Harkat (Re) (T.D.), 2003 FCT 759 (CanLII)

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DES-4-02

2003 FCT 759

IN THE MATTER of a certificate signed pursuant to subsection 77(1) of the *Immigration and Refugee Protection Act,* S.C. 2001, c. 27 (the Act);

AND IN THE MATTER OF the referral of that certificate to the Federal Court of Canada pursuant to subsection 77(1), sections 78 and 80 of the Act;

AND IN THE MATTER OF Mohamed Harkat.

Indexed as: Harkat (Re) (T.D.)

Trial Division, Dawson J.--Ottawa, June 12 and 19, 2003.

Citizenship and Immigration -- Exclusion and Removal -- Removal of Refugees -- Motion for order under Immigration and Refugee Protection Act, s. 79 suspending referral of security certificate to Court to allow making protection application to Minister -- Issue: timing of Minister's decision on removal order if person held inadmissible -- Harkat found to be Convention refugee -- Minister, Solicitor General later signing security certificate which was referred to F.C. as to whether reasonable -- Certificate alleges Harkat inadmissible as terrorist or terrorist organization member -- Seeking Act, s. 112 protection -- Whether entitled to apply as already protected person (Act, s. 115(1)) -- Security Certificate regime explained -- New concept of "Refugee protection" explained -- Pre-removal risk assessment explained -- Applicable principles of statutory interpretation -- Grammatical, ordinary sense of text -- Broader statutory context -- Regulations not altering protection provided by Act -- Legislative scheme not yielding absurd result -- Intention of Act to expedite proceedings, protect safety by denying security risks access to Canada -- Act provides for just one decision whether Harkat to be removed -- Not purpose of judicial review to substitute Court's discretion for Minister's but to test lawfulness of Minister's decision on record before him.

This application for an order under *Immigration and Refugee Protection Act* section 79 put in issue the timing of the Minister's decision as to whether Harkat may be removed from Canada if, in this proceeding, he is found inadmissible.

In 1997, Harkat was found to be a Convention refugee but in 2002 the Minister and the Solicitor General signed a security certificate which was referred to this Court under subsection 77(1) for a determination as to its reasonableness. According to the certificate, Harkat is inadmissible under paragraphs 34(1)(*c*) and (*f*) (engaging in terrorism, or belonging to an organization believed to engage or that will engage in terrorism). Harkat then applied for protection under section 112. His counsel was advised that it was not open to Harkat to make such a claim in

that as a Convention refugee he was already a protected person under subsection 115(1). The question therefore was whether he is entitled to make a subsection 112(1) protection claim.

Held, the motion should be rejected.

Section 81 provides that if a certificate is determined to be reasonable, the certificate (1) is conclusive proof that the person named in it is inadmissible, (2) is a removal order that may not be appealed against and, (3) is in force and the person named may not apply for protection under subsection 112(1). Therefore it is imperative that any application for protection on behalf of a person named in a certificate be made before it is decided that the certificate is reasonable.

"Refugee protection" is a new concept in the Act. A "person in need of protection" is either one described in Article 1 of the United Nations *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, or one who would have been granted protection under the former *Immigration Act* as a post-determination refugee claimants in Canada class member. Under subsection 95(2), one upon whom refugee protection has been conferred is a "protected person". Harkat, having been determined to be a Convention refugee, is a "protected person"; he could not have obtained refugee protection by an application now brought, a security certificate having been issued.

Under subsection 115(1), a protected person shall not be removed to a country where at risk of persecution for a Convention ground or torture. But there are certain narrow exceptions, one being that a person inadmissible on security grounds may be sent back if he should not be allowed to stay on account of the severity of the acts committed or the danger to Canadian security.

