure s 7 compliance at the removal stage, and will ensure that the principle of non-*refoulement* is respected” and that:

> [46] It is important to emphasize that the IRPA expressly contemplates different avenues to consider claims for refugee

protection and establishes three broad categories of refugee protection (*Saint Paul v Canada (Citizenship and Immigration)*, 2020 FC 493 at paras 47-48). Part 2 of the IRPA deals with refugee protection and is divided into three divisions. Division 1 deals with “Refugee Protection, Convention Refugees and Persons in Need of Protection”, Division 2 deals with “Convention Refugees and Persons in Need of Protection”, and Division 3 deals with “Pre-removal Risk Assessment”. Subsection 95(1) of the IRPA expressly states that refugee protection is conferred on a person who falls in one of the three enumerated categories, namely: 1) Convention refugee (section 96); 2) a person in need of protection (section 97); or 3) a person whose application for protection is allowed by the Minister (section 112). The third option refers to the PRRA application process. Pursuant to subsection 112(1) of the IRPA, individuals rendered ineligible to have their claims referred to the RPD (such as Mr. Seklani) generally have access to a PRRA.

[47] It is therefore plainly incorrect for Mr. Seklani to state that the process before the RPD and the IRB is the only procedure in Canada designed to assess claims for refugee protection. True, the process before the IRB is the standard, usual refugee determination process. But, it is not the only one. And the IRPA expressly provides [at section 114] that the PRRA process can result in refugee protection being granted…

[48] The refugee protection granted as a result of the PRRA process is not a second-class category of refugee protection. It is simply a different channel offered to asylum claimants to obtain refugee protection. The PRRA process provides the same objective as the refugee process at the IRB. It is based on similar grounds and confers the same degree of refugee protection to the asylum claimants. In other words, the same approach will be applied to assess whether someone is in need of protection or not. A successful PRRA applicant is granted refugee protection under paragraph 114(1)(a) of the IRPA, and such applicant may, subsequently, seek permanent resident status in the same manner as a claimant granted Convention refugee or protected person status by the IRB.

[49] Even if the new paragraph 101(1)(c.1) of the IRPA prevents Mr. Seklani and other individuals in his situation from having access to the RPD, they will therefore not be barred from claiming asylum and refugee protection in Canada. They can still claim asylum in Canada but they will be moved to another channel, namely a PRRA application. It is not because these refugee protection claimants do not have access to both the RPD process

and the PRRA process that the PRRA option suddenly becomes a lesser or a weakened one.

[50] Mr. Seklani further argues that the PRRA process, even enhanced with the mandatory hearing now provided by section 113.01 of the IRPA, remains an inadequate replacement and substitute for the refugee determination process before the RPD and that it infringes on his section 7 rights. In other words, Mr. Seklani contends that the PRRA hearing process does not respect the principles of fundamental justice.

[51] Once again, I am not convinced by Mr. Seklani's submissions.

[52] Section 7 of the Charter does not require a particular type of process and does not give a positive right to refugee protection. Section 7 protects against removal to a place where an individual would face a substantial risk of death, torture, or cruel and unusual treatment or punishment (Febles at para 67-68). As such, a bar from the RPD does not engage section 7 rights, even if Mr. Seklani is not otherwise inadmissible to Canada or excluded from refugee protection. Section 7 instead requires a fair process having regard to the nature of the proceedings and the interests at stake (Charkaoui v Canada (Citizenship and Immigration), 2007 SCC 9 at para 20). As the FCA pointed out in Kreishan, individuals facing removal are essentially entitled to two constitutionally protected rights, being 1) that their risk be assessed and to not be removed if it is found that there is such a risk, and 2) that their claim be adjudicated with the proper procedural safeguards as established by the SCC in Singh (Kreishan at paras 117, 130). Mr. Seklani has not persuaded me that, in and of itself, the enhanced PRRA process to which he is now entitled by the operation of paragraph 101(1)(c.1) and section 113.01 of the IRPA does not fulfill these two requirements.

[53] I observe that, in the context of this application for judicial review of the CBSA officer's ineligibility determination, it is premature to determine whether the subsequent PRRA process to which Mr. Seklani will be entitled offers all required procedural guarantees, as such a question is highly fact-specific. Ultimately, whether a particular PRRA hearing under section 113.01 of the IRPA infringes on the principles of fundamental justice is a question for another day. The arguments raised by Mr. Seklani regarding the PRRA process or the independence of PRRA officers must be assessed with the relevant factual context, and not in a vacuum.

