IMM-1757-18

2019 FC 798

Bradley Shaka (*Applicant*)

v.

The Minister of Citizenship and Immigration (*Respondent*)

INDEXED AS: SHAKA V. CANADA (CITIZENSHIP AND IMMIGRATION)

Federal Court, Norris J.—Toronto, December 10, 2018; Ottawa, June 11, 2019.

Citizenship and Immigration — Exclusion and Removal — Removal of Refugees — Pre-removal risk assessment — Judicial review seeking writ of mandamus, declaratory relief in case involving refugee status — Applicant, citizen of Burundi, seeking refugee protection in Canada with brother — Applicant previously claiming refugee protection which claim determined to be ineligible to be referred to Refugee Protection Division (RPD) of Immigration and Refugee Board — Thus, applicant's current refugee claim found to be ineligible for referral to RPD under Immigration and Refugee Protection Act, s. 101(1)(c); applicant served removal order — Nevertheless, allowed to enter Canada with brother — Applicant then given notification of right to apply for pre-removal risk assessment (PRRA) under Act, s. 112(1) — Applicant submitting PRRA application, supporting documents but no decision made thereon — Subsequently, applicant's counsel filing present application — Meanwhile, respondent's delegate cancelling applicant's PRRA application on basis that Administrative Deferral of Removal (ADR) to Burundi adopted by Canadian government in 2015 — Applicant seeking several forms of relief while respondent arguing that application for mandamus moot, that applicant not entitled to declaratory relief sought — Whether respondent erring in cancelling applicant's PRRA application; whether application for writ of mandamus moot; whether applicant entitled to declaratory relief sought — Respondent not erring in cancelling applicant's PRRA application — Decision consistent with purpose of PRRA process, applicable legal principles — Act, s. 160(3)(a) triggering obligation to give notification of opportunity to submit PRRA application only when person concerned facing removal — Applicant not facing removal given ADR for Burundi in effect — Would be inconsistent with objective of PRRA scheme to proceed with assessment — Thus, PRRA application having to be cancelled — Regarding issue of mootness, no longer live controversy affecting rights of parties at least as far as PRRA application concerned — Present matter therefore moot — Court declining to exercise discretion to consider matter despite mootness — With respect to applicant's request for declaratory relief, applicant contending that respondent's failure to determine his status as Convention refugee violating applicant's rights under Canadian Charter of Rights and Freedoms, s. 7 — However, applicant failing to establish entitlement to declaratory relief since failing to establish that current circumstances engaging Charter, s. 7 — Applicant also failing to establish entitlement to declaration respondent violating international law — Absent reason to rule out humanitarian and compassionate relief application as suitable, effective route to naturalization for applicant, no basis for finding that respondent violating international law by not determining applicant's status as refugee — Application dismissed.

This was an application for leave and judicial review seeking a writ of *mandamus* and declaratory relief. [7, 10] The applicant and his brother, both citizens of Burundi, sought refugee protection in Canada. However, their respective claims took very different paths. The claim of the applicant's

brother as well as that of his mother, who had also made a refugee claim, were accepted and they were both granted refugee protection. The applicant's claim, on the other hand, was found to be ineligible for referral to the RPD under paragraph 101(1)(c) of the *Immigration and Refugee Protection Act*. This is because the applicant had previously made a claim for refugee protection that was determined to be ineligible to be referred to the Refugee Protection Division (RPD) of the Immigration and Refugee Board. Even though the applicant's claim was not considered by the RPD and the removal order served on the applicant was not a conditional one, the applicant was allowed to enter Canada with his brother. The applicant was given the right to apply for a pre-removal risk assessment (PRRA) under subsection 112(1) of the Act, which application had to be submitted before a deadline. As long as the applicant met the deadline, the removal order made against him when he entered Canada would be suspended until a decision was made about this. The applicant submitted his PRRA application and supporting documents but no decision was made on the applicant's PRRA application. Subsequently, the present application was filed. At some point, the respondent's delegate cancelled the applicant's PRRA application, a decision that was communicated to the applicant afterwards. In 2015, an Administrative Deferral of Removal (ADR) to Burundi was adopted by the Government of Canada because of conditions there. The Enforcement Officer who provided the applicant with notification of his right to submit a PRRA application admitted that this was in error since the applicant could not be removed from Canada back in August 2017 because of the existing ADR. As well, the same reason was given for cancelling the PRRA application.

Specifically, the applicant sought: a writ of *mandamus* against the respondent requiring the PRRA officer to determine the applicant's PRRA application within 90 days of the Court's order; a declaration that the respondent's failure to determine the applicant's status as a Convention refugee violated Canada's international human rights law obligations towards refugees under the *United Nations Convention Relating to the Status of Refugees*; a declaration that the respondent's failure to determine the applicant's status as a Convention refugee violated section 7 of the *Canadian Charter of Rights and Freedoms*; and an order setting aside the decision cancelling the applicant's PRRA application. As for the respondent, he argued that the application for *mandamus* was moot and that the applicant was not entitled to the declaratory relief he sought.

The issues were whether the respondent erred in cancelling the applicant's PRRA application; whether the application for a writ of *mandamus* was moot; and whether the applicant was entitled to the declaratory relief he sought.

Held, the application should be dismissed.

The respondent did not err in cancelling the applicant's PRRA application. The decision was consistent with the purpose of the PRRA process and the applicable legal principles. Parliament designed the refugee determination process and the PRRA process to perform closely related but distinct functions. The applicant could not succeed in modifying the PRRA process to emulate the refugee determination process simply through an exercise in statutory interpretation. While the text of paragraph 160(3)(a) of the Act is open to the broader interpretation urged by the applicant, it is constrained by the context and purpose of the provision. These considerations supported the respondent's interpretation, not the applicant's. In sum, an interpretation of paragraph 160(3)(a) of the Act which triggers the obligation to give notification of the opportunity to submit a PRRA application only when the person concerned is facing removal was consistent with the words of the provision read "harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament". This interpretation was also consistent with the duties imposed on the respondent under the Charter and international law insofar as they are engaged by the PRRA scheme. The Enforcement Officer involved made a mistake when she gave the applicant notification of his right to submit an application for a PRRA when she did. This is because, with the ADR for Burundi in effect, the applicant was not facing removal from Canada. It would be inconsistent with the objective of the

PRRA scheme to proceed with an assessment at that time. Thus, the only way to undo the officer's mistake was to cancel the PRRA application. Nonetheless, the timing of the decision to cancel the applicant's PRRA application and the complete absence of an explanation for the delay in making that decision left much to be desired.

Regarding the issue of mootness, a two-stage mootness analysis was made. There was no longer a live controversy that affected the rights of the parties, at least as far as the PRRA application was concerned. That application had been cancelled for a reason found to be legally sound and correct. There no longer being a decision to be made on an application, there was nothing to compel the respondent to do at that time even if all the pre-conditions for a writ of *mandamus* were satisfied. The matter was therefore moot. Nevertheless, it had to be determined whether the Court should address the issues raised despite their mootness. In this case, only the factor of an adversarial context was present since the applicant's refugee status remained undetermined and he clearly had a continuing interest in the matter. The other factors examined weighed heavily against deciding that part of the application on its merits. Thus, the Court declined to exercise its discretion to give further consideration to the applicant's moot request for a writ of *mandamus*.

