CITATION: LI *v.* CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), 2009 FC 623, [2010] 2 F.C.R. 467 IMM-3786-08

Dong Zhe Li and **Dong Hu Li** (*Applicants*)

v.

The Minister of Citizenship and Immigration (*Respondent*)

INDEXED AS: LI v. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION) (F.C.)

Federal Court, Heneghan J.—Vancouver, December 9 and 16, 2008; Ottawa, June 9, 2009.

* Editors Note: This decision has been reversed on appeal (A-251-09, 2010 FCA 75). The reasons for judgment, handed down March 17, 2010, will be published in the *Federal Courts Reports.*

Citizenship and Immigration — Exclusion and Removal — Removal of visitors — Judicial review of pre-removal risk assessment (PRRA) decision determining applicants described in Immigration and Refugee Protection Act, s. 112(3) — Applicants Chinese nationals, legally entering Canada, subsequently detained under warrants issued pursuant to Act — Exclusion order issued against them — Applicants submitting PRRA applications — PRRA officer concluding applicants having committed serious crime in China, falling within scope of United Nations Convention Relating to the Status of Refugees, Art. 1F(b), excluded from refugee consideration pursuant to Act, s. 98 — Officer erring in finding applicants described in Act, s. 112(3)(c) — Act, s. 112(3)(c) applying to persons having made refugee protection claim rejected on basis of Convention, Art. 1F — By operation of Act, s. 99(3), applicants ineligible to make claim for Convention refugee protection — Thus could not be described in paragraph 112(3)(c) — Application for protection should have been considered pursuant to Act, s. 113(c) — S. 113(c) directing officer to consider application on basis of Act, ss. 96–98 — Upon plain reading of s. 113(c), officer clearly having jurisdiction to consider s. 98 — Here, officer not properly exercising jurisdiction since erroneously purporting to assess application pursuant to s. 113(d) — Finding applicants described in s. 112(3) unreasonable — Application allowed.

This was an application for judicial review of a pre-removal risk assessment (PRRA) decision in which it was determined that the applicants were described in subsection 112(3) of the *Immigration and Refugee Protection Act* (Act).

The applicants were Chinese nationals who legally entered Canada as visitors but were subsequently detained under warrants issued pursuant to the Act. An exclusion order was issued against them, and they submitted PRRA applications. The applicants, who were named in warrants of arrest for the commission of theft of over 170 million yuan through negotiable instruments fraud in China, argued that they would be at risk of torture, cruel or unusual treatment or punishment, or risk to life from the Chinese authorities if they were to be returned to that country. The PRRA officer concluded that the applicants committed a serious crime in China, that they fell within the scope of Article 1F(b) of the *United Nations Convention Relating to the Status of Refugees* and were excluded from refugee consideration pursuant to section 98 of the Act.

The issues were whether the officer erred in finding that the applicants were described in section 112(3) of the Act and whether she had jurisdiction to consider exclusion in respect of Article 1F of the Convention.

Held, the application should be allowed.

Paragraph 113(*c*) instructs a PRRA officer to consider if an applicant is "not described in subsection 112(3)". This determination affects how the application is to be assessed. Subsection 112(3) imposes a preliminary obligation on the officer, as a threshold step, to identify whether there is a restriction on the availability of protection. Each of the four situations referred to contemplate that some action or determination has already occurred. None of the exceptions in subsection 112(3) contemplate the restriction of protection *vis-à-vis* persons who are ineligible to make claims for Refugee Convention status. Here, the officer erred in finding the applicants are as described in paragraph 112(3)(*c*). That paragraph applies to persons who have made a claim to refugee protection that was rejected on the basis of Article 1F of the Convention. By operation of subsection 99(3) of the Act, according to which a claim for refugee protection may not be made by a person who is subject to a removal order, the applicants were ineligible to make a claim for Convention refugee protection. As a result, they could not be described in paragraph 112(3)(*c*).