[54] That said, I underline that, contrary to what Mr. Seklani alleges, the SCC decision in Singh only warrants an oral hearing in regard of credibility findings, not necessarily for all legal submissions. In Singh, the SCC stated that when the life, liberty or security of the person is engaged, as in a removal to a place where a migrant would face such a risk, and when a serious issue of credibility is involved, nothing will pass muster short of a full oral hearing before an adjudication on the merits. The SCC thus found that, when a serious issue of credibility is involved, it should be determined on the basis of an oral hearing (Singh at pp 213-214). While the absence of an oral hearing will not be inconsistent with fundamental justice in every case, it is required where credibility issues are at stake. With the adoption of paragraph 113(b) of the IRPA and section 167 of the IRP Regulations, the PRRA process now always allows for an oral hearing to be held when a serious issue of credibility is at stake.

[55] For Mr. Seklani and other applicants in a similar situation, the new section 113.01 of the IRPA goes even further and provides that all claimants determined to be ineligible under paragraph 101(1)(c.1) who apply for a PRRA will have a hearing unless their application has been approved. In other words, this amendment reinforces the assurance that the required procedural safeguards, as they are set forth and defined in Singh, are respected for refugee claimants like Mr. Seklani. Mr. Seklani has not convinced me that this enhanced PRRA process, in itself, is not consistent with the requirements described by the SCC in Singh. Furthermore, I note that, even if PRRAs do not have an appeal process (although they can be judicially reviewed before this Court on leave), the principles of fundamental justice do not require an appeal process or a right of appeal (Kreishan at paras 65, 122).

[56] Of course, the Court has the authority to review the merits and the legality of a PRRA decision on an application for judicial review, and to determine whether the process followed during a specific PRRA process respects the principles of fundamental justice. In the case of Mr. Seklani, it is not my role to make such determination at this stage, and it will be up to the Court to make it in due course should it arise at a later stage of Mr. Seklani's refugee determination process.

(emphasis added)

[32] In sum, Justice Gascon found that the enhanced PRRA process safeguards both the right of a claimant to have their risk assessed (and, if a risk is identified, to be protected against *refoulement*), and their right to have their claim be assessed utilizing the procedural safeguards identified in *Singh*. Further, and significantly, that the mandatory hearing provided for by s 113.01 of IRPA is an appropriate mechanism to determine refugee claims, consistent with the principles of fundamental justice as identified in *Singh*.

[33] In my view, the Applicants' arguments in this matter regarding s 2(e) of the *Bill of Rights* are on all fours with the arguments advanced by the applicant in *Seklani* where the principles of fundamental justice were considered in the context of s 7 of the *Charter*. The Applicants do not address *Seklani* or suggest that its finding that principles of fundamental justice as delineated by *Singh* are met by the enhanced PRRA process is somehow distinguishable in a s 2(e) *Bill of Rights* analysis.

[34] Further, *Singh* does not support the Applicants' primary argument which relies on the premise that there is a mandated bookended process which must be adhered to in order to meet the requirements of fundamental justice. *Singh* does not set out a particular process that must be followed or dictate that there must be two distinct processes.

[35] In that regard, the Applicants also submit that what *Kreishan* "establishes is that refugee claimants in Canada are entitled to a bookended process". I disagree.

[36] *Kreishan* was concerned the Safe Third Country Agreement. Claimants arriving from the United States and who have family members in Canada fall within an exception to the Safe Third Country Agreement. As such, they are entitled to have their claims heard by the RPD. But, pursuant s 110(2) of the IRPA, they are denied a right of appeal to the RAD. The claimants in *Kreishan* asserted that their s 7 *Charter* rights were thereby infringed. The Federal Court of Appeal did not agree. Its reasons address the requirements of *Singh* as well as when s 7 is engaged.

[37] In the context of *refoulement*, the Federal Court of Appeal noted that the Convention does not stipulate the refugee determination process to be effected by member states:

> [114] The Convention is not prescriptive as to how signatory countries fulfill their obligation not to refoule. The legislative design, including the nature of the adjudicative body, whether administrative or judicial, or a combination of both, is a matter of domestic law. International law does not mandate any particular form of refugee determination process, or that an appeal mechanism exist (Németh at para. 51). Neither the Convention nor the Charter require review mechanisms, let alone compel review by appeal or judicial review.

[38] The Federal Court of Appeal noted that, in recognition of the fact that circumstances may change or that a new risk might arise, Parliament inserted additional protections at the time of removal. The PRRA process recognizes that the principle of non-*refoulement* is prospective. As to when s 7 *Charter* rights engage, the Federal Court of Appeal held that:

> [117] In broad terms, the refugee determination process is framed by two constitutional protections. Upon first presentation of a claim for asylum, section 7 mandates that claimants have a right to a hearing before an independent decision maker (*Singh*). Section 7 re-engages at the conclusion of the process to ensure that failed or excluded claimants are not removed to face section 7 risks (*B010* at para. 75). It is for this reason, as I noted earlier, that the discussion whether failed claimants are being "*refouled*" is a

diversion. The jurisprudence is clear that, at the point of removal, section 7 interests are engaged.

[118] The Supreme Court has been consistent in its determination that the substantive elements of section 7 are addressed at the removal stage.