The applicant failed to establish his entitlement to declaratory relief because he failed to establish that his current circumstances engaged section 7 of the Charter. Concerning international law, the applicant failed to establish his entitlement to a declaration by the Court even assuming the Court had the jurisdiction to issue such a declaration. The applicant argued that by refusing to determine his claim for refugee protection for an indefinite period of time, the respondent failed to facilitate the applicant's assimilation and naturalization. But this argument was rejected. There was no reason in principle to think that a humanitarian and compassionate (H&C) application was not a suitable and effective route to naturalization for someone in the applicant's situation. An H&C application is intended to be a flexible solution for exceptional cases where the law operates unfairly or inequitably. Absent a reason to rule out an H&C application as a suitable and effective route to naturalization for the applicant, there was no basis for finding that the respondent violated international law by not determining the applicant's status as a refugee, as alleged by the applicant.

STATUTES AND REGULATIONS CITED

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], ss. 7, 24(1).

Constitution Act, 1982, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], s. 52.

Immigration and Refugee Protection Act, S.C. 2001, c. 27, ss. 3(3)(f), 25(1), 48(1), 49, 50(e), 96, 97, 98, 101(1), 112, 113, 114, 115(1).

Immigration and Refugee Protection Regulations, SOR/2002-227, ss. 2 "Department", 159.5(c), 160, 162, 230, 232.

TREATIES AND OTHER INSTRUMENTS CITED

United Nations Convention Relating to the Status of Refugees, July 28, 1951, [1969] Can. T.S. No. 6, Art. 34.

CASES CITED

APPLIED:

B010 v. Canada (Citizenship and Immigration), 2015 SCC 58, [2015] 3 S.C.R. 704; *Németh v. Canada (Justice)*, 2010 SCC 56, [2010] 3 S.C.R. 281; *Febles v. Canada (Citizenship and Immigration)*, 2014 SCC 68, [2014] 3 S.C.R. 431; *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, (1989), 57 D.L.R. (4th) 231; *Lunyamila v. Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22, [2018] 3 F.C.R. 674.

CONSIDERED:

Dunsmuir v. New Brunswick, 2008 SCC 9, [2008] 1 S.C.R. 190; *Tabingo v. Canada (Citizenship and Immigration)*, 2014 FCA 191, [2015] 3 F.C.R. 346; *Francis v. Canada (Citizenship and Immigration)*, 2018 FC 1123; *Raza v. Canada (Citizenship and Immigration)*, 2007 FCA 385, 289 D.L.R. (4th) 675; *Revich v. Canada (Citizenship and Immigration)*, 2005 FC 852, 289 D.L.R. (4th) 675; *Asfaw v. Canada (Citizenship and Immigration)*, 2016 FC 366; *Ewart v. Canada*, 2018 SCC 30, [2018] 2 S.C.R. 165.

REFERRED TO:

Thamotharampillai v. Canada (Citizenship and Immigration), 2016 FC 352, [2016] 4 F.C.R. 331; *A.B. v. Canada (Citizenship and Immigration)*, 2017 FC 629; *Lakatos v. Canada (Immigration and Citizenship)*, 2018 FC 367; *Belaroui v. Canada (Citizenship and Immigration)*, 2015 FC 863; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31, [2018] 2 S.C.R. 230; *Figurado v. Canada (Solicitor General)*, 2005 FC 347, [2005] 4 F.C.R. 387; *Sogi v. Canada (Citizenship and Immigration)*, 2007 FC 108; *Solis Perez v. Canada (Citizenship and Immigration)*, 2008 FC 663, 328 F.T.R. 290; *R. v. Appulonappa*, 2015 SCC 59, [2015] 3 S.C.R. 754; *Democracy Watch v. Canada (Attorney General)*, 2018 FCA 195; *Apotex Inc. v. Canada (Attorney General)*, [1994] 1 F.C. 742 (1993), 18 Admin. L.R. (2d) 122 (C.A.); *Farhadi v. Canada (Citizenship and Immigration)*, 2014 FC 926, 465 F.T.R. 19; *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, (1999), 216 N.B.R. (2d) 25; *Siemens v. Manitoba (Attorney General)*, 2003 SCC 3, [2003] 1 S.C.R. 6; *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 S.C.R. 909; *Bawazir v. Canada (Citizenship and Immigration)*, 2019 FC 623.

AUTHORS CITED

Regulatory Impact Analysis Statement, SOR/2002-227, *C. Gaz*. 2002.II.177.

APPLICATION for leave and judicial review seeking several forms of relief involving the applicant's immigration status, including that the applicant's pre-removal risk assessment be determined. Application dismissed.

APPEARANCES

Raoul Boulakia for applicant.

Nadine S. Silverman for respondent.

SOLICITORS OF RECORD

Raoul Boulakia, Toronto, for applicant.

Deputy Attorney General of Canada for respondent.

The following are the reasons for judgment and judgment rendered in English by

NORRIS J.:

I. OVERVIEW

[1] On August 15, 2017, the applicant and his brother presented themselves at the Cornwall, Ontario Port of Entry. Both are citizens of Burundi. Both had been in the United States on student visas. Both said they were now seeking refugee protection in Canada. Their grounds for seeking protection were essentially the same. From that point on, however, their respective claims for protection took very different paths.

[2] The applicant's brother's claim was referred to the Refugee Protection Division (RPD) of the Immigration and Refugee Board of Canada (I.R.B.). Even though he was entering Canada from the United States at a Point of Entry, he was not ineligible to have his claim referred to the RPD under paragraph 101(1)(e) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA [or the Act]). This was because he had a qualifying family member in Canada—namely, his mother, who had arrived in Canada separately from Rwanda on July 8, 2017, and made a refugee claim (see paragraph 159.5(c) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (IRPR)). The applicant's brother was served with a conditional removal order but it would come into force only if his claim was not accepted by the RPD (see IRPA, subsection 49(2)). He was permitted to enter Canada. The applicant's brother's and mother's refugee claims were joined and heard together by the RPD. On October 4, 2017, the RPD accepted their claims and granted them refugee protection. (The pertinent statutory and regulatory provisions are set out in the Annex to these reasons.)

[3] The applicant's claim, on the other hand, was found to be ineligible for referral to the RPD under paragraph 101(1)(c) of the IRPA. This was because previously he had made a claim

for refugee protection that was determined to be ineligible to be referred to the RPD. On January 16, 2016, the applicant had presented himself at the St-Amand/Philipsburg, Quebec Port of Entry and made a refugee claim. His claim was found to be ineligible for referral to the RPD under paragraph 101(1)(e) of the IRPA because the applicant was coming from the United States and, at the time, he did not have a qualifying family member in Canada. As a result of this earlier determination, the applicant's 2017 claim, unlike his brother's, would not be considered by the RPD. As well, again unlike his brother's, the removal order served on the applicant was not a conditional one. However, since under paragraph 49(2)(b) of the IRPA the order served on him did not come into force until seven days later (i.e. not until August 22, 2017), the applicant was permitted to enter Canada along with his brother. (There is an immaterial discrepancy in the record as to whether the order was served on the applicant on August 15th or 16th.)

[4] On August 17, 2017, the applicant was served with notification under section 160 of the IRPR of his right to apply for a pre-removal risk assessment (PRRA) under subsection 112(1) of the IRPA. He was told that his application had to be submitted no later than September 1, 2017, and that his written submissions had to be provided no later than September 17, 2017. As long as the applicant met these deadlines, the removal order made against him would be suspended until a decision was made on his application (see sections 162 and 232 of the IRPR).

[5] With the assistance of a lawyer, the applicant submitted his PRRA application and comprehensive supporting submissions as required. Supplementary submissions relating to the favourable decision of the RPD in the case of the applicant's mother and brother were provided on October 7, 2017.

[6] On November 17, 2017, counsel for the applicant wrote to Citizenship and Immigration Canada requesting a decision on the PRRA application. He indicated that, if no reply to this request was received by April 1, 2018, he would proceed with an application for a writ of *mandamus* and a declaration that the government of Canada has a legal obligation to determine the applicant's Convention refugee status. He did not receive a reply.