Persons subject to a removal order or named in a security certificate may apply for a pre-removal risk assessment but, under subsection 112(3), those named in a security certificate are entitled only to a modified pre-removal risk assessment. Such persons are assessed, not under the Convention, but only against the grounds set out in Act, section 97: whether at risk of torture, death or cruel and unusual treatment. Furthermore, a positive determination does not confer refugee protection: paragraph 114(1)(*b*). It only serves to stay the removal order with respect to a country from which the person is in need of protection. And even the stay can be set aside by the Minister should the circumstances change: subsection 114(2).

As a Convention refugee, Mr. Harkat is a "protected person" and so not entitled to a pre-removal risk assessment. To be entitled, subsection 112(1) would have to be read as if the phrase "other than a person referred to in subsection 115(1)" was not there. For subsection 115(2) to operate to exclude from subsection 115(1) one in Harkat's situation, the person must be "inadmissible on grounds of security". Being named in a certificate does not make one inadmissible on security grounds within subsection 115(2) since it is only when the certificate is held reasonable that inadmissibility is proven.

While the text of the legislation was clear, and compelling contextual arguments would be required to justify a different interpretation, the Court considered whether a construction based upon the ordinary meaning of the words used (1) was consistent with the regulations, (2) produced an absurd result or was consistent with the scheme of the Act and (3) was consistent with the Act's object. The Regulations could not alter the scope of protection provided by the Act. The Court could not agree with Harkat's submission, that it was an absurd result if, while one not determined to be a Convention refugee gets a pre-removal risk assessment prior to a section 80 determination of a certificate as well as judicial review of the assessment without leave, a Convention refugee gets a risk assessment "if at all" only after determination of the certificate with leave for judicial review being required. The legislative scheme does not give lesser rights to Convention refugees. They maintain the right not to be "refouled" unless the Minister determines, under paragraph 115(2)(*b*), that the person ought not be allowed to remain due to the severity of the acts committed or the danger to Canadian security. This was contrasted with the situation of one who has not received refugee protection and is named in a certificate. Such person is entitled only to a modified pre-removal risk assessment. Furthermore, that assessment cannot result in the conferral of refugee protection but only a stay of removal--protection similar to that enjoyed by one having refugee status. While leave is required for judicial review of a decision of the Minister to "refoule", applicant need establish only a fairly arguable case. And, if leave is given, there could be an appeal if a question is certified by the Court. The decision of the designated judge as to the reasonableness of a certificate and the lawfulness of the pre-removal risk assessment are not, on the other hand, appealable. It was also noted that the Act is aimed at expediting

immigration proceedings while safeguarding the security of Canadian society by denying security risks access to Canadian territory.

Nor could the Court accept Harkat's argument, that the intention of the Act was to collapse into the inquiry as to the reasonableness of the certificate all removal issues. To do so might actually reduce the protection of one in Harkat's position. The Act provides for but one decision as to whether Harkat may be removed and this is a more streamlined way of proceeding.

It was also stressed that the purpose of judicial review is not to substitute the Court's discretion for that for the Minister but rather to rule on the lawfulness of the Minister's decision on the record before him.

Finally, Harkat relied upon the recently reported decision of MacKay J. in *Jaballah (Re)* but that case was distinguished in that Jaballah was not a Convention refugee.

The Crown's request of an order for costs was denied, this motion having raised a novel point, not previously dealt with by case law.

statutes and regulations judicially

considered

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].

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, December 10, 1984, [1987] Can. T.S. No. 36, Art. 1.

Federal Court Act, R.S.C., 1985, c. F-7 , s. 18.1(4) (as enacted by S.C. 1990, c. 8, s. 5).

Immigration Act, R.S.C., 1985, c. I-2.

Immigration and Refugee Protection Act, S.C. 2001, c. 27, ss. 2(1) "foreign national", 3(1)(*h*),(*i*), (3)(*d*),(*f*), 34(1)(*c*),(*f*), 77, 79, 80, 81, 95, 96, 97, 112, 113, 114, 115, Sch.