[119] In *Febles*, for example, the Supreme Court held that section 98 of the IRPA — under which an individual may be excluded from even advancing a claim for protection — was consistent with section 7 of the Charter because, even if so excluded, an individual may still apply for a stay of removal under the IRPA's PRRA provisions if he or she faces a risk of death, torture or cruel and unusual treatment or punishment (at para. 67).

[120] The weakness in the appellants' argument is apparent if their situation is contrasted to such individuals who are denied the right to advance any claim for protection. The Supreme Court considered the constitutionality of those circumstances in *B010*. Citing *Febles*, the Supreme Court stated at paragraph 75:

> … s. 7 of the *Charter* is not engaged at the stage of determining admissibility to Canada under s. 37(1). This Court recently held in *Febles v. Canada (Citizenship and Immigration)*, 2014 SCC 68, [2014] 3 S.C.R. 431, that a determination of exclusion from refugee protection under the *IRPA* did not engage s. 7, because "even if excluded from refugee protection, the appellant is able to apply for a stay of removal to a place if he would face death, torture or cruel and unusual treatment or punishment if removed to that place" (para. 67). It is at this subsequent pre-removal risk assessment stage of the *IRPA*'s refugee protection process that s. 7 is typically engaged. The rationale from *Febles*, which concerned determinations of "exclusion" from refugee status, applies equally to determinations of "inadmissibility" to refugee status under the *IRPA*.
>
> [Emphasis added]

[121] Analogy may be drawn to other asylum claimants who, for reasons of criminality or participation in crimes against humanity, are inadmissible under Article 1F of the Convention. In commenting on the role of section 7 in relation to this category of claimants, Evans J. (as he then was) observed in *Jekula v. Canada*

> *(Minister of Citizenship and Immigration)*, [1999] 1 FC 266, 154 F.T.R. 268 (*Jekula*), "while it is true that a finding of ineligibility deprives [a] claimant of access to an important right, namely the right to have a claim determined by the Refugee Division, this right is not included in 'the right to life, liberty and security of the person'" … "[A] determination that a refugee claimant is not eligible to have access to the Refugee Division is merely one step in the administrative process that may lead eventually to removal from Canada" (at paras. 31-32).
>
> [122] So too is the denial of an appeal to the RAD. It is but one measure in a process that may lead to removal. The section 7 interests of all claimants, regardless of the underlying administrative basis of their rejection – excluded under Article 1F, rejected by the RAD or rejected by the RPD, ineligible to appeal as having no credible basis – are protected at the removal stage, whether by a PRRA, a request to defer removal or the right to seek a stay of removal in the Federal Court. This section does not mandate appeals or judicial review at every stage of a process (*Canada (Secretary of State) v. Luitjens* (1991), 46 F.T.R. 267, 155 Imm. L.R. (2d) 40 (F.C.T.D.).
>
> (Emphasis added)

[39] Thus, in the context of s 7 of the *Charter*, *Kreishan* recognizes that claimants are entitled to "a constitutionally compliant adjudication of their claims for asylum (*Singh*) and constitutionally compliant assessment of new risks prior to removal *(Febles, B010, Tapambwa, Atawnah)*" (*Kreishan* at para 130). And, even where a claimant is ineligible to have their claim heard by the RPD or to appeal to the RAD, this is just one step in the process that may lead to removal. Their s 7 rights engage at the removal stage, including by way of a PRRA.

[40] In support of their "bookend" argument, the Applicants seize on paragraph 133 of *Kreishan.* There, when discussing the difficulty presented by the appellants statistical evidence offered in support of their argument that the risk of *refoulment* was enhanced to the point of triggering s 7, the Federal Court of Appeal stated:

> At what point along the continuum of differing success rates is the risk of *refoulement* sufficiently mitigated that no section 7 interest is engaged? There is no answer to this, of course, which is why the Supreme Court of Canada has, in its reasons, focused on the bookends of the process – initial adjudication (*Singh*), and consistent with international law, removal (*Suresh, Febles, B010*).

[41] In my view, this does not assist the Applicants.

[42] As stated above, *Kreishan* confirms that the refugee determination process is framed by two constitutional protections. Upon first presentation of a claim for asylum, s 7 mandates that claimants have a right to a hearing before an independent decision maker (*Singh*). Section 7 re-engages at the conclusion of the process to ensure that failed or excluded claimants are not removed to face s 7 risks. This recognizes that risk could change, or a new risk could emerge, between the time that the initial claim for protection was assessed and denied and the time of removal. *Kreishan* does not, however, suggest that the right to a hearing and the assessment of risk cannot occur contemporaneously. And, as held in *Seklani*, in the context of s 7 of the *Charter*, the enhanced PRRA process is consistent with the procedural safeguards required by *Singh and Kreishan* (*Seklani* at para 52, 55).