[7] On April 17, 2018, the applicant filed the present application for a writ of *mandamus* and declaratory relief. However, at some point in or about July 2018, the Minister of Citizenship and

Immigration, acting through his delegate(s), cancelled the applicant's PRRA application. This decision was communicated to the applicant on or about August 30, 2018.

[8] The Minister now contends that the application for *mandamus* is moot and that the applicant is not entitled to the declaratory relief he seeks.

[9] I have considerable sympathy for the predicament in which the applicant finds himself. As will be explained in more detail below, his claim for refugee protection in Canada is essentially stalled for the foreseeable future. In this very important respect, his life remains on hold for an indeterminate period of time.

[10] For the reasons that follow, however, I agree with the Minister. The applicant does not have a legal right to have his PRRA application decided at this time. The Minister therefore did not err in cancelling the application. The only error was to have invited the applicant to make a PRRA application in the first place. As a result, the application for *mandamus* is moot. I have also concluded that the applicant has not established his entitlement to the declaratory relief he seeks. Accordingly, this application for judicial review must be dismissed.

II. PROCEDURAL BACKGROUND

[11] Some additional background is necessary to put the present application in context.

[12] Section 162 of the IRPR provides that an application for a PRRA made within 15 days of when notification was given under section 160 of the IRPR shall not be decided until at least 30 days after notification was given. In effect, this gives an applicant for a PRRA the opportunity (albeit brief) to provide submissions and evidence in support of his or her application. Otherwise, there are no statutory time constraints on the rendering of a decision on a PRRA application. As well, if the decision remains outstanding after 30 days of notification, there is nothing to prevent an applicant from providing supplementary submissions or evidence, as the present applicant did. (The only statutory constraint on the evidence supporting the application is that it must meet the requirements of paragraph 113(a) of the IRPA. That is, an applicant whose claim for refugee protection was rejected "may present only new evidence that arose after the rejection or was not reasonably available, or that the applicant could not reasonably have been expected in the

circumstances to have presented, at the time of the rejection". Since the applicant's prior refugee claim was never considered on its merits, this provision does not apply to him.)

[13] As set out above, counsel for the applicant notified the Minister of his intention to seek a writ of *mandamus* if a decision was not made by April 1, 2018. This correspondence went unacknowledged and, of course, no decision was made.

[14] On April 17, 2018, the applicant filed an application for leave and judicial review seeking the following principal forms of relief:

(a) a writ of *mandamus* against the Minister requiring the PRRA officer to determine the applicant's PRRA application within 90 days of the Court's order;

(b) a declaration that the Minister's failure to determine the applicant's status as a Convention refugee violates Canada's international human rights law obligations towards refugees under the Refugee Convention; and

(c) a declaration that the Minister's failure to determine the applicant's status as a Convention refugee violates section 7 of the *Canadian Charter of Rights and Freedoms* [Charter].

[15] Since the decision to cancel the PRRA application was not made until about three months after the application for leave and judicial review was filed, it is not surprising that it is not mentioned there. However, the application for leave and judicial review was not amended to challenge the decision cancelling the PRRA application prior to the hearing of this application for judicial review. At the hearing, I expressed the concern that unless the decision to cancel the PRRA application was set aside, the cancellation would be a *fait accompli* and there would be no outstanding decision with respect to which a writ of *mandamus* could issue. The applicant agreed to amend the application for leave and judicial review by adding a request for the following additional relief: "an order setting aside the decision of Immigration Enforcement Officer A. Biscotti dated July 19, 2018, which the applicant was notified of on August 30, 2018, cancelling his Pre-Removal Risk Assessment application". The respondent consented to this amendment.

[16] While nothing turns on this, I pause to note that I do not agree with the applicant that it was Enforcement Officer Biscotti who made the decision to cancel the PRRA. On a fair reading of documents in the certified tribunal record (CTR), it is apparent that the decision to cancel the PRRA was made at some point by someone from Citizenship and Immigration Canada and not by Enforcement Officer Biscotti. Even so, we have no idea who that person is or his or her position. Enforcement Officer Biscotti (who had dealt with the applicant back in August 2017) merely communicated this decision and the reason for it to the applicant by writing him a letter. She then arranged for a local Canada Border Services Agency (CBSA) office in Mississauga to give the letter to the applicant in person. That being said, it would have been very helpful to the parties and to the Court if there had been greater clarity in the CTR concerning who made the decision to cancel the PRRA and when. In a matter as important as this, there should not be any room for doubt about such things. (For ease of reference, generally I will refer to the decision simply as that of Minister's.)

III. DECISION UNDER REVIEW

[17] As noted above, the decision to cancel the PRRA application was communicated to the applicant in a letter from Enforcement Officer Biscotti. The letter stated the following:

> *Votre demande d'Examen Des Risques Avant Renvoi (ERAR) a été annulée puisque vous n'êtes pas prêt à être renvoyé en ce moment.*
>
> *Il y a présentement un Sursis Administratif aux Renvois pour le Burundi. Lorsque le Sursis Administratif aux Renvois sera annulé, vous serez contacté afin de déposer une autre demande d'Examen Des Risques Avant Renvoi.*

[18] The letter was given to the applicant on or about August 30, 2018.

[19] As Enforcement Officer Biscotti alludes to in her letter, on December 2, 2015, the Government of Canada adopted a *Sursis Administratif aux Renvois* (or an Administrative Deferral of Removals (ADR)) to Burundi. This measure was adopted because of conditions there, including government instability, rising levels of violence and food insecurity.

[20] The authority to put an ADR in place comes from section 230 of the IRPR, which provides as follows:

Considerations

230 (1) The Minister may impose a stay on removal orders with respect to a country or a place if the circumstances in that country or place pose a generalized risk to the entire civilian population as a result of:

(a) an armed conflict within the country or place;

(b) an environmental disaster resulting in a substantial temporary disruption of living conditions; or

(c) any situation that is temporary or generalized.

Cancellation

(2) The Minister may cancel the stay if the circumstances referred to in subsection (1) no longer pose a generalized risk to the entire civilian population.

[21] Subsection 230(3) sets out a number of exceptions to this type of stay of removal but none of them apply to the applicant. As a result, for as long as the ADR remains in place, the applicant cannot be removed to Burundi.

[22] It was Enforcement Officer Biscotti who provided the applicant with notification of his right to submit an application for a PRRA. In an affidavit filed in connection with the present application, she states that she was in error when she did so. Since the applicant could not be removed from Canada in August 2017 because of the ADR, he should not have been provided with notification under section 160 of the IRPR.

[23] As set out above, essentially the same reason is given for cancelling the PRRA application: the applicant is entitled to make a PRRA application only when he is ready to be removed from Canada and he cannot be removed while the ADR is in place.

IV. ISSUES

[24] While this application raises several inter-related issues, I have framed my discussion around three broad questions:

(a) Did the Minister err in cancelling the applicant’s PRRA application?

(b) Is the application for a writ of *mandamus* moot?

(c) Is the applicant entitled to the declaratory relief he seeks?

V. ANALYSIS

[25] As stated in his application for leave and judicial review, the applicant contends that he has a right to a determination of his refugee status in Canada now and that the Minister is under a corresponding duty to make this determination. This is the legal foundation of the applicant's request for *mandamus*. It also underlies his request for declaratory relief.