Immigration and Refugee Protection Regulations, SOR/2002-227 , s. 160(1),(3)(*b*).

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

cases judicially considered

applied:

Bristol-Myers Squibb Co. v. Canada (Attorney General) 2003 FCA 180 (CanLII), (2003), 226 D.L.R. (4th) 138; 24 C.P.R. (4th) 417; 303 N.R. 63 (F.C.A.).

distinguished:

Jaballah (Re), 2002 FCT 1046 (CanLII), [2003] 3 F.C. 85; (2002), 224 F.T.R. 20 (T.D.).

referred to:

Chieu v. Canada (Minister of Citizenship and Immigration), 2002 SCC 3 (CanLII), [2002] 1 S.C.R. 84; (2002), 208 D.L.R. (4th) 107; 37 Admin. L.R. (3d) 252; 18 Imm. L.R. (3d) 93; 280 N.R. 268; *Bains v. Canada (Minister of Employment and Immigration)* (2000), 47 Admin. L.R. 317; 109 N.R. 239 (F.C.A.).

MOTION for an order under *Immigration and Refugee Protection Act*, section 79, suspending a referral of a certificate to the Federal Court to allow the making of, and for the Minister to decide on, an application for protection. Order to go dismissing the motion.

appearances:

Donald A. MacIntosh and *I. John Loncar* for the Department of Justice.

James H. Mathieson and *Michael W. Dale* for Solicitor General of Canada.

Rocco Galati and *Bruce Engel* for Mohamed Harkat.

solicitors of record:

Deputy Attorney General of Canada for the Department of Justice and the Solicitor General of Canada.

Rocco Galati, Toronto, and *Bruce Engel*, Ottawa, for Mohamed Harkat.

The following are the reasons for order rendered in English by

[1]Dawson J.: Mr. Harkat has moved for an order pursuant to section 79 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) suspending this proceeding in order to permit him to make, and the Minister of Citizenship and Immigration (Minister) to decide, an application for protection. What fundamentally is put in issue in this motion is the timing of the Minister's decision as to whether Mr. Harkat may be removed from Canada if, in this proceeding, he is found to be inadmissible to Canada. This issue, in turn, depends upon ascertaining Parliament's intention as expressed in the Act.

BACKGROUND FACTS

[2]The factual basis on which this dispute arises is as follows. On February 24, 1997, Mr. Harkat was found to be a Convention refugee.

[3]Thereafter, on December 10, 2002 a certificate, signed by the Minister and the Solicitor General of Canada ("security certificate" or "certificate") was referred to this Court pursuant to subsection 77(1) of the Act for determination as to whether the certificate is reasonable. The security certificate asserts that Mr. Harkat is inadmissible to Canada under paragraphs 34(1)(*c*) and (*f*) of the Act. Those paragraphs render a permanent resident or foreign national inadmissible on security grounds for engaging in terrorism, or for being a member of an organization that there are reasonable grounds to believe engages, has engaged, or will engage in terrorism. At the time the security certificate was issued Mr. Harkat was a "foreign national", as defined in the Act [subsection 2(1)], and he had not acquired permanent resident status.

[4]On December 24, 2002, counsel for Mr. Harkat gave formal notice of Mr. Harkat's application for protection pursuant to section 112 of the Act. In response, Mr. Harkat's counsel was advised that because Mr. Harkat was previously determined to be a Convention refugee, he is a protected person referred to in subsection 115(1) of the Act. In consequence, it was said that Mr. Harkat may not apply for protection under section 112 of the Act.

THE ISSUE

[5]The legal question to be answered in this motion is whether Mr. Harkat is entitled to apply for protection pursuant to subsection 112(1) of the Act. If so, it follows that he is entitled to request the suspension of this proceeding pending determination of the application for protection.

ANALYSIS

(i) The Relevant Provisions of the Act

[6]I turn first to consider the legislative framework relevant to this motion, and specifically the interrelation of the provisions of the Act which deal with security certificates, refugee protection and pre-removal risk assessments. The provisions of the Act to which I refer are set out in Annex A to these reasons.