[43] Similarly, in my view, the Applicant's right under s 2(e) of the *Bill of Rights* not to be deprived of the right of a fair hearing in accordance with the principles of fundamental justice is not infringed by the fact that an oral hearing is held as part of the PRRA process. Neither *Singh* nor *Kreishan* mandate that the right to a hearing and the right to an assessment of risk must entail two distinct processes conducted separately, that is, that there must be what the Applicants describe as "bookend" approach.

[44] I also do not agree with the Applicants' submission that s 101(1)(c.1) has the effect of denying refugee claimants the basic levels of procedural fairness recognized by *Singh* and *Kreisham*.

[45] The Applicants submit that once a claimant is deemed ineligible their refugee claim is not referred to the RPD and that "[t]his is the end of their refugee claim", they are instead funnelled into different process. As indicated by Justice Gascon in *Seklani*, above, this is not so. The protection granted by a successful PRRA application is no different than the protection that results from a successful refugee claim before the RPD. The PRRA process, although different in form from the procedure before the RPD, is similar in substance to the RPD's determinations of refugee status, in both the factual and legal considerations and in its end result (see *Seklani* at paras 48-49).

[46] Section 168 of the IRP Regulations sets out how a PRRA hearing is to be conducted:

> **Hearing procedure**
>
> **168** A hearing is subject to the following provisions:
>
> **(a)** notice shall be provided to the applicant of the time and place of the hearing and the issues of fact that will be raised at the hearing;
>
> **(b)** the hearing is restricted to matters relating to the issues of fact stated in the notice, unless the officer conducting the hearing considers that other issues of fact have been raised by statements made by the applicant during the hearing;
>
> **(c)** the applicant must respond to the questions posed by the officer and may be assisted for that purpose, at their own expense, by a barrister or solicitor or other counsel; and

> **(d)** any evidence of a person other than the applicant must be in writing and the officer may question the person for the purpose of verifying the evidence provided.

[47] The Respondent points to the IRCC Operational Manual – Oral Hearings – Pre-removal Risk Assessments (PRRAs) [Manual], which guides officers in conducting oral hearings for PRRAs. The Manual is not law and is not binding, but serves as a valuable set of guidelines to the immigration officers in carrying out their duties, and for courts in assessing the reasonableness of their decisions (*Duka v. Canada (Citizenship and Immigration),* 2010 FC 1071 at para 30; *Frank v. Canada (Citizenship and Immigration)*, 2010 FC 270 at para 21; *John v Canada (Citizenship and Immigration)*, 2010 FC 85 at para 7). For the purposes of this matter, the Manual is useful in that it elaborates upon the enhanced PRRA hearing process envisioned by s 113.01 of the IRPA.

[48] The Manual deals with:

i. notice;

ii. the inclusion of all issues of fact in the notice, stating that:

> For all cases where a hearing is held, refusal of an application shall not be based on a determinative issue of fact that has not been discussed with the applicant. For cases where an issue arises following a hearing, PRRA officers should address these issues through a procedural fairness letter or subsequent hearing….

iii. the scope of the examination, noting that the purpose of the hearing is to address determinative issues by exploring issues of fact. In a mandatory hearing, since the officer is not limited by the prescribed factors identified in s 167 of the IRP

Regulations, the nature of the issues discussed is broader and includes objective as well as credibility-based issues:

> As outlined in paragraphs R168(a) and (b), only determinative issues of fact are to be discussed at the hearing. Therefore, the hearing is not intended to be a forum to make legal representations; it is through written submissions that the applicant is to make legal representations. The hearing is an informal process restricted to raising determinative issues of fact with the applicant, affording the applicant an opportunity to answer questions raised by the officer with, if needed, the assistance of counsel [R168(c)]. The PRRA officer does not make a decision on an application at the hearing.

iv. General guidelines on the conduct of a hearing:

> The hearing is non-adversarial in nature. The officer leads the hearing and ensures it is conducted in a fair and expedient manner.
>
> The officer should restrict the hearing to the issues raised in the notice but may, per paragraph R168(b), consider other determinative issues of fact if they are raised by the applicant's statements at the hearing. Where a new determinative issue comes to light based on statements made by the applicant in the hearing, the officer should consider if any accommodation (such as a recess, an adjournment or an opportunity to provide further submissions post-hearing) is necessary, in line with the principles of procedural fairness.
>
> It is not appropriate for the applicant or counsel to raise at the hearing issues that do not relate to the issues signalled in the notice, unless these issues arise from statements made by the applicant during the hearing. It is also not appropriate to use the hearing to make legal representations or present arguments. It is not a forum for adjudication of the application; rather, the purpose of the hearing is to raise determinative issues of fact with the applicant, affording the applicant an opportunity to answer questions raised by the officer with, if needed, the assistance of counsel [R168(c)]. It is through written submissions that the applicant presents evidence and makes legal representations.
>
> Per paragraph R168(d), evidence from anyone other than the applicant should be provided in writing. The applicant cannot bring other witnesses to the hearing, unless an officer decides to hear