[26] In assessing this submission, it is important to keep in mind what is, and what is not, in issue in this application. The applicant has not challenged the constitutionality of any statute or regulation. He has not sought any form of remedy in relation to legislation, either under section 52 of the *Constitution Act, 1982* or under subsection 24(1) of the Charter. In particular, he has not challenged the constitutionality of the provision that bars him from access to the Refugee Protection Division—namely, paragraph 101(1)(c) of the IRPA. He has therefore accepted that, for purposes of this application, the PRRA process is the only statutory process available to him for the determination of his claim for protection. Rather than challenging the constitutionality of any statute or regulation that governs that process, the applicant contends that he has a right to a decision under the PRRA process on his claim for refugee protection now and that the Minister is under a corresponding duty. He grounds this claim in the IRPA and the IRPR, in the Charter, and in international law. On this basis, the applicant argues that the Minister's refusal to make a decision on his PRRA application infringes this right and the appropriate and just remedy is an order requiring the Minister to make a decision on the application.

[27] If I agreed with the applicant about this, I would set aside the decision to cancel his PRRA application and proceed to consider whether he had established the pre-conditions for a writ of *mandamus*. On the other hand, if I do not agree with the applicant, there is no basis for me to interfere with the decision to cancel the PRRA application and the application for a writ of *mandamus* would be moot.

[28] In what follows, I will explain why I do not agree with the applicant.

A. *Did the Minister err in cancelling the applicant's PRRA application?*

(1) Standard of review

[29] The parties did not say much about what standard of review I should apply to the decision to cancel the PRRA application. The respondent simply defends the decision as a reasonable one. The applicant does not address this question directly.

[30] It is well-established that ordinarily a PRRA officer's decision is to be reviewed on a standard of reasonableness (see, for example, *Thamotharampillai v. Canada (Citizenship and Immigration)*, 2016 FC 352, [2016] 4 F.C.R. 331, at paragraph 18; *A.B. v. Canada (Citizenship and Immigration)*, 2017 FC 629, at paragraph 12; and *Lakatos v. Canada (Immigration and Citizenship)*, 2018 FC 367, at paragraph 13). The reviewing court examines the decision for "the existence of justification, transparency and intelligibility within the decision-making process" and determines "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paragraph 47). The reviewing court is required to show deference to the PRRA officer's analysis of the evidence in the record, something that falls within his or her presumed expertise (*Belaroui v. Canada (Citizenship and Immigration)*, 2015 FC 863, at paragraph 10).

[31] The present case, however, is not the usual sort of PRRA decision. It is not a decision on the merits of an application. It is a decision to cancel an application. As well, as discussed above, we do not even know who made that decision—a PRRA officer, or someone else from Citizenship and Immigration Canada. It is difficult to know whether deference is owed to an completely anonymous decision maker.

[32] The facts upon which the decision to cancel the PRRA application are not in dispute. The decision turns on the interpretation of section 160 of the IRPR as opposed to the assessment of evidence. The case could be made that deference is still owed to the decision maker and the reasonableness standard should be applied because he or she was interpreting and applying one of his or her home statutes (or regulations, to be precise) (*Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31, [2018] 2 S.C.R. 230, at paragraphs

27–29; *B010 v. Canada (Citizenship and Immigration)*, 2015 SCC 58, [2015] 3 S.C.R. 704 (*B010*), at paragraph 25. On the other hand, one could also argue that in matters relating to the protection against *non-refoulement*, the decision maker must apply the correct legal principles. See, for example, the Supreme Court of Canada's approach in *Németh v. Canada (Justice)*, 2010 SCC 56, [2010] 3 S.C.R. 281 (*Németh*), at paragraph 58, albeit without an express discussion of the standard of review. However, it is not necessary to resolve this question here because, as I will explain, even applying the more stringent correctness standard of review, I have concluded that the Minister did not err in cancelling the applicant's PRRA application. The decision is consistent with the purpose of the PRRA process and the applicable legal principles as I understand them to be.

(2) The PRRA process

[33] To understand the legal scheme for making and determining a PRRA application, one must consider both the IRPA and the IRPR. In this as in other respects, the IRPA functions as "framework legislation. It states basic principles and policies, leaving secondary policies, implementation, and operational matters to be dealt with in regulations" (*Tabingo v. Canada (Citizenship and Immigration)*, 2014 FCA 191, [2015] 3 F.C.R. 346, at paragraph 17).

[34] As set out in the IRPA and the IRPR, the PRRA process can involve many exceptions and restrictions, depending on a variety of factors. Since none of these exceptions or restrictions apply to the applicant, for the sake of simplicity I will generally summarize only those parts of the process that apply to him. The full text of the relevant provisions may be found in the Annex to these reasons.

[35] Subsection 112(1) of the IRPA provides that a person in Canada, other than a person referred to in subsection 115(1) of the Act (i.e. a protected person or a person recognized as a Convention refugee by another country to which they may be returned) "may, in accordance with the regulations, apply to the Minister for protection if they are subject to a removal order that is in force". Subsection 160(1) of the IRPR provides that "a person may apply for protection after they are given notification to that effect by the Department." ("Department", naturally, means the Department of Citizenship and Immigration—see IRPR, section 2). Paragraph 160(3)(a) of the IRPR provides that, in the case of a person who is subject to a removal order that is in force,

notification shall be given “before removal from Canada”. In the applicant’s case, the assessment of the PRRA application would be on the basis of sections 96 to 98 of the IRPA—in other words, whether he is a Convention refugee or a person in need of protection (IRPA, paragraph 113(c)). If allowed, the application has the effect of conferring refugee protection on the applicant (IRPA, paragraph 114(1)(a)).

[36] In simple terms, the duty to initiate the PRRA process by offering someone the opportunity to make an application is subject to a legal pre-condition and a temporal outer limit. The legal pre-condition is that the person must be “subject to a removal order that is in force” (IRPA, subsection 112(1) and IRPR, paragraph 160(3)(a)). The temporal outer limit is that the offer must be made “before removal from Canada” (IRPR, paragraph 160(3)(a)). Both the Act and the Regulations are silent about how long before removal a person is entitled to this notification.

[37] As a practical matter, there is now a division of responsibilities between PRRA officers with Citizenship and Immigration Canada and enforcement officers with the CBSA. It is CBSA enforcement officers who typically give notification under subsection 160(3) of the IRPR. If a person goes ahead with an application, it is a PRRA officer who will decide it. Once the decision is made, it will be a CBSA enforcement officer who delivers it to the person concerned.

[38] There is no dispute that the applicant is subject to a removal order that is in force—namely, the exclusion order that was served on him on August 15 (or 16), 2017, which came into force on August 22 (or 23), 2017. The critical question is whether it was nevertheless a mistake to give him notification on August 17, 2017, of the opportunity to submit a PRRA application, a mistake which had to be corrected by cancelling the PRRA application. (I note parenthetically that in this case nothing turns on the fact that the applicant was served with the PRRA notification before his removal order was actually in force. The applicant was served on August 17, 2017 but the removal order did not come into force until a few days later. It is safe to assume that, given the officer’s understanding of the situation at the time, had she not served the applicant on August 17, 2017, she would have provided him with a PRRA notification on or shortly after August 22, 2017.)

[39] This Court has observed that, provided the person in question is subject to a removal order that is in force, "the timing of the notice is in the hands of the immigration authorities" (*Francis v. Canada (Citizenship and Immigration)*, 2018 FC 1123 (*Francis*), at paragraph 22). The exercise of this discretion is to be guided by the objective of the scheme. This Court and the Federal Court of Appeal have both held this objective is to ensure compliance with Canada's domestic and international commitments to the principle of *non-refoulement* (*Figurado v. Canada (Solicitor General)*, 2005 FC 347, [2005] 4 F.C.R. 387, at paragraph 40; *Raza v. Canada (Citizenship and Immigration)*, 2007 FCA 385, 289 D.L.R. (4th) 675 (*Raza*), at paragraph 10).