(a) The Security Certificate Regime

[7]One effect of the issuance of a security certificate, provided for in subsection 77(2) of the Act, is that upon

referral of the certificate to the Court, any proceeding under the Act may neither be commenced nor continued in respect of the person named in a security certificate. The one exception to this provision is an application for protection under subsection 112(1) of the Act. The stay of proceeding provided in subsection 77(2) continues until a decision is made as to whether the security certificate is reasonable.

[8]With respect to an application for protection, on the request of the Minister or a foreign national named in the certificate, the judge designated to hear the certificate proceedings (designated judge) shall, pursuant to subsection 79(1) of the Act, suspend the proceeding with respect to the reasonableness of the certificate in order to allow the Minister to reach his or her decision with respect to the application for protection. When the Minister has reached that decision, the Minister is required to give notice of the decision to the foreign national and to the designated judge, at which time the judge shall resume the certificate proceedings. In addition to ruling on the reasonableness of the certificate, the judge is then also required to review the lawfulness of the decision of the Minister on the application for protection. Such review is to be done on the basis of the grounds for judicial review listed in subsection 18.1(4) of the *Federal Court Act* [R.S.C., 1985, c. F-7 (as enacted by S.C. 1990, c. 8, s. 5)]. See: subsection 79(2) of the Act.

[9]At the conclusion of this process the judge shall quash the certificate if he or she is of the opinion that it is not reasonable. If the judge does not quash the certificate and finds the certificate to be reasonable, but finds the decision on the application for protection to be not lawfully made, that latter decision is quashed and the proceedings are again suspended pending redetermination of the application for protection. See: section 80 of the Act.

[10]If the certificate is determined to be reasonable, three things follow, as set out in section 81 of the Act. They are that the certificate:

(a) is conclusive proof that the permanent resident or foreign national named in it is inadmissible;

(b) is a removal order that may not be appealed against, and is in force; and

(c) the person named in it may not apply for protection under subsection 112(1).

[11]Accordingly, it is imperative that any application for protection on behalf of a person named in a certificate be made before it is decided that the certificate is reasonable.

(b) The Conferral of Refugee Protection

[12]"Refugee protection" is a new concept contained in the Act. A person is granted refugee protection, pursuant to section 95 of the Act, when he or she is found to be either a Convention refugee as defined by *the United Nations Convention Relating to the Status of Refugees* [July 28, 1951, [1969] Can. T.S. No. 6] (which definition is incorporated into the Act in section 96), or when found to be a person in need of protection as defined in subsection 97(1) of the Act. People who fall within the definition of a "person in need of protection" are persons that are described in Article 1 of the United Nations *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, [December 10, 1984, [1987] Can. T.S. No. 36] or are persons who would have been granted protection under the former *Immigration Act* [R.S.C., 1985, c. I-27] as members of the post-determination refugee claimants in Canada class.

[13]Refugee protection is also conferred, pursuant to paragraph 95(1)(*c*) of the Act, where the Minister allows an application for protection, except where an application for protection is allowed in respect of a person named in a security certificate.

[14]Subsection 95(2) of the Act provides that a person upon whom refugee protection is conferred is a "protected person", subject only to losing such status as a result of certain specifically listed subsequent events, none of which are at issue in this case.

[15]Mr. Harkat is, therefore, by virtue of the February 24, 1997 determination that he is a Convention refugee, a "protected person". Any application for protection now brought, being an application brought subsequent to the issuance of the security certificate, could not result in refugee protection being conferred so as to make Mr. Harkat

a protected person.