> from anyone other than the applicant for the purpose of verifying the evidence provided. This is necessary only in instances where the PRRA officer finds that questioning a witness is necessary for the purpose of resolving a determinative issue of fact.
>
> …..
>
> Before concluding a hearing, applicants and their counsel should be given an opportunity to provide any further information related to the issues of fact discussed in the hearing that they wish to share.
>
> …..

v. The role of counsel:

> The PRRA process provides for a robust role for counsel participation that is both compliant with the Canadian Charter of Rights and Freedoms and with the principles of natural justice. Counsel's role is essentially to protect their client's interests and ensure that they have access to a fair process.
>
> Counsel plays a supportive role in PRRA hearings. Counsel are allowed to assist the applicant during the hearing for the purposes of clarifying questions, assisting with responses, eliciting further information, and intervening if prejudicial statements are made to clarify or correct information. In line with natural justice, it is understood that, in cases where the issues are more complex (such as those where exclusion is raised or cases dealing with vulnerable persons), counsel may play a more significant role as there may be an increased need for counsel's assistance.
>
> …….

[49] The Applicants point out the differences between the procedure followed in a hearing before the RPD and a hearing before a PRRA officer. I agree that these hearing processes differ. However, they are not required to be identical, and the fact of the difference does not alone serve to establish that the PRRA hearing process does not meet the requirements of fundamental justice.

[50] In my view, the Applicants have not demonstrated that the scope of an enhanced PRRA hearing is insufficiently broad to allow them to "adequately state their case" (*Singh* at para 57). I am also not persuaded that the Applicants are denied the level of procedural fairness mandated by *Singh*, as they submit. As held in *Seklani*, pursuant to *Singh* an oral hearing is required when credibility is at issue. The effect of s 113(b) of the IRPA and s 167 of the IRP Regulations is that the PRRA process always allows for an oral hearing to be held when a serious issue of credibility is at stake. Section 113.01 of the IRPA enhances this and provides that all claimants determined to be ineligible under s 101(1)(c.1) and who apply for a PRRA will have a hearing unless their application has been approved. "In other words, this amendment reinforces the assurance that the required procedural safeguards, as they are set forth and defined in *Singh*, are respected for refugee claimants" (*Seklani* at para 55).

[51] Finally, as to the Applicants' submission that they will not enjoy an independent adjudicator as their claims will be determined by an agent of the same agency that decided not to refer the claims to the RPD, to issue a departure order and issue exclusion orders, this is of no merit.

[52] I would first note that pursuant to s 101(1)(c.1), a finding that a claimant is ineligible to be referred to the RPD is dependent on only one factual determination to be made by the Minister's Delegate. If it has been confirmed by one of the other countries with whom Canada has entered into an information sharing agreement that the claimant has previously made a claim for refugee protection in that country, then the applicant must be found to be ineligible. There is no discretion. Accordingly, it is difficult to see how the Minister's Delegate Review could

possibly give rise to a real or perceived lack of independence on the part of the officer later assessing a PRRA.

[53] In any event, the Applicants put forward no evidence of institutional bias or want of impartiality and independence to support their bare assertion. The Respondent submits that this Court has previously rejected arguments that the PRRA process is unconstitutional because a PRRA officer is not sufficiently independent from the Minister (*Abdollahzadeh v Canada (Citizenship and Immigration*), 2007 FC 1310 at paras 42-43; *Muhammad v Canada (Citizenship and Immigration)*, 2014 FC 448 at paras 137-144 [*Muhammad*]; see also *Dunova v Canada (Citizenship and Immigration)*, 2010 FC 438 at para 69).

[54] I agree that, absent evidence to the contrary, a decision maker is presumed to be impartial (*Muhammad* at para 141). Here the Applicants have put forward no evidence to rebut the presumption.

[55] There is also no evidence to support the Applicant's submission that PRRA Officers are "a body with less specialized expertise and a severe lack of institutional capacity".

[56] I also agree with the Respondent's submission that while there is no right of appeal for a PRRA process, the principles of fundamental justice do not require an appeal process or right of appeal (*Seklani* at para 55; *Kreishan* at para 122) and that neither the *Charter* nor the Convention require review mechanisms (*Kreishan* at para 114).

[57] In conclusion, for the reasons above, I find that s 101(1)(c.1) of the IRPA, pursuant to which the Applicants are ineligible to have their claims referred to the RPD for a hearing, does not infringe paragraph 2(e) of the *Bill of Rights* because the enhanced PRRA hearing process accords with the principles of fundamental justice as set out in *Singh* and *Kreishan*.

Does s 101(1)(c.1) of the IRPA violate s 15(1) of the *Charter* and, if so, is s 101(1)(c.1) saved by s 1 of the *Charter*?