[40] A Regulatory Impact Analysis Statement concerning the PRRA (and other aspects of the IRPR) ([SOR/2002-227] *Canada Gazette*, Part II, Vol. 136, Extra (June 14, 2002)) made this purpose clear (at page 274):

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

Similarly, under the heading "Purpose of these provisions", the Regulatory Impact Analysis states (at page 274):

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

[41] In *Raza* the Federal Court of Appeal expressly adopted the first passage quoted above as stating the purpose of section 112 of the IRPA (at paragraph 10).

[42] The Regulatory Impact Analysis goes on to explain how the PRRA process had been designed to "encourage applicants to exercise diligence in making their applications according to specific objective timelines in order to ensure that the PRRA assessment remains linked in time to removal" (at page 274). The PRRA is said to be "closely linked in time to removals and is carried out immediately prior to removal" (at page 276).

[43] Not surprisingly, this Court has taken the same view of the importance of the proximity of the assessment to removal. In *Revich v. Canada (Citizenship and Immigration)*, 2005 FC 852, 289 D.L.R. (4th) 675, Justice Tremblay-Lamer held that "if this review is to be effective and consistent with Parliament's intention when creating it, the PRRA must coincide as closely as possible with the person's departure from the country" (at paragraph 16). This view was adopted by Justice Zinn in *Asfaw v. Canada (Citizenship and Immigration)*, 2016 FC 366, where he held that a PRRA "*should not* be conducted immediately, because its effectiveness in safeguarding the applicant's right of *non-refoulement* depends on it being conducted just prior to removal" (at paragraph 16, emphasis in original). Justice Zinn returned to this point again in *Francis*, where he reiterated that "PRRA decisions are to be made close to the actual removal from Canada of an applicant" (at paragraph 21).

[44] The applicant submits, correctly, that none of these decisions presented the same issue as the present case. Nevertheless, this does not detract from the soundness of their analysis of how best to achieve the objective of the scheme. If someone is not facing removal, there is no risk of non-compliance with the principle of *non-refoulement* and so there is no need to offer them a PRRA at that time. Further, if the risk assessment is done too early and it is negative, it might need to be done again prior to removal in case country conditions or the person's circumstances have changed in the meantime. As the Supreme Court of Canada held in *Németh* in a different but closely related context, the relevant time for assessing entitlement to *non-refoulement* protection is the time removal is sought (at paragraph 50). Finally, it is noteworthy that there is a certain redundancy to submitting a PRRA application while other measures prevent the person's removal from Canada. The statutory stay of removal while a PRRA application is pending serves to ensure that the risk assessment is made before removal from Canada, not after (*Sogi v. Canada (Citizenship and Immigration)*, 2007 FC 108, at paragraph 31; *Solis Perez v. Canada (Citizenship and Immigration)*, 2008 FC 663, 328 F.T.R. 290, at paragraph 25). Such a stay will generally not be necessary to prevent a person's removal if an ADR for the relevant country is in place.

[45] I acknowledge that this interpretation of when one becomes eligible for a PRRA means that access to this form of protection is more restricted temporarily than the same form of protection provided by the RPD. The present case is a stark illustration of the difference between

the two: the applicant cannot obtain refugee protection because of the ADR but the ADR did not prevent his brother or his mother from being recognized as refugees by the RPD. Still, it must be recalled that the main reason the applicant cannot obtain refugee protection now is because his claim was ineligible for referral to the RPD under paragraph 101(1)(c) of the IRPA. As a matter of public policy, Canada has established certain barriers to access to the refugee determination process. The applicant has not challenged the barrier that prevented his access to the refugee determination process before the RPD.

[46] Parliament designed the refugee determination process and the PRRA process to perform closely related but distinct functions. The PRRA process was adopted as a safe-guard for ensuring compliance with the principle of *non-refoulement* but it is only necessary to engage it for individuals who have not been granted refugee protection, either because they did not apply for it, because they applied for it but were unsuccessful, or (like the applicant) because they could not apply for it. In short, the purpose of the PRRA is to prevent removal that is contrary to the principle of *non-refoulement* for individuals who, for whatever reason, have not otherwise been able to secure refugee protection. The applicant has not persuaded me that the PRRA process is meant to perform any other function than this critically important one.

[47] Conducting a PRRA reasonably close in time to when the person could be removed from Canada best ensures its effectiveness. This is the best way to protect the rights of the person concerned and the best way to ensure that Canada complies with its domestic and international obligations. I cannot accept the applicant's contention that the PRRA process should function more broadly as an alternative route to refugee status, even though that is one possible outcome of that process and, for some (like the applicant), it is the only route to recognition of that status. In my view, the applicant cannot succeed in modifying the PRRA process to emulate the refugee determination process simply through an exercise in statutory interpretation, as he has attempted to do. The outcome he seeks is contrary to the purpose of the scheme and the clear intention of Parliament in enacting it (*Németh*, at paragraph 26). While the text of paragraph 160(3)(a) of the IRPR is open to the broader interpretation urged by the applicant, it is constrained by the context and purpose of the provision. These considerations support the Minister's interpretation, not the applicant's.

[48] The applicant relies on the Charter in support of his argument for a temporally broader interpretation of paragraph 160(3)(a) of the IRPR and of when the entitlement to have a PRRA application decided arises. It is clear from the statement of purpose quoted above that part of the purpose of the PRRA process is to ensure compliance with the Charter. The applicant has not persuaded me that, under the Minister's interpretation, the PRRA process falls short in protecting Charter rights, as it was designed to do. Moreover, the Charter does not give a positive right to refugee protection (*Febles v. Canada (Citizenship and Immigration)*, 2014 SCC 68, [2014] 3 S.C.R. 431 (*Febles*), at paragraph 68). As for the applicant's attempt to use the Charter to impute a broader function to the PRRA process, when Parliament's intent for a statutory provision is clear and unambiguous, "the *Charter* cannot be used as an interpretive tool to give the legislation a meaning which Parliament did not intend" (*Febles*, at paragraph 67).

[49] The applicant has also urged me to consider the international law context in which the PRRA scheme in general and subsection 112(1) of the IRPA and subsection 160(3) of the IRPR in particular are enacted when interpreting these provisions. There is no question that this must be done (IRPA, paragraph 3(3)(f); *B010*, at paragraphs 47–50; *R. v. Appulonappa*, 2015 SCC 59, [2015] 3 S.C.R. 754, at paragraph 40). But having done so, I cannot agree that an interpretation of the scheme that triggers the obligation to give notification of the opportunity to submit a PRRA application only when the person concerned is about to be removed from Canada is inconsistent with that context. On the contrary, it helps to ensure that the scheme serves its intended function of promoting compliance with the principle of *non-refoulement*, a cornerstone of refugee protection and one of the foundational principles of international human rights law generally (*Németh*, at paragraphs 1, 18 and 19).

[50] In sum, I find that an interpretation of paragraph 160(3)(a) of the IRPR which triggers the obligation to give notification of the opportunity to submit a PRRA application only when the person concerned is facing removal is consistent with the words of the provision, read "harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*B010*, at paragraph 29). I am also satisfied that this interpretation is consistent with the duties imposed on the Minister under the Charter and international law insofar as they are engaged by the PRRA scheme.

[51] The applicant also contends that the Minister is subject to a free-standing duty, grounded in the Charter and international law, to determine his application for refugee protection outside of the PRRA scheme. I will address this submission below in connection with the applicant's request for declaratory relief.

(3) The decision to cancel the PRRA

[52] On the basis of the foregoing, I have concluded that the Minister did not err in cancelling the applicant's PRRA application. Enforcement Officer Biscotti made a mistake when she gave the applicant notification of his right to submit an application for a PRRA on August 17, 2017. This is because, with the ADR for Burundi in effect, the applicant was not facing removal from Canada. It would be inconsistent with the objective of the PRRA scheme to proceed with an assessment at that time.