[16]A significant benefit is conferred upon protected persons. Subsection 115(1) provides that a protected person shall not be removed from Canada to a country where they would be a risk of persecution for a Convention ground, or be at risk of torture or cruel and unusual treatment or punishment. There are narrow exceptions to this protection. The exception to this general principle of non-refoulement of potential application to Mr. Harkat is contained in paragraph 115(2)(*b*) of the Act, which provides that a person who is inadmissible on grounds of security may be returned to a country where there is risk of persecution 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.

(c) The Pre-Removal Risk Assessment

[17]Generally, all persons who are in Canada and who are subject to a removal order which is in force, or who are named in a security certificate, may apply for a pre-removal risk assessment. The exceptions to this general right are found in subsections 112(1) and (2) of the Act. The exceptions found in subsection 112(2) are agreed not to be applicable to Mr. Harkat. More will be said later of the exception contained in subsection 112(1).

[18]Subsection 112(3) provides that applicants who are inadmissible on grounds which include being named in a security certificate, are only eligible to receive a modified pre-removal risk assessment. A person named in a security certificate is not assessed against the fear of persecution within the meaning of the *United Nations Convention Relating to the Status of Refugees*, but rather is assessed only against the grounds enumerated in section 97 of the Act (see: paragraph 113(*d*) of the Act). This requires assessment of whether the applicant is at risk of torture, or risk to his or her life, or risk of cruel and unusual treatment.

[19]A further distinction exists where the applicant for a pre-removal risk assessment is described in a security certificate. That distinction, found in paragraph 114(1)(*b*) of the Act, is that a positive determination will not have the effect of conferring refugee protection. Rather, the effect of a positive decision in this case is to stay the removal order with respect to a country or place in respect of which the applicant was determined to be in need of protection. Such a stay of removal may, pursuant to subsection 114(2) of the Act, be cancelled by the Minister if circumstances surrounding the stay have changed.

(ii) The Applicable Principles of Statutory Interpre-tation

[20]Having described generally the legislative scheme, I move to consider the principles to be applied in order to ascertain Parliament's intent as evidenced in the legislation.

[21]The parties agree that the approach to be taken when interpreting the Act is that the words of the Act are to be read in their entire context, and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament. See, for example, *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3 (CanLII), [2002] 1 S.C.R. 84, at paragraph 27.

[22]As the Federal Court of Appeal noted *Bristol-Myers Squibb Co. v. Canada (Attorney General)* 2003 FCA 180 (CanLII), (2003), 226 D.L.R. (4th) 138, at paragraph 13:

. . . This holistic approach to the interpretation of legislation . . . requires a court to attribute the meaning that provides the best fit with both the text and the context of the provision in question. Neither can be ignored, although the clearer the "ordinary meaning" of the text, the more compelling the contextual considerations must be in order to warrant a different reading of it, especially when that involves adding words to those used by the legislator.

(iii) The Grammatical and Ordinary Sense of the Relevant Text

[23]I begin with consideration of the actual words used by Parliament as found in the Act. The key provisions are subsections 112(1), 115(1) and (2), and 95(1) and (2) which, for ease of reference, are 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).

. . .

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.

(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.

. . .

95. (1) Refugee protection is conferred on a person when

(*a*) the person has been determined to be a Convention refugee or a person in similar circumstances under a visa application and becomes a permanent resident under the visa or a temporary resident under a temporary resident permit for protection reasons;

(*b*) the Board determines the person to be a Convention refugee or a person in need of protection; or

(*c*) except in the case of a person described in subsection 112(3), the Minister allows an application for protection.

(2) A protected person is a person on whom refugee protection is conferred under subsection (1), and whose claim or application has not subsequently been deemed to be rejected under subsection 108(3), 109(3) or 114(4). [Underlining added.]

[24]Subsection 112(1) of the Act specifies who may apply for protection and receive a pre-removal risk assessment. Specifically excluded are persons "referred to in subsection 115(1)". Subsection 115(1) refers to a "protected person" or "a person who is recognized as a Convention refugee by another country to which the person may be returned" (the latter provision is not relevant to this case). Subsection 95(2) provides that a "protected person" is "a person on whom refugee protection is conferred under subsection (1)".