(IMM- 7417-19)

Section 15

Applicant's position

[58] Ms. Nusrat submits that s 101(1)(c.1) of the IRPA is discriminatory because of the impact of two main differences in the process used for adjudicating asylum claims in the UK as compared to the process for refugee determination in Canada. In essence, Ms. Nusrat submits that by way of s 101(1)(c.1) of the IRPA, Canada has "delegated" its obligations for its refugee determination system to foreign governments. The first difference concerns the initial file review process which she claims led to a negative credibility determination against her in the UK. The second difference concerns what Ms. Nusrat describes as the considerably higher standard that applies in the UK to asylum claims by Ahmadis from Pakistan. According to Ms. Nusrat, the result is that she, and others similar situated, suffer disadvantage linked to an enumerated or analogous ground. They are relegated to a second-tier refugee determination process on the basis of immutable characteristic such as gender, religion and physical ability.

Respondent's position

[59] The Respondent submits that Parliament has not delegated the refugee determination process to other countries. Section 101(1)(c.1) and s 113.01 of the IRPA create a separate channel and process for the consideration of refugee claims where a claimant has made a previous refugee claim in one of the "Five Eyes" countries. This does not amount to discrimination against Ms. Nusrat on the basis of one of the grounds enumerated in s 15 of the *Charter*, or on an analogous ground. Rather, she is ineligible to be referred to the RPD for assessment under its process because she made a previous refugee claim in the UK. This is not related to any immutable personal characteristics either directly or through a disproportionate adverse effect.

Analysis

[60] As stated by the Supreme Court of Canada in *Fraser v Canada (Attorney General)*, 2020 SCC 28 at para 27 [*Fraser*], s 15(1) reflects a profound commitment to promote equality and prevent discrimination against disadvantaged groups (*Fraser* at para 27). Adverse impact discrimination occurs when a seemingly neutral law has a disproportionate impact on members of groups protected on the basis of an enumerated or analogous group. That is, instead of explicitly singling out those who are in the protected groups for differential treatment, the impugned law indirectly places them at a disadvantage (*Fraser* at paras 30, 45). Adverse impact discrimination violates the norm of substantive equality (*Fraser* at para 47).

[61] The parties agree that the two part test for assessing a claim of an infringement of s 15 of the *Charter*, or the substantive equality analysis, is well established:

i. Does the impugned law, on its face or in its impact, create a distinction based on enumerated or analogous grounds?

ii. If so, does the law impose burdens or deny a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage?

(See: *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 at para 25, quoting *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, at paras 19-20 [*Kahkewistahaw*]; *Withler v Canada (Attorney General)*, 2011 SCC 12 at para 30 [*Withler*]; *Fraser* at para 27.)

[62] How a s 15 analysis is to be conducted was set out by the Supreme Court in *Kahkewistahaw*:

> [16] The approach to s. 15 was most recently set out in *Quebec (Attorney General) v. A*, [2013] 1 S.C.R. 61, at paras. 319-47. It clarifies that s. 15(1) of the *Charter* requires a "flexible and contextual inquiry into whether a distinction has the effect of perpetuating arbitrary disadvantage on the claimant *because of his or her membership in an enumerated or analogous group*": para. 331 (emphasis added).
>
> [17] This Court has repeatedly confirmed that s. 15 protects substantive equality: *Quebec v. A*, at para. 325; *Withler v. Canada (Attorney General)*, [2011] 1 S.C.R. 396, at para. 2; *R. v. Kapp*, [2008] 2 S.C.R. 483, at para. 16; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143. It is an approach which recognizes that persistent systemic disadvantages have operated to limit the opportunities available to members of certain groups in society and seeks to prevent conduct that perpetuates those disadvantages. As McIntyre J. observed in *Andrews*, such an

approach rests on the idea that not every difference in treatment will necessarily result in inequality and that identical treatment may frequently produce serious inequality: p. 164.

[18] The focus of s. 15 is therefore on laws that draw *discriminatory* distinctions — that is, distinctions that have the effect of perpetuating arbitrary disadvantage based on an individual's membership in an enumerated or analogous group: *Andrews*, at pp. 174-75; *Quebec v. A*, at para. 331. The s. 15(1) analysis is accordingly concerned with the social and economic context in which a claim of inequality arises, and with the effects of the challenged law or action on the claimant group: *Quebec v. A*, at para. 331.

[19] The first part of the s. 15 analysis therefore asks whether, on its face or in its impact, a law creates a distinction on the basis of an enumerated or analogous ground. Limiting claims to enumerated or analogous grounds, which "stand as constant markers of suspect decision making or potential discrimination", screens out those claims "having nothing to do with substantive equality and helps keep the focus on equality for groups that are disadvantaged in the larger social and economic context": *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at para. 8; Lynn Smith and William Black, "The Equality Rights" (2013), 62 *S.C.L.R.* (2d) 301, at p. 336. Claimants may frame their claim in terms of one protected ground or several, depending on the conduct at issue and how it interacts with the disadvantage imposed on members of the claimant's group: *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, at para. 37.