The applicants should have had their application for protection considered pursuant to paragraph 113(*c*). The officer would not have been limited to consideration of section 97 since paragraph 113(*c*) directs an officer to assess an application on the basis of sections 96 to 98. For present purposes, section 98, an exclusionary provision incorporating sections E and F of Article 1 of the Convention, was the most important provision in the assessment of the applicants' claim for protection. Although an officer clearly has the jurisdiction to consider section 98, upon a plain reading of the language of paragraph 113(*c*), the officer here did not properly exercise that jurisdiction since she was erroneously purporting to assess the application pursuant to paragraph 113(*d*). In the result, her finding that the applicants are as described in subsection 112(3) was not reasonable.

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], s. 7.
Immigration and Refugee Protection Act, S.C. 2001, c. 27, ss. 2(1) "Refugee Convention", 44, 45, 77(1) (as am. by S.C. 2008, c. 3, s. 4), 96, 97, 98, 99, 112, 113, 114, Sch.
Immigration and Refugee Protection Regulations, SOR/2002-227, s. 172.

TREATIES AND OTHER INSTRUMENTS CITED

United Nations Convention Relating to the Status of Refugees, July 28, 1951, [1969] Can. T.S. No. 6, Art. 1E, 1F(b).

CASES CITED

APPLIED:

Dunsmuir v. New Brunswick, 2008 SCC 9, [2008] 1 S.C.R. 190, 329 N.B.R. (2d) 1, 291 D.L.R. (4th) 577.

DISTINGUISHED:

Xie v. Canada (Minister of Citizenship and Immigration), 2004 FCA 250, [2005] 1 F.C.R. 304, 245 D.L.R. (4th) 385, 37 Imm. L.R. (3d) 163, affg 2003 FC 1023, [2004] 2 F.C.R. 372, 239 F.T.R. 59, 34 Imm. L.R. (3d) 220.

CONSIDERED:

Li v. Canada (Minister of Citizenship and Immigration), 2007 FC 941, 319 F.T.R. 14, 65 Imm. L.R. (3d) 234; *Biro v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 776, 63 Imm. L.R. (3d) 300.

REFERRED TO:

Canada (Minister of Citizenship and Immigration) v. Li, 2009 FCA 85, [2010] 2 F.C.R. 433, 308 D.L.R. (4th) 314, 188 C.R.R. (2d) 71; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, (1998), 36 O.R. (3d) 418, 154 D.L.R. (4th) 193; *Singh et al. v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, (1985), 17 D.L.R. (4th) 422, 12 Admin. L.R. 137.

APPLICATION for judicial review of a pre-removal risk assessment decision in which it was determined that the applicants were described in subsection 112(3) of the *Immigration and Refugee Protection Act*. Application allowed.

APPEARANCES

Christopher Elgin for applicants.
Cheryl D. E. Mitchell for respondent.

SOLICITORS OF RECORD

Elgin, Cannon & Associates, Vancouver, for applicants.
Deputy Attorney General of Canada for respondent.

The following are the reasons for judgment rendered in English by

HENEGHAN J.:

Introduction

[1] Mr. Dong Zhe Li and Mr. Dong Hu Li (the applicants) seek judicial review of the decision of pre-removal risk assessment officer A. Bremner (the officer). In that decision dated April 24, 2008, the officer determined that the applicants are described in subsection 112(3) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA or the Act).

Background

[2] The applicants are Chinese nationals who legally entered Canada as visitors on December 31, 2004. Subsequently, they were detained under warrants issued pursuant to the Act in February 2007. An exclusion order was issued against them on February 27, 2007. A detailed history of the various legal proceedings initiated by the applicants in Canada is to be found in the recent decision of the Federal Court of Appeal, *Canada (Minister of Citizenship and Immigration) v. Li*, 2009 FCA 85, [2010] 2 F.C.R. 433.

[3] The applicants challenged the exclusion order in causes IMM-1028-07, IMM-1098-07, IMM-1026-07 and IMM-1099-07. The four applications for judicial review were heard together and in a judgment reported at 2007 FC 941, 319 F.T.R. 14 [*Li v. Canada (Minister of Citizenship and Immigration)*], Mr. Justice Simon Noël dismissed the applications for judicial review, finding that the exclusion order is valid and that, pursuant to subsection 99(3) of the Act, the applicants are

ineligible to claim refugee status because they are the subjects of a removal order.