[25]Therefore, because Mr. Harkat has been determined to be a Convention refugee he is a "protected person", and is therefore a person referred to in subsection 115(1) of the Act. It follows on the plain and grammatical wording of the legislation, read in its ordinary sense, that he is not a person entitled to a pre-removal risk assessment. For Mr. Harkat to be so entitled subsection 112(1) would have to be read as if the phrase "other than a person referred to in subsection 115(1)" was not there.

[26]On Mr. Harkat's behalf it is alleged that subsection 115(1) must be read together with the exception to subsection 115(1) found in subsection 115(2). Reading them together has the result, it is said, of removing Mr. Harkat from the ambit of subsection 115(1).

[27]There are, in my respectful view, two difficulties with this submission. First, subsection 112(1) does not refer to persons referred to "in subsections 115(1) and (2)". It would have been easy for the provision to have so read if that was Parliament's intent. Second, for subsection 115(2) to operate to exclude a person from subsection 115(1) in circumstances such as face Mr. Harkat, the person must be "inadmissible on grounds of security". I am not satisfied that simply being named in a certificate makes one inadmissible on grounds of security within the

contemplation of paragraph 115(2) because it is not until the security certificate is found to be reasonable that the inadmissibility of the person named in the certificate is conclusively proven (see: paragraph 81(*a*) of the Act). Any suggestion of such inadmissibility would not, it seems to me, remain if the certificate were to be quashed. This interpretation is consistent with the position of the Crown on this motion, which is that Mr. Harkat is not inadmissible until the Court determines the certificate to be reasonable.

(iv) The Broader Statutory Context

[28]The grammatical and ordinary sense of the words used is supported when the relevant provisions are read in the entire context of the Act. (Although I note parenthetically that the text of the legislation appears to be clear, requiring compelling contextual consideration to warrant a different meaning). In order, however, to interpret the provisions governing the right to a pre-removal risk assessment contextually, I shall consider whether the interpretation based on the ordinary sense of the words used:

(a) is consistent with the regulations to the Act;

(b) produces an absurd result or, rather, is consistent with the scheme of the Act; and

(c) is consistent with the object and intention of the Act.

(a) The Regulations

[29]It is argued on Mr. Harkat's behalf that his interpretation of the Act is borne out by the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (Regulations) and particularly by subsection 160(1) and paragraph 160(3)(*b*) of the Regulations. They are as follows:

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.

. . .

(3) Notification shall be given

. . .

(*b*) in the case of a person named in a certificate described in subsection 77(1) of the Act, on the provision of a summary under paragraph 78(*h*) of the Act.

[30]In my view, the answer to this submission is found in the wording of subsection 160(1) of the Regulations which indicates that the provisions are "for the purposes of subsection 112(1) of the Act" and that "a person may apply for protection after they are given notification to that effect". It is common ground that notification was not provided to Mr. Harkat. In my view that was appropriate, given that the regulatory provisions exist for the purposes of subsection 112(1) of the Act and subsection 112(1) does not, as I found above, authorize an application for protection being brought by a person who, having been found to be a refugee, is already a protected person.

[31]Put another way, the Regulations cannot alter the scope of protection provided in the Act.

(b) Absurd Result?

[32]On Mr. Harkat's behalf it is argued that this interpretation leads to the following absurd results:

(i) someone who has not been determined to be a Convention refugee does get a pre-removal risk assessment, prior to the section 80 determination of a certificate, and judicial review of the decision rendered with respect to the application for protection, without leave, pursuant to subsection 79(2) of the Act; however

(ii) someone who has been determined to be a Convention refugee, must wait and then get a risk assessment, "if at

all", after the determination of the certificate, for which leave would be required to judicially review the decision. This is described by Mr. Harkat's counsel as "an absurd and nonsensical result incongruous with the clear intent of protection against torture and the clear scheme of the Act".

