NOTE TO USERS

This reproduction is the best copy available.

UMI
Le principe de non-refoulement et la possibilité de la tenue d’une audience dans le cadre du processus de l’examen des risques avant renvoi au Canada

Par
James Chester

Mémoire soumis à la Faculté de droit en vue de l’obtention
du grade de Maître en droit, LL.M.

le 19 janvier 2009

Pour le programme de Maîtrise en droit (Recherche)
Faculté de droit
Université de Sherbrooke
Sherbrooke, Québec

© James Chester, 2009. Tous droits réservés
NOTICE:

The author has granted a non-exclusive license allowing Library and Archives Canada to reproduce, publish, archive, preserve, conserve, communicate to the public by telecommunication or on the Internet, loan, distribute and sell theses worldwide, for commercial or non-commercial purposes, in microform, paper, electronic and/or any other formats.

The author retains copyright ownership and moral rights in this thesis. Neither the thesis nor substantial extracts from it may be printed or otherwise reproduced without the author's permission.

In compliance with the Canadian Privacy Act some supporting forms may have been removed from this thesis.

While these forms may be included in the document page count, their removal does not represent any loss of content from the thesis.

AVIS:

L’auteur a accordé une licence non exclusive permettant à la Bibliothèque et Archives Canada de reproduire, publier, archiver, sauvegarder, conserver, transmettre au public par télécommunication ou par l'Internet, prêter, distribuer et vendre des thèses partout dans le monde, à des fins commerciales ou autres, sur support microforme, papier, électronique et/ou autres formats.

L’auteur conserve la propriété du droit d'auteur et des droits moraux qui protège cette thèse. Ni la thèse ni des extraits substantiels de celle-ci ne doivent être imprimés ou autrement reproduits sans son autorisation.

Conformément à la loi canadienne sur la protection de la vie privée, quelques formulaires secondaires ont été enlevés de cette thèse.

Bien que ces formulaires aient inclus dans la pagination, il n'y aura aucun contenu manquant.
THE PRINCIPLE OF NON-REFOULEMENT AND THE POSSIBILITY OF AN ORAL HEARING IN PRE-REMOVAL RISK ASSESSMENT IN CANADA

by

James Chester

A thesis submitted in fulfillment of the requirements for the degree of Master of Laws, LL.M.

at

Faculty of Law
University of Sherbrooke
Sherbrooke, Québec
19 January, 2009

Copyright © James Chester, 2009
Acknowledgement

I would like to express my gratitude to all those who have assisted and encouraged me to complete this thesis.

I want to thank the Faculty of Law, University of Sherbrooke, for giving me the opportunity to write my thesis and providing me with all the assistance to do the necessary research work.

I am deeply indebted to my supervisor Prof. Sébastien Lebel-Grenier, Vice-Dean, Research and Graduate Studies, who provided stimulating comments and guidance for this thesis. He was always available to provide me feedback whenever I needed them.

Especially, a special thanks to my loving wife, Josephine, for patiently proofreading, encouraging and assisting me to complete my thesis.

I would also like to thank my mother, Kumari Lillianama, for her love and for having so much hope in me. I thank my father, Athanasius, and my youngest brother, Jinny George, for their continued motivation.
Résumen du mémoire

En vertu du principe de non-refoulement, le Canada a l’obligation de procéder à l’évaluation des risques avant l’expulsion de non-citoyens hors du Canada lorsque ces derniers allèguent le risque de persécution, le risque de torture, la menace pour la vie ou le risque de peines ou de traitements cruels et inusités. Ainsi, afin d'assurer le respect du principe de non-refoulement, le Canada a établi un processus d'Examen des risques avant renvoi («ERAR»). Mon mémoire porte sur la mise en œuvre procédurale du processus de l'ERAR qui rend