[4] In the course of his judgment, Justice Noël described the basic facts surrounding the applicants' arrival in Canada in paragraphs 5 to 9 of his decision as follows:

> The applicants are Chinese citizens who came to Canada on New Years Eve 2004. They each entered the country on a Temporary Residents Visa (TRV), which they did not seek to extend upon expiration. Instead of leaving the country when their visas expired, the applicants remained in Canada illegally and took concerted steps to avoid Canadian authorities. In fact they went into hiding at the Sheraton Wall Centre Hotel in downtown Vancouver after the arrest of an associate GAO, Shan and his wife, LI, Xue, on February 16, 2007.
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> Based on information provided by the Chinese authorities, the applicants allegedly fled the People's Republic of China (China), a few weeks before they were both charged with theft of over 170 million Yuan (equivalent of $24,500,000 CA), through negotiable instruments fraud. The brothers were the subject of a warrant for arrest dated January 24, 2005 issued by the People's Protectorate of Harbin City, Heilongjiang Province, China, under article 194 of the *Criminal Law of the People's Republic of China*. If committed in Canada, this offence would be equivalent to paragraph 380(1)(a) of the *Canadian Criminal Code,* R.S.C. 1985, c. C-46, fraud over $5,000.00, an indictable offence punishable by a maximum term of imprisonment of fourteen years.
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> Armed with these Chinese arrest warrants on November 14, 2006, the Immigration Enforcement Officer, Cheryl Shapka (Officer Shapka) issued an inadmissibility report pursuant to subsection 44(1) of the *Immigration and Refugee Protection Act,* (the Act), S.C. 2001, c. 27 (the relevant passages of the Act are attached to these reasons in Annex "A"). Moreover, Officer Shapka issued a second inadmissibility report against the applicants for having overstayed their visitor's visa. Two days later, on November 16, 2006, Officer Shapka issued warrants for their arrest.
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> The applicants went underground and succeeded in eluding the Canadian authorities. When officers of the Vancouver Police Department (VDP) eventually tracked them down at the hotel and came knocking at their door on Friday, February 23, 2007, they refused to open the door to the police. Resorting to the use of a Special Entry Warrant, the VDP officers entered the applicants' hotel suite. The applicants were arrested and taken into custody that same day.
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> Both applicants were detained at the North Vancouver RCMP detachment where they were read their rights. In addition, Officer Shapka interviewed each applicant separately at the RCMP detachment and informed them that they had been arrested for inadmissibility to Canada as a result of the serious fraud charges against them in China, pursuant to paragraph 36(1)(c) of the Act. She also informed them that they were arrested and detained pursuant to section 55 of the Act because of their refusal to leave Canada or apply for an extension when their TRV expired.

[5] Although Justice Noël provided counsel for the applicants and the Minister of Citizenship and Immigration (the respondent) with the opportunity to submit a question for certification, neither side submitted a question and no question was certified. The judgment of Justice Noël was delivered on September 21, 2007.

[6] The applicants submitted their pre-removal risk assessment (PRRA) applications on March 13, 2007. They asked that assessment of their applications be deferred pending disposition of their outstanding proceedings before the Federal Court. By letter dated September 28, 2007, that is after delivery of the judgment of Justice Noël, the officer advised counsel for the applicants of the opportunity to make submissions on risk.

[7] By letter dated September 28, 2007, the officer advised the applicants that the PRRA application was being considered. By letter dated the same day, counsel for the applicants said that they were awaiting further disclosure of documents.

[8] The officer replied to the letter from counsel for the applicants on September 28, 2007, advising that she was awaiting submissions on the issue of risk and evidence about country conditions as they related to the applicants.

[9] On October 22, 2007, counsel for the applicants wrote again to the officer, addressing the issue of risk. The risk was identified as the treatment of the applicants by the Chinese authorities in the investigation and prosecution of financial crimes alleged to have been committed by the applicants in China. The basis of the applicants' fear of returning to China is that they are named in warrants of arrest for the commission of the crime of theft of more than 170 million yuan, through negotiable instruments fraud. The applicants, through their lawyers, argued that they would be at risk of torture, cruel or unusual treatment or punishment, or risk to life from the Chinese authorities if they were returned to China.