[33]I respectfully disagree. The legislative scheme as I have described above does not lead to lesser rights for a person who is determined to be a Convention refugee and thereby given refugee protection before the issuance of a security certificate. Such a person at all times maintains their right not to be "refouled" unless the Minister determines, pursuant to paragraph 115(2)(*b*) of the Act, that he or she should not be allowed to remain in Canada because of the nature and severity of acts committed, or because of danger to the security of Canada.

[34]By comparison, a person who has not received refugee protection and who is named in a security certificate is only entitled to a modified pre-removal risk assessment. That assessment cannot consider the existence of a well-founded fear of persecution on Convention grounds, and cannot result in the conferral of refugee protection. The result of the favourable decision is a stay of removal which provides protection similar to that enjoyed by a person with refugee protection.

[35]It is true that if after the completion of the certificate proceedings the Minister exercises his or her discretion to "refoule" a protected person, that decision may only be reviewed by the Court if leave is granted by the Court. However, the threshold at law for the granting of leave is low, an applicant need only establish a fairly arguable case. See: *Bains v. Canada (Minister of Employment and Immigration)* reflex, (1990), 47 Admin. L.R. 317 (F.C.A.), at paragraph 1. This does not create an absurd result, and it is offset, at least in part, by the fact that if leave is given a right of appeal exists from the resulting decision where a question is certified by the Court. By comparison, the decision of the designated judge with respect to the reasonableness of the certificate and the lawfulness of the pre-removal risk assessment is not in any event appealable.

(c) The Object and Intent of the Act

[36]It is common ground that one of the objects of the Act is to streamline or expedite immigration proceedings in Canada while, at the same time, protecting the safety of Canada, maintaining the security of Canadian society, and promoting international justice and security by denying access to Canadian territory to persons who are security risks. See: paragraphs 3(1)(*h*) and (*i*) of the Act.

[37]Further, the Act is to be construed and applied in a manner that ensures that decisions taken under the Act are consistent with 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]], and comply with international human rights instruments to which Canada is signatory. See: paragraphs 3(3)(*d*) and (*f*) of the Act.

[38]Nothing in the interpretation which I give to subsection 112(1) is, in my view, inconsistent with the objects of the Act, or the Charter, or international human rights instruments. Rather, such interpretation reflects that, in the words of the Supreme Court of Canada in *Chieu, supra*, at paragraph 59, "the Act treats citizens differently from permanent residents, who in turn are treated differently from Convention refugees, who are treated differently from individuals holding visas and from illegal residents. It is an important aspect of the statutory scheme that these different categories of individuals are treated differently, with appropriate adjustments to the varying rights and context of the individuals in these groups". While those words were written with respect to the former *Immigration Act*, I consider them to be equally apposite to the current Act.

[39]Mr. Harkat argues that this interpretation contradicts the object of the Act to streamline proceedings, in that the Act intends to collapse into the inquiry as to the reasonableness of the certificate all issues of removal. I again, respectfully, disagree. First, to so collapse the proceeding would, for the reasons set out above, arguably diminish the protection already afforded to someone such as Mr. Harkat who now enjoys protection as a Convention refugee. Second, the interpretation urged by Mr. Harkat would result in the suspension of this proceeding, followed by the decision with respect to a pre-removal risk assessment, and then the conclusion of the certificate proceedings. At the end of that Mr. Harkat would still, in my view, have the right he now enjoys not to be "refouled" without a further decision by the Minister, which decision would be judicially reviewable with leave of the Court. The Act as I interpret it provides for only one decision as to whether Mr. Harkat may be removed. This interpretation provides for a more streamlined proceeding.