[53] When a given person is facing removal from Canada such as to trigger paragraph 160(3)(a) of the IRPR will depend on a variety of factors. It is not necessary for me to consider this broader question here. It suffices to conclude that, since the applicant cannot be removed from Canada because of the ADR, he was not facing removal when he was offered a PRRA. The only way to undo the officer's mistake was to cancel the PRRA application. The reason given for doing so—the applicant is currently not facing removal from Canada—is legally sound and fully explains the result. The applicant is subject to a removal order that is in force but that order is not enforceable because it has been stayed by the Minister under section 230 of the IRPR (see IRPA, subsection 48(1) and paragraph 50(e)). The fact that the applicant did not need a statutory stay under the PRRA scheme to prevent his removal from Canada is another indication that his PRRA application is not yet ripe for consideration. In such circumstances, the Minister is not required to proceed with a PRRA despite the fact that the applicant was offered one. Indeed, to proceed with the risk assessment while the ADR is in place would be inconsistent with the effective operation of the PRRA scheme.

[54] That being said, I must observe that the timing of the decision to cancel the applicant's PRRA application (nearly a year after he submitted his application and only after he had to take the unusual step of seeking a writ of *mandamus*) and the complete absence of an explanation for the delay in making that decision leave much to be desired.

B. *Is the application for a writ of* mandamus *moot?*

[55] With the PRRA application having been cancelled, the Minister contends that the application for a writ of *mandamus* should be dismissed as moot.

[56] A mootness analysis proceeds in two stages. The first question is whether a live controversy remains that affects or may affect the rights of the parties. If this question is answered in the negative, the proceeding is moot but the Court must still consider whether it should nonetheless exercise its discretion to decide the matter on the merits (*Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 (*Borowski*), at pages 353–363; *Democracy Watch v. Canada (Attorney General)*, 2018 FCA 195, at paragraph 10).

[57] I am satisfied that there is no longer a live controversy that affects the rights of the parties, at least as far as the PRRA application is concerned. That application has been cancelled for a reason which I have found to be legally sound (indeed, correct). There no longer being a decision to be made on an application, there is nothing for me to compel the Minister to do at this time (even assuming all the other pre-conditions for a writ of *mandamus* were satisfied—see *Apotex Inc. v. Canada (Attorney General)*, [1994] 1 F.C. 742 (C.A.), at paragraph 45). The matter is therefore moot.

[58] In *Borowski*, the Court formulated guidelines for determining whether a court should address the issues raised in a case despite their mootness. Three factors were identified: (1) whether there is an adversarial context; (2) the concern for judicial economy; and (3) whether deciding the case on its merits would be consistent with the court's adjudicative role relative to that of the legislative branch of government (at pages 358–363). The Court emphasized that this is not an exhaustive list: "more than a cogent generalization is probably undesirable because an exhaustive list would unduly fetter the court's discretion in future cases" (at page 358). This discretion is "to be judicially exercised with due regard for established principles" (at page 358). Further, the application of these factors is not a "mechanical process" (at page 363). The factors may not all support the same conclusion in a given case, and the presence of one or two may be overborne by the absence of a third, and vice versa (at page 363).

[59] In my view, only the first of these factors favours deciding this case on its merits. There is no question that an adversarial context is present here. The applicant's refugee status remains undetermined and he clearly has a continuing interest in the matter. The Minister has a continuing interest as well. Both sides have ably advanced their positions on the merits of the application. However, the other two factors weigh heavily against deciding this part of the application on its merits. Judicial economy would not be served by entering into a further discussion of the Minister's duties towards the applicant under the PRRA process when these questions will crystalize later (assuming it becomes necessary to engage the PRRA at some point). To the extent that there are important legal issues to be determined, in my view the foregoing discussion of the PRRA process together with the discussion to follow concerning the applicant's requests for declaratory relief suffice for present purposes. *Mandamus* is already an extraordinary, discretionary remedy (*Farhadi v. Canada (Citizenship and Immigration)*, 2014 FC 926, 465 F.T.R. 19, at paragraph 28). Nothing would be gained by further consideration of the now entirely hypothetical request for this relief.

[60] For these reasons, I decline to exercise my discretion to give further consideration to the applicant's moot request for a writ of *mandamus*.

C. *The applicant's requests for declaratory relief*

[61] A court may, in its discretion, grant a declaration "where it has jurisdiction to hear the issue, where the dispute before the court is real and not theoretical, where the party raising the issue has a genuine interest in its resolution, and where the respondent has an interest in opposing the declaration sought" (*Ewart v. Canada*, 2018 SCC 30, [2018] 2 S.C.R. 165, at paragraph 81).

[62] The request for declaratory relief was part of the original application for leave and judicial review, which was filed when a decision on the PRRA application was still outstanding. The applicant clearly hoped that, if granted, this remedy would put additional legal pressure on the Minister to make a decision on his PRRA application. While the cancellation of the PRRA application has rendered the request for a writ of *mandamus* moot, it did not have the same impact on the request for declarations. It remains a live controversy between the parties that affects or may affect their rights.

(1) Section 7 of the Charter

[63] The applicant seeks a declaration as a remedy under subsection 24(1) of the Charter.

[64] A precondition for entitlement to such relief is that the applicant must establish that his Charter rights have been infringed or denied. The applicant contends that the Minister's failure to determine his status as a Convention refugee violates his rights under section 7 of the Charter.

[65] A claim under section 7 must establish two things: first, that there is a deprivation of a right that is protected by section 7 (life, liberty or security of the person); second, that this deprivation is not in accordance with the principles of fundamental justice (*Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350 (*Charkaoui*), at paragraph 12).

[66] In my view, the applicant has failed to establish his entitlement to declaratory relief because he has failed to establish that his current circumstances engage section 7 of the Charter.

[67] There are a variety of ways that the protections of section 7 of the Charter may be engaged but the applicant has not established that they are engaged in his case—at least, not at this time. He is not detained or subject to other serious restrictions on his liberty (*Charkaoui*, at paragraph 13). He is not currently facing removal from Canada to a place where his life or freedom would be threatened or where he could be tortured (*Charkaoui*, at paragraph 14). He has not been labelled by Canada in a way that could cause irreparable harm in his life (*Charkaoui*, at paragraph 14).

[68] The applicant states in his affidavit that the prospect of remaining in Canada indefinitely without any resolution of his claim for refugee protection is "depressing". He is "saddened" that his case remains unresolved while his brother's and his mother's claims were brought to a successful conclusion. The prospect that he could one day be forced to return to Burundi is a source of anxiety for him. He is unable to feel "entirely secure" in Canada. No other evidence concerning the psychological impact on the applicant of his unresolved status was provided.

[69] The right to security of the person guaranteed by section 7 of the Charter protects the psychological integrity of an individual (*Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, at paragraphs 55–57). However, to engage

section 7 on this basis, the impact of the state action must be greater than ordinary stress and anxiety; it must be serious and profound (*New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, at paragraph 60). I do not doubt the sincerity of the applicant's evidence about the psychological impact of the Minister's refusal to determine his refugee status in some way. However, it falls well short of the high threshold necessary to engage section 7 of the Charter.

[70] The applicant also states that he has had difficulty moving ahead in his life. He cannot afford to attend school (because he cannot afford foreign student fees) and he has had difficulty obtaining work (because of his temporary status in Canada). The law is clear, however, that the right to life, liberty and security of the person protected by section 7 encompasses essential or fundamental life choices, and not pure economic interests (*Siemens v. Manitoba (Attorney General)*, 2003 SCC 3, [2003] 1 S.C.R. 6, at paragraph 45). The impact of the applicant's unresolved status on his education or employability does not engage section 7 of the Charter, either.