[10] As well, in this letter, counsel for the applicants said that the applicants were eligible to pursue a PRRA determination since they were subject to a removal order, that they did not fall within the scope of subsection 112(3) of the Act, and that the officer did not have jurisdiction to consider section 98. Further, counsel for the applicants requested that if the officer were going to consider section 98 of the Act, the applicants wanted to know what evidence would be reviewed so that they could have the opportunity to respond.

[11] By further correspondence dated January 10, 2008, the officer advised that she was going to consider possible exclusion pursuant to section 98 of the Act, on the basis that the applicants had allegedly committed serious non-political crimes. She specifically said that she was not inviting submissions as to her jurisdiction to consider the application of section 98. She went on to say that if she found that the applicants were subject to exclusion under section 98, then she would proceed to do an assessment of risk pursuant to section 97 and if that decision were positive, that is if risk were established, then she would forward the matter for balancing.

[12] Counsel for the applicants sent another letter on February 7, 2008, addressing the application of section 98. Further submissions were also made relating to sections 96 and 97. Counsel did not make submissions on the officer's jurisdiction to consider section 98 but indicated that they were prepared to address that issue in the future.

[13] By letter dated March 18, 2008, the officer wrote to counsel for the applicants concerning the section 98 exclusion. She requested an explanation concerning the applicants' possession of large sums of money upon their arrival in Canada.

[14] Counsel for the applicants responded to this letter on March 20, 2008, asking if the inquiry about this money was the amount of US$300 000 referred to in the statement of Cpl. Armstrong or to the assets of the applicants in Canada prior to their arrival in Canada on December 24, 2004 or to both.

[15] The officer replied by letter of March 20, 2008 and said that she was "asking to know all about the Applicants' funds that allowed them to engage in the financial activities described in the affidavit of Cpl. Dave Armstrong".

[16] By letter dated April 11, 2008, counsel for the applicants made further submissions about section 98 and forwarded affidavits of the applicants, providing an explanation for their possession of large amounts of money. In their affidavits, the applicants denied the commission of any crimes in China.

The PRRA Decision

[17] The officer briefly reviewed the facts about the arrival of the applicants in Canada. She noted that they had been the subject of two reports under section 44 of the Act, one for inadmissibility due to overstaying their visitors' visas and the second for possible criminal inadmissibility. At the time of making her decision on the PRRA application, no decision had been made respecting the alleged criminal inadmissibility.

[18] In her decision, the officer found that the applicants are described in subsection 112(3) of the Act. At the same time, she found that upon a balance of probabilities, the applicants face a danger of torture in China. In her decision, the officer reviewed the evidence before her, including arrest warrants that had been issued by the Chinese authorities, and the applicable law of the Republic of China regarding the crime of financial fraud. The law of China allows for the imposition of the death penalty in the case of serious financial fraud.

[19] The officer considered the affidavit of Cpl. Dave Armstrong that contained a summary of the financial information gathered in the course of the investigation of the applicants. She directed her mind to the question of evidence relating to the applicants' "possession of large amounts of money in a manner that is not related to any legally recognized source of funds".

[20] The officer noted that the applicants had sworn affidavits saying that the accusations against them were false.

[21] In beginning the analysis section of her decision, the officer said that she would examine the evidence to see if she "must find that the Applicants are excluded pursuant" to section 98 of the Act. She referred to the decision in *Xie v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 250, [2005] 1 F.C.R. 304 where the Federal Court of Appeal confirmed the finding of the trial Judge [2003 FC 1023, [2004] 2 F.C.R. 372] that a purely economic offence was sufficient to exclude a person from refugee protection. In that case, the applicant had been excluded from refugee protection on the basis of section 98, after a hearing before the Immigration and Refugee Board, Refugee Protection Division (IRB).

[22] The officer acknowledged the decision of the Federal Court in *Biro v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 776 where the Court decided that the absence of a fair trial process may have negatively affected the ability of the applicant to present a full defence at trial. The officer concluded that the facts in *Xie* presented a closer parallel to those in the present case and said that she was to be guided by the principles that "persons who are fleeing prosecution do not use the

asylum principles to avoid legal accountability".