[40]Mr. Harkat also argues that it is unfair that any decision of the Minister under section 115 to remove him would be judicially reviewed, on leave, by a different judge than the designated judge. The other judge would not, it is argued, have the benefit of the complete record now before the Court. I am not satisfied that this would be the case. Any judicial review of the Minister's decision would be based upon the record before the Minister, which may be at least co-extensive with that now before the Court. Moreover, the nature of the decision on judicial review is not to substitute the Court's discretion for that of the Minister on all of the facts known to the Court. Rather, the function of the Court on judicial review is to gauge the lawfulness of the Minister's decision on the record before him or her.

[41]A final point. Mr. Harkat relied upon the decision of my colleague Mr. Justice MacKay in *Jaballah (Re)*, 2002 FCT 1046 (CanLII), [2003] 3 F.C. 85 (T.D.) in support of his interpretation of the Act. However, Mr. Jaballah was not a Convention refugee and so his circumstances are distinguishable from those of Mr. Harkat. Mr. Justice MacKay was not required to consider the legislative scheme as it applies to a Convention refugee.

CONCLUSION

[42]For these reasons, I have concluded that Mr. Harkat is not entitled to apply for protection pursuant to subsection 112(1) of the Act. An order will issue, therefore, dismissing the motion.

[43]The Crown seeks its costs of this motion. As this is a novel point, not yet decided by the case law, in the exercise of my discretion I consider that each side should bear their own costs. There will be no order as to costs.

ANNEX A

77. (1) The Minister and the Solicitor General of Canada shall sign a certificate stating that a permanent resident or a foreign national is inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality and refer it to the Federal Court--Trial Division, which shall make a determination under section 80.

(2) When the certificate is referred, a proceeding under this Act respecting the person named in the certificate, other than an application under subsection 112(1), may not be commenced and, if commenced, must be adjourned, until the judge makes the determination.

. . .

79. (1) On the request of the Minister, the permanent resident or the foreign national, a judge shall suspend a proceeding with respect to a certificate in order for the Minister to decide an application for protection made under subsection 112(1).

(2) If a proceeding is suspended under subsection (1) and the application for protection is decided, the Minister shall give notice of the decision to the permanent resident or the foreign national and to the judge, the judge shall resume the proceeding and the judge shall review the lawfulness of the decision of the Minister, taking into account the grounds referred to in subsection 18.1(4) of the *Federal Court Act*.

80. (1) The judge shall, on the basis of the information and evidence available, determine whether the certificate is reasonable and whether the decision on the application for protection, if any, is lawfully made.

(2) The judge shall quash a certificate if the judge is of the opinion that it is not reasonable. If the judge does not quash the certificate but determines that the decision on the application for protection is not lawfully made, the judge shall quash the decision and suspend the proceeding to allow the Minister to make a decision on the application for protection.

(3) The determination of the judge is final and may not be appealed or judicially reviewed.

81. If a certificate is determined to be reasonable under subsection 80(1),

(*a*) it is conclusive proof that the permanent resident or the foreign national named in it is inadmissible;

(*b*) it is a removal order that may not be appealed against and that is in force without the necessity of holding or continuing an examination or an admissibility hearing; and

(*c*) the person named in it may not apply for protection under subsection 112(1).

. . .

95. (1) Refugee protection is conferred on a person when

(*a*) the person has been determined to be a Convention refugee or a person in similar circumstances under a visa application and becomes a permanent resident under the visa or a temporary resident under a temporary resident permit for protection reasons;

(*b*) the Board determines the person to be a Convention refugee or a person in need of protection; or

(*c*) except in the case of a person described in subsection 112(3), the Minister allows an application for protection.

(2) A protected person is a person on whom refugee protection is conferred under subsection (1), and whose claim or application has not subsequently been deemed to be rejected under subsection 108(3), 109(3) or 114(4).

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.

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.

. . .

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).

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.

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.

(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.

(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.

(4) If a decision is vacated under subsection (3), it is nullified and the application for protection is deemed to have been rejected.

Principle of Non-refoulement

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.

(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.

(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.