[71] I must stress that these findings should in no way be taken to suggest that the impact on the applicant of his unresolved status should not entitle him to some other form of relief (e.g. humanitarian and compassionate (H&C) relief under subsection 25(1) of the IRPA). All I have concluded is that the applicant has failed to establish his entitlement to a Charter remedy in this proceeding because he has failed to establish that his current circumstances engage section 7 of the Charter.

[72] The applicant states in his affidavit: "For the foreseeable future there is no prospect of the human rights situation in Burundi improving. If the Administrative Deferral continues indefinitely, I will remain indefinitely here without resolution of my status". Any fair-minded person would empathize with the applicant. However, for reasons I develop in the next section, I am not convinced that the applicant's situation is as bleak as he may think.

(2) International law

[73] I begin by noting that I have serious doubts about the jurisdiction of this Court to issue a declaration concerning international law. Nevertheless, assuming for the sake of argument that it

is appropriate for me to consider the request, I have concluded that the applicant has failed to establish his entitlement to such relief.

[74] As I understand the applicant's argument, he relies principally on Article 34 of the Refugee Convention [*United Nations Convention Relating to the Status of Refugees*, July 28, 1951, [1969] Can. T.S. No. 6] to contend that the Minister has violated international law by refusing to process his claim for refugee protection.

[75] Article 34 provides as follows:

ARTICLE 34

Naturalization

> The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.

[76] The applicant contends that obtaining refugee protection in Canada is a necessary step towards naturalization. By refusing to determine his claim for refugee protection for an indefinite period of time, the Minister has failed to facilitate the applicant's assimilation and naturalization "as far as possible" and has failed to "make every effort to expedite" the applicant's naturalization.

[77] I cannot agree with the applicant.

[78] The applicant's argument depends on the premise that obtaining refugee protection is the only effective means for him to become eligible to seek permanent resident status in Canada. I am not convinced that this premise is correct. The applicant argues that the only other option—seeking permanent resident status on H&C grounds under subsection 25(1) of the IRPA—is not as effective a route to naturalization as obtaining refugee status. However, the evidence in this application and the applicant's submissions fall well short of demonstrating that this is the case.

[79] I acknowledge that decisions on H&C applications are inherently discretionary and that they are based on a wider and different range of considerations than an application for refugee

protection. However, there is no reason in principle to think that this is not a suitable and effective route to naturalization for someone in the applicant's situation. An H&C application is intended to be a flexible solution for exceptional cases where the law operates unfairly or inequitably (*Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 S.C.R. 909, at paragraphs 13 and 19). It is at the very least arguable that the applicant's current circumstances fall squarely within the intended ambit of subsection 25(1) of the IRPA (see my recent discussion of an H&C decision concerning an individual who is subject to an ADR in *Bawazir v. Canada (Citizenship and Immigration)*, 2019 FC 623).

[80] There is no evidence before me that the applicant has made an H&C application. The applicant's counsel submits that there are practical considerations that limit the effectiveness of this remedy (e.g. cost and delay) but no evidence concerning these barriers is before me. Even assuming that this is the case, such things do not necessarily entail that an H&C application is inherently a less effective way to secure naturalization. It is an available option under the law. Its ineffectiveness (if such is the case) can only be established by engaging that process and then seeing how it performs in a given case. Moreover, in my respectful view, the applicant's otherwise sound arguments based on international law mounted here would be better directed to supporting an H&C application or, if necessary, to the judicial review of an adverse H&C decision or unreasonable delay in making a decision. Absent a reason to rule out an H&C application as a suitable and effective route to naturalization for the applicant, there is no basis for finding that the Minister has violated international law by not determining the applicant's status as a refugee, as alleged by the applicant.

D. *Certified question*

[81] The applicant proposes the following question for certification:

> Does Canada have a duty under international human rights law to determine a claim for Convention refugee status if removal of the refugee claimant has been deferred, suspended or stayed?

[82] The respondent does not appear to oppose certification of such a question in principle but proposes instead the following, more narrowly framed question:

> Does Canada have a duty under international human rights law to determine an application for

> protection (specifically, the Pre-Removal Risk Assessment) if removal of the foreign national has been deferred, suspended or stayed?

[83] The criteria for certification were stated recently by the Federal Court of Appeal in *Lunyamila v. Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22, [2018] 3 F.C.R. 674, at paragraph 46.

[84] In my view, while both of the questions posed by the parties are serious, transcend the interests of the parties, and are important, neither would be dispositive of the appeal. As a result, neither question will be certified.

VI. CONCLUSION

[85] For these reasons, the application for judicial review is dismissed. No question of general importance is certified.

JUDGMENT IN IMM-1757-18

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

2. No question of general importance is stated.

ANNEXE A

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

Enforcement of Removal Orders

Enforceable removal order

48 (1) A removal order is enforceable if it has come into force and is not stayed.

Effect

(2) If a removal order is enforceable, the foreign national against whom it was made must leave Canada immediately and the order must be enforced as soon as possible.

In force

49 (1) A removal order comes into force on the latest of the following dates:

(a) the day the removal order is made, if there is no right to appeal;

(b) the day the appeal period expires, if there is a right to appeal and no appeal is made; and

(c) the day of the final determination of the appeal, if an appeal is made.

In force — claimants

(2) Despite subsection (1), a removal order made with respect to a refugee protection claimant is conditional and comes into force on the latest of the following dates:

(a) the day the claim is determined to be ineligible only under paragraph 101(1)(e);

(b) in a case other than that set out in paragraph (a), seven days after the claim is determined to be ineligible;

(c) if the claim is rejected by the Refugee Protection Division, on the expiry of the time limit referred to in subsection 110(2.1) or, if an appeal is made, 15 days after notification by the Refugee Appeal Division that the claim is rejected;

(d) 15 days after notification that the claim is declared withdrawn or abandoned; and

(e) 15 days after proceedings are terminated as a result of notice under paragraph 104(1)(c) or (d).

Stay

50 A removal order is stayed

(a) if a decision that was made in a judicial proceeding — at which the Minister shall be given the opportunity to make submissions — would be directly contravened by the enforcement of the removal order;

(b) in the case of a foreign national sentenced to a term of imprisonment in Canada, until the sentence is completed;

(c) for the duration of a stay imposed by the Immigration Appeal Division or any other court of competent jurisdiction;

(d) for the duration of a stay under paragraph 114(1)(b); and

(e) for the duration of a stay imposed by the Minister.

…

Examination of Eligibility to Refer Claim

…

Ineligibility

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

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

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

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

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

(e) the claimant came directly or indirectly to Canada from a country designated by the

regulations, other than a country of their nationality or their former habitual residence; or

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

…

DIVISION 1

Refugee Protection, Convention Refugees and Persons in Need of Protection

…

Convention refugee

96 A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

Person in need of protection

97 (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

Person in need of protection

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

Exclusion — Refugee convention

98 A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection.

…

DIVISION 3

Pre-removal Risk Assessment

Protection

Application for protection

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).

Exception

(2) Despite subsection (1), a person may not apply for protection if

(a) they are the subject of an authority to proceed issued under section 15 of the *Extradition Act*;

(b) they have made a claim to refugee protection that has been determined under paragraph 101(1)(e) to be ineligible;

(b.1) subject to subsection (2.1), less than 12 months, or, in the case of a person who is a national of a country that is designated under subsection 109.1(1), less than 36 months,

have passed since their claim for refugee protection was last rejected — unless it was deemed to be rejected under subsection 109(3) or was rejected on the basis of section E or F of Article 1 of the Refugee Convention — or determined to be withdrawn or abandoned by the Refugee Protection Division or the Refugee Appeal Division;

(c) subject to subsection (2.1), less than 12 months, or, in the case of a person who is a national of a country that is designated under subsection 109.1(1), less than 36 months, have passed since their last application for protection was rejected or determined to be withdrawn or abandoned by the Refugee Protection Division or the Minister.