[23] Ultimately, the officer concluded that, on the basis of the evidence submitted and guided by the decision in *Xie*, the applicants have committed a serious crime in China, that they fall within the scope of Article 1F(b) of the Refugee Convention [*United Nations Convention Relating to the Status of Refugees*, July 28, 1951, [1969] Can. T.S. No. 6] and are excluded from refugee consideration pursuant to section 98 of the Act. She then proceeded to address the question of risk pursuant to section 97 of the Act and determined that the applicants are at risk of torture if returned to China. She said that the applicants' case would be forwarded to a Minister's delegate for balancing pursuant to section 172 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations). The consequences of the officer's decision are significant for the applicants.

Submissions

[24] The applicants argue that the officer had no jurisdiction to make an exclusion order and that she was authorized only to assess risk, pursuant to sections 96 and 97.

[25] Further, they submit that the officer erred in her interpretation and application of the decision of the Federal Court of Appeal in *Xie*.

[26] For his part, the respondent argues that the officer properly followed the statutory scheme. The statutory scheme requires the PRRA officer to assess the application pursuant to section 113 and that will lead to a consideration of subsection 112(3). Subsection 112(3) requires an officer to consider restrictions on eligibility to be granted refugee protection. The respondent submits that the officer committed no reviewable error.

Issues

[27] The parties addressed the following issues in their respective memoranda of fact and law:

1. Did the officer err in finding that the applicants are described in subsection 112(3) of the Act?

2. Did the officer have jurisdiction to consider exclusion in respect of Article 1F of the Convention?

3. Was the decision unreasonable and not made pursuant to the principles of fundamental justice?

4. Was the decision made without regard to the evidence?

5. Did the officer err by shifting the burden of proof regarding the exclusion clause on to the applicants?

Discussion and Disposition

[28] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, the Supreme Court of Canada identified two standards of review for administrative decisions, that is correctness and reasonableness. Decisions that are fact-specific or those that involve the exercise of discretion and

policy considerations will usually attract a standard of reasonableness. Questions where the legal issues are closely entwined with factual issues will also generally attract review on the standard of reasonableness: see *Dunsmuir*, paragraph 51.

[29] In my opinion, the question whether the officer erred in finding that the applicants are described in subsection 112(3) involves a question of fact. That issue should be reviewed on the standard of reasonableness.

[30] Questions of jurisdiction and of statutory interpretation such as those raised by issue two will attract review on the standard of correctness.

[31] The issue of any breach of the principles of fundamental justice as guaranteed in the *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] (the Charter) is a question of law and will be reviewed on the standard of correctness.

[32] The issue of the assessment of the evidence, in light of the statutory criteria, is a question of mixed fact and law that is reviewable on the standard of reasonableness.

[33] I agree with the submissions of the respondent that the issue of any shifting burden of proof to the applicants is a question of law that is reviewable on the standard of correctness.

[34] The main statutory provisions that are involved in the proceeding are sections 112 and 113 of the Act. Section 112 allows a person to apply for protection in Canada, as follows:

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).

(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;

(*c*) in the case of a person who has not left Canada since the application for protection was rejected, the prescribed period has not expired; or

(*d*) in the case of a person who has left Canada since the removal order came into force, less than six months have passed since they left Canada after their claim to refugee protection was determined to be ineligible, abandoned, withdrawn or rejected, or their application for protection was rejected.

(3) Refugee protection may not result from an application for protection if the person

(*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 punished by a term of imprisonment of at least two 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).

[35] The applicants availed themselves of the opportunity provided for in subsection 112(1). Section 113 describes the manner in which an officer shall consider a PRRA application and provides as follows:

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), 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.

[36] Paragraph 113(*c*) instructs an officer to consider if an applicant is "not described in subsection 112(3)". This determination will affect how an officer is to assess an application for protection.

[37] In this case, the officer decided that the applicants are as described in subsection 112(3), specifically paragraph (c). That provision applies to persons who have "made a claim to refugee protection that was rejected on the basis of section F of Article 1 of the Refugee Convention".