[20] The second part of the analysis focuses on arbitrary — or discriminatory — disadvantage, that is, whether the impugned law fails to respond to the actual capacities and needs of the members of the group and instead imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage:

> The root of s. 15 is our awareness that certain groups have been historically discriminated against, and that the perpetuation of such discrimination should be curtailed. If the state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory. [*Quebec v. A*, at para. 332]

> [21] To establish a *prima facie* violation of s. 15(1), the claimant must therefore demonstrate that the law at issue has a disproportionate effect on the claimant based on his or her membership in an enumerated or analogous group. At the second stage of the analysis, the specific evidence required will vary depending on the context of the claim, but "evidence that goes to establishing a claimant's historical position of disadvantage" will be relevant: *Withler*, at para. 38; *Quebec v. A*, at para. 327.

[63] I agree with the Respondent that the Ms. Nusrat's claim fails at the first stage of the s 15(1) test.

[64] This is because while s 101(1)(c.1) does create a distinction, it does not do so on an enumerated or analogous ground. The distinction is between those refugee claimants whose claims will be referred to the RPD for a hearing and those who are ineligible for that process and will instead have their refugee claim determined by the enhanced PRRA process. This distinction is based solely on whether or not the claimant has made a previous refugee claim in a country with whom Canada has an information sharing agreement. The distinction is not based on an enumerated ground – religion, gender, age or physical disability as Ms. Nusrat submits – or an analogous ground, which Ms. Nusrat has not argued.

[65] In my view, Ms. Nusrat's arguments conflate the two-part test for assessing a claim of an infringement of s 15 of the *Charter* and are ill founded. I summarize them as follows:

- Ms. Nusrat asserts that s 101(1)(c.1) has an adverse impact on those affected by it, as it "effectively adopts as sufficient the process and standards for refugee or asylum protection that are used in those other countries [the other Five Eyes countries]" which is contrary to Canada's international law obligations to ensure that a refugee claim is

conducted in accordance with the Refugee Convention and in accordance with Canadian law. According to Ms. Nusrat, s 101(1)(c.1) contradicts these obligations as it presumes that an individual who has requested asylum elsewhere was afforded a refugee determination process as robust as that offered in Canada.

- Ms. Nusrat submits that by way of s 101(1)(c.1) Parliament has delegated a portion of its international obligations for its refugee determination system to foreign governments. Those claimants who then seek protection in Canada are disadvantaged because s 101(1)(c.1) will preclude them from having access to a refugee determination process equivalent to that which would be provided by the RPD. And if the refugee claim is based on, or otherwise implicates, an enumerated or analogous ground, then this disadvantage is tied to an enumerated or analogous ground and is discriminatory.

- Ms. Nusrat asserts that her claim is based on "a concatenation" of enumerated grounds including religion, gender and disability. She asserts that the standard and the process that applies for determination of asylum claims in the UK for Ahmadis from Pakistan is markedly different from the process that applies in Canada. In that regard, she also notes that the RPD has recently indicated that claims that relate to religious persecution of Ahmadis in Pakistan may be categorized as "Less Complex Claims" which are appropriate for the short-hearing and file review process because they are strong *prima facie* claims. She also asserts, by way of example of the disadvantage imposed by s 101(1)(c.1), that the law in the United States is markedly different from the law in Canada in terms of whether victims of domestic violence can be members of a particular social group and in its treatment of the issues of state protection. She asserts that this

distinction relates to gender, an enumerated ground, and establishes that claimants who have made a refugee claim in the US will not enjoy the fulsome protection of the *Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecutions*.

- Ms. Nusrat claims that she is an older woman who is living with disabilities. When she made her asylum claim in the UK she did not disclose all of her medical information relating to her disabilities, which led to a negative credibility finding. She submits that had she not been a person living with disabilities there would have been no medical information to disclose. Further, that a similar failure to disclose medical information upon initial entry into Canada would not have had a similar effect on issues of credibility. She asserts that the "consequences of the [UK] decision and process relied upon in the United Kingdom caused Ms. Nusrat not to have her refugee claim referred to the RPD; it caused her to suffer a disadvantage. In that the disadvantage is linked to the enumerated or analogous ground of disability, it is discriminatory and contrary to s 15 of the *Charter*".

[66] I would first note that Ms. Nusrat provides no evidence to support her submission that Parliament has delegated the claimant assessment process, or any decision making authority, to other states. Nor do I agree with the submission made at the hearing before me that a logical inference can be drawn that Canada has adopted foreign law. This suggestion was based on the view that Canada must be taken to have accepted that the foreign process for assessing refugee claims was sufficiently robust in order to permit Canada to afford only a PRRA hearing, and not

a hearing before the RPD, to those who are found to be ineligible pursuant to s 101(1)(c.1). This is simply without merit.