(d) [Repealed, 2012, c. 17, s. 38]

Exemption

(2.1) The Minister may exempt from the application of paragraph (2)(b.1) or (c)

(a) the nationals — or, in the case of persons who do not have a country of nationality, the former habitual residents — of a country;

(b) the nationals or former habitual residents of a country who, before they left the country, lived in a given part of that country; and

(c) a class of nationals or former habitual residents of a country.

Application

(2.2) However, an exemption made under subsection (2.1) does not apply to persons in respect of whom, after the day on which the exemption comes into force, a decision is made respecting their claim for refugee protection by the Refugee Protection Division or, if an appeal is made, by the Refugee Appeal Division.

Regulations

(2.3) The regulations may govern any matter relating to the application of subsection (2.1) or (2.2) and may include provisions establishing the criteria to be considered when an exemption is made.

Restriction

(3) Refugee protection may not be conferred on an applicant who

(a) is determined to be inadmissible on grounds of security, violating human or

international rights or organized criminality;

(b) is determined to be inadmissible on grounds of serious criminality with respect to a conviction in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years or with respect to a conviction outside Canada for an offence that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years;

(c) made a claim to refugee protection that was rejected on the basis of section F of Article 1 of the Refugee Convention; or

(d) is named in a certificate referred to in subsection 77(1).

Consideration of application

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

(a) an applicant whose claim to refugee protection has been rejected may present only new evidence that arose after the rejection or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of the rejection;

(b) a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required;

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

(d) in the case of an applicant described in subsection 112(3) — other than one described in subparagraph (e)(i) or (ii) — consideration shall be on the basis of the factors set out in section 97 and

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

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

(e) in the case of the following applicants, consideration shall be on the basis of sections 96 to 98

and subparagraph (d)(i) or (ii), as the case may be:

> **(i)** an applicant who is determined to be inadmissible on grounds of serious criminality with respect to a conviction in Canada punishable by a maximum term of imprisonment of at least 10 years for which a term of imprisonment of less than two years — or no term of imprisonment — was imposed, and
>
> **(ii)** an applicant who is determined to be inadmissible on grounds of serious criminality with respect to a conviction of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, unless they are found to be a person referred to in section F of Article 1 of the Refugee Convention.

Effect of decision

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.

Cancellation of stay

(2) If the Minister is of the opinion that the circumstances surrounding a stay of the enforcement of a removal order have changed, the Minister may re-examine, in accordance with paragraph 113(d) and the regulations, the grounds on which the application was allowed and may cancel the stay.

Vacation of determination

(3) If the Minister is of the opinion that a decision to allow an application for protection was obtained as a result of directly or indirectly misrepresenting or withholding material facts on a relevant matter, the Minister may vacate the decision.

Effect of vacation

(4) If a decision is vacated under subsection (3), it is nullified and the application for protection is

deemed to have been rejected.

Protection

115 (1) A protected person or a person who is recognized as a Convention refugee by another country to which the person may be returned shall not be removed from Canada to a country where they would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion or at risk of torture or cruel and unusual treatment or punishment.

Exceptions

(2) Subsection (1) does not apply in the case of a person

(a) who is inadmissible on grounds of serious criminality and who constitutes, in the opinion of the Minister, a danger to the public in Canada; or

(b) who is inadmissible on grounds of security, violating human or international rights or organized criminality if, in the opinion of the Minister, the person should not be allowed to remain in Canada on the basis of the nature and severity of acts committed or of danger to the security of Canada.

Removal of refugee

(3) A person, after a determination under paragraph 101(1)(e) that the person's claim is ineligible, is to be sent to the country from which the person came to Canada, but may be sent to another country if that country is designated under subsection 102(1) or if the country from which the person came to Canada has rejected their claim for refugee protection.

Immigration and Refugee Protection Regulations, SOR/2002-227

Non-application — claimants at land ports of entry

159.5 Paragraph 101(1)(e) of the Act does not apply if a claimant who seeks to enter Canada at a location other than one identified in paragraphs 159.4(1)(a) to (c) establishes, in accordance with subsection 100(4) of the Act, that

…

(c) a family member of the claimant who has attained the age of 18 years is in Canada and

has made a claim for refugee protection that has been referred to the Board for determination, unless

(i) the claim has been withdrawn by the family member,

(ii) the claim has been abandoned by the family member,

(iii) the claim has been rejected, or

(iv) any pending proceedings or proceedings respecting the claim have been terminated under subsection 104(2) of the Act or any decision respecting the claim has been nullified under that subsection;

…

Pre-Removal Risk Assessment

Application for protection

160 (1) Subject to subsection (2) and for the purposes of subsection 112(1) of the Act, a person may apply for protection after they are given notification to that effect by the Department.

No notification

(2) A person described in section 165 or 166 may apply for protection in accordance with that section without being given notification to that effect by the Department.

Notification

(3) Notification shall be given

(a) in the case of a person who is subject to a removal order that is in force, before removal from Canada; and

(b) in the case of a person named in a certificate described in subsection 77(1) of the Act, when the summary of information and other evidence is filed under subsection 77(2) of the Act.

When notification is given

(4) Notification is given

(a) when the person is given the application for protection form by hand; or

(b) if the application for protection form is sent by mail, seven days after the day on which it was sent to the person at the last address provided by them to the Department.

…

Application within 15-day period

162 An application received within 15 days after notification was given under section 160 shall not be decided until at least 30 days after notification was given. The removal order is stayed under section 232 until the earliest of the events referred to in paragraphs 232(c) to (f) occurs.

…

Stay of Removal Orders

Considerations

230 (1) The Minister may impose a stay on removal orders with respect to a country or a place if the circumstances in that country or place pose a generalized risk to the entire civilian population as a result of

(a) an armed conflict within the country or place;

(b) an environmental disaster resulting in a substantial temporary disruption of living conditions; or

(c) any situation that is temporary and generalized.

Cancellation

(2) The Minister may cancel the stay if the circumstances referred to in subsection (1) no longer pose a generalized risk to the entire civilian population.

Exceptions

(3) The stay does not apply to a person who

(a) is inadmissible under subsection 34(1) of the Act on security grounds;

(b) is inadmissible under subsection 35(1) of the Act on grounds of violating human or

international rights;

(c) is inadmissible under subsection 36(1) of the Act on grounds of serious criminality or under subsection 36(2) of the Act on grounds of criminality;

(d) is inadmissible under subsection 37(1) of the Act on grounds of organized criminality;

(e) is a person referred to in section F of Article 1 of the Refugee Convention; or

(f) informs the Minister in writing that they consent to their removal to a country or place to which a stay of removal applies.

…

Stay of removal — pre-removal risk assessment

232 A removal order is stayed when a person is notified by the Department under subsection 160(3) that they may make an application under subsection 112(1) of the Act, and the stay is effective until the earliest of the following events occurs:

(a) the Department receives confirmation in writing from the person that they do not intend to make an application;

(b) the person does not make an application within the period provided under section 162;

(c) the application for protection is rejected;

(d) [Repealed, SOR/2012-154, s. 12]

(e) if a decision to allow the application for protection is made under paragraph 114(1)(a) of the Act, the decision with respect to the person's application to remain in Canada as a permanent resident is made; and

(f) in the case of a person to whom subsection 112(3) of the Act applies, the stay is cancelled under subsection 114(2) of the Act.

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

Life, liberty and security of person

7. 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.

…

ENFORCEMENT

Enforcement of guaranteed rights and freedoms

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.