[38] In my opinion, the officer erred in finding that the applicants are as described in paragraph 112(3)(*c*). Following the conduct of an admissibility hearing before the Immigration Division on February 26, 2007 and the issuance of a removal order on February 27, 2007, the applicants were ineligible to make a claim for Convention refugee protection. This ineligibility arose by operation of law, that is subsection 99(3) of the Act. As noted above, the applicants challenged the effect of the removal order in proceedings before Justice Noël and their application for judicial review was dismissed.

[39] The officer referred to the decision in *Xie*. In that case, the Federal Court of Appeal found that exclusion from Convention refugee status on the basis of section F of Article 1 did not mean exclusion from protection pursuant to the PRRA process. That situation is distinguishable from the present case since the applicants did not make claims for refugee status and indeed, were found ineligible to do so.

[40] Since the applicants were barred from making Convention refugee claims, they have never received rejections by the IRB on the basis of section F of Article 1 of the Refugee Convention. As a result, they cannot be described in paragraph 112(3)(*c*).

[41] In my opinion, this argument is unsound. Had the officer proceeded upon a proper assessment of the facts, she would have determined that the applicants should have had their application for protection considered pursuant to paragraph 113(*c*). That approach would have led to consideration upon the grounds set out in sections 96, 97 and 98. If the applicants were found to be subject to the exclusion in section 98, they would be excluded from consideration as Convention refugees or as persons in need of protection. In this scenario, section 114 would not have been engaged.

[42] The respondent submits that the officer's finding that the applicants are as described in paragraph 112(3)(*c*) is reasonable, if not correct, in order to avoid the "absurd result" of allowing them to obtain Convention refugee status pursuant to the operation of section 114 of the Act, despite their inability to claim refugee protection pursuant to subsection 99(3).

[43] The respondent supports its argument by suggesting that I "read in" certain words such that "a claim for refugee protection", in paragraph 112(3)(c) includes "a claim for protection" pursuant to the PRRA process.

[44] In my view, this approach would place the cart before the horse. Before the officer could find the applicants as described in subsection 112(3) for having made a claim for protection pursuant to the PRRA process that was rejected upon the basis of section F of Article 1 of the Refugee Convention, the officer would first have to reject their application on this ground. This in itself would create an absurd result as the officer would essentially be rejecting the claim for protection and then returning to the application only to reassess it in light of her previous rejection. In my opinion, the respondent's submissions in this regard are not well founded.

[45] Finding the applicants to be as described within subsection 112(3) would deny them the ability to receive refugee protection pursuant to the operation of subsection 114(1) of the Act which provides as follows:

> **114.** (1) A decision to allow the application for protection has
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> (*a*) in the case of an applicant not described in subsection 112(3), the effect of conferring refugee protection; and
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> (*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.

[46] Subsection 112(3) imposes a preliminary obligation on the officer to first identify, as a

threshold step, whether there is a restriction on the availability of protection. This is essentially a fact-finding exercise, according to the criteria identified in subsection 112(3).

[47] For ease of reference, I repeat subsection 112(3) as follows:

> **112.** (1) . . .
>
> (3) Refugee protection may not result from an application for protection if the person
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> (*a*) is determined to be inadmissible on grounds of security, violating human or international rights or organized criminality;
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> (*b*) is determined to be inadmissible on grounds of serious criminality with respect to a conviction in Canada punished by a term of imprisonment of at least two 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;
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> (*c*) made a claim to refugee protection that was rejected on the basis of section F of Article 1 of the Refugee Convention; or
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> (*d*) is named in a certificate referred to in subsection 77(1).

[48] Each of the four situations referred to in paragraphs (*a*), (*b*), (*c*) and (*d*), respectively, contemplate that some action or determination has already occurred. Paragraphs 112(3)(*a*) and (*b*) address the consequences of inadmissibility hearings pursuant to section 45 of the Act. These hearings are conducted by the Immigration Division.

[49] Paragraph 112(3)(*c*) describes the consequences of a hearing before the Refugee Protection Division, where a claim was rejected on the basis of section F of Article 1 of the Refugee Convention. Article 1 is incorporated in the Act as a schedule, pursuant to subsection 2(1) [definition of "Refugee Convention"] of the Act, and provides as follows:

> ARTICLE 1
>
> *Definition of the Term "Refugee"*
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> . . .
>
> F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
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> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
>
> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
>
> (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

[50] Paragraph 112(3)(*d*) addresses the consequences of action taken by the Minister pursuant to subsection 77(1) [as am. by S.C. 2008, c. 3, s. 4] of the Act.