[67] Further, the mere fact that Ms. Nusrat fell within the ambit of s 101(1)(c.1) does not establish that her age, gender, religion, or disability are related to her ineligibility.

[68] Even if the denial of her refugee claim by the UK were related to her disability, which based on the record does not appear to be the case (the documents found in her record indicate that Ms. Nusrat was interviewed with respect to her refugee claim and stated that her reason for entering the UK was because her life was in danger in Pakistan, however, that she was rejected for credibility reasons because she had failed to disclose this fear to an immigration officer upon her arrival in the UK), s 101(1)(c.1) operates whether her claim had been denied, withdrawn, or left pending. That is, s 101(1)(c.1) is not linked to the refugee assessment *process* of another state, only to the fact that a claim for refugee protection was made.

[69] In short, distinctions between the process of claims for refugee protection in Canadian immigration system and that process in the UK or other “Five Eyes” countries are irrelevant to the operation of s 101(1)(c.1).

[70] The first part of the s 15 test can be satisfied where a law that is neutral on its face, such as s 101(1)(c.1), has a disproportionate impact on a group or individual that can be identified by factors relating to an enumerated or analogous ground (*Fraser* at para 30, 45-47). However, as the Respondent submits, an evidentiary foundation is required to succeed on an argument that a

law has a disproportional impact, which evidence must amount to “more than a web of instinct” (*Kahkewistahaw* at para 34). While in Ms. Nusrat’s application there is some evidence about the enumerated grounds upon which she relies (religion, gender, disability), there is no statistical or other evidence that links a disparity arising from s 101(1)(c.1) with those personal characteristics.

[71] I agree with the Respondent that Ms. Nusrat presumes that not having access to the RPD process will have an adverse impact, yet she provides no evidence that the enhanced PRRA process will or is more likely to result in the denial of a meritorious refugee claim. As discussed above, in that circumstance PRRA officers apply the same tests under s 96 and 97 of the IRPA as would the RPD and can consider other factors, such as the *Gender Guidelines*. I note that, as to the less Complex Claims Process which Ms. Nusrat asserts would have been available to her but for her ineligibility pursuant to s 101(1)(c.1), this process is not a guarantee that refugee protection will be granted. However, to the extent that the Minister has determined that Ahmadis are at risk in Pakistan and accordingly caused the implementation of that process, I see no reason why this would also not be factored into the PRRA assessment. Indeed, the enhanced PRRA process can be granted without a hearing if her claim is sufficiently established.

[72] In essence, Ms. Nusrat is arguing that because her refugee claim is based on enumerated or analogous grounds, that s 101(1)(c.1) is also linked to those grounds. But this is not so. Ms. Nusrat has not demonstrated the distinction arising from s 101(1)(c.1) has the effect of perpetuating an arbitrary disadvantage because of her membership in an enumerated or analogous ground (*Kahkewistahaw* at para 16, 18-19). Put otherwise, Ms. Nusrat has failed to

provide sufficient evidence to show that the effect of s 101(1)(c.1) is that persons with the same immutable characteristics as her will disproportionately have their refugee claims denied.

[73] I conclude, therefore, that the distinction created by s 101(1)(c.1) of the IRPA is not based on any enumerated or analogous ground.

[74] As the first branch of the s 15(1) test has not been met, I need not address the second part of the test – being whether s 101(1)(c.1) impose burdens or deny a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage. I would, however, agree with the Respondent that Ms. Nusrat has provided no evidence that s 101(1)(c.1) of the IRPA exacerbates the stigma or historical disadvantage, if any, of refugee claimants in her situation.

[75] Given my finding that s 101(1)(c.1) of the IRPA does not violate s 15(1) of the *Charter*, I need not consider whether the provision is saved by s 1.

JUDGMENT IN IMM-1685-20 AND IMM-7417-19

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed;

2. There shall be no order as to costs; and

3. No question of general importance for certification was proposed or arises.

"Cecily Y. Strickland"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1685-20
STYLE OF CAUSE:	SAIMA SHAHID, SHAHID MASOOD BUTT v THE MINISTER OF CITIZENSHIP AND IMMIGRATION CANADA
AND DOCKET:	IMM-7417-19
STYLE OF CAUSE:	FARIDA NUSRAT v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	BY VIDEOCONFERENCE USING ZOOM
DATE OF HEARING:	NOVEMBER 4, 2021
JUDGMENT AND REASONS:	STRICKLAND J.
DATED:	DECEMBER 1, 2021

APPEARANCES:

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Don Klaassen	FOR THE RESPONDENT

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Department of Justice Saskatoon, Saskatchewan	FOR THE RESPONDENT