[51] In my opinion, none of the exceptions in subsection 112(3) contemplate the restriction of protection *vis-à-vis* persons who are ineligible to make claims for Refugee Convention status as the result of the operation of section 99 of the Act.

[52] As noted above, section 113 provides a "road map" to the manner in which an application for protection will be considered. Paragraphs 113(*c*) and (*d*) each refer to subsection 112(3), as follows:

> **113.** . . .
>
> (*c*) in the case of an applicant not described in subsection 112(3), consideration shall be on the basis of sections 96 to 98;
>
> (*d*) in the case of an applicant described in subsection 112(3), consideration shall be on the basis of the factors set out in section 97 and
>
> (i) in the case of an applicant for protection who is inadmissible on grounds of serious criminality, whether they are a danger to the public in Canada, or
> (ii) in the case of any other applicant, whether the application should be refused because of the nature and severity of acts committed by the applicant or because of the danger that the applicant constitutes to the security of Canada.

[53] The language of these provisions strengthens my opinion that the starting point in dealing with an application for protection is the factual determination in accordance with subsection 112(3). That factual finding will dictate how the PRRA application is assessed by an officer, in accordance with the Act and the Regulations.

[54] On page four of her decision, the officer found the applicants as described in subsection 112(3). She then proceeded to assess their allegations of risk pursuant to paragraph 113(*d*), that is on the basis of the factors set out in section 97 of the Act. If she had assessed the applicants in accordance with paragraph 113(*c*), the officer would not have been limited to consideration only of section 97 since paragraph 113(*c*) directs an officer to assess an application on the basis of sections 96 to 98. Section 96 is the basis for seeking Refugee Convention status. Section 97 addresses degrees of risk that are not limited to Convention grounds. Section 98 is an exclusionary provision that incorporates by reference sections E and F of Article 1 of the Refugee Convention. The three provisions read as follows:

> **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,
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> (*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.

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.

(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.

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.

[55] For present purposes, it seems to me that section 98 is the most important provision of the Act in the assessment of the applicants' claim for protection. I am satisfied that the officer has jurisdiction to consider section 98 when acting pursuant to paragraph 113(*c*). Section 98 requires the officer to assess whether an applicant is described in either section E or F of Article 1 of the Refugee Convention. Section F is relevant to the within matter in the face of allegations that the applicants committed serious non-political crimes, that is fraud, outside Canada, that is in China.

[56] Counsel for the applicants challenged the jurisdiction of the officer to consider section 98. They also challenged her findings in that regard. Although I am satisfied that an officer clearly has the jurisdiction to consider section 98, upon a plain reading of the language of paragraph 113(*c*), I am not satisfied that she properly exercised that jurisdiction since she was erroneously purporting to assess the applicants' application pursuant to paragraph 113(*d*). It follows that in this case, the officer improperly assumed jurisdiction.

[57] In the result, I find that the officer's finding that the applicants are as described in subsection 112(3) is not reasonable.

[58] Both the applicants and the respondent argue that subsection 112(3) must be interpreted in a purposive, contextual manner, following the directions from the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27. However, the applicants submit that the focus should be on the context of risk assessment, while the respondent argues that regard should be given to the broader purpose of the Act, that is the regulation of the admission into Canada of immigrants and persons in need of protection.

[59] The applicants submit that an interpretation of paragraph 113(*c*) that would allow an officer to

exclude a person pursuant to section 98 would lead to the unfair result that a person may be removed from Canada without an assessment of risk, potentially giving rise to a breach of section 7 of the Charter and contrary to the decision in *Singh et al. v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177.

[60] In my opinion, consideration of this argument, that is, issue three, as well as the arguments respecting issues four and five, is premature since I am satisfied that this application for judicial review should be allowed and the decision of the officer should be quashed, with the matter being remitted to a different officer for a proper determination.

[61] Counsel will have seven days from receipt of these reasons to submit a proposed question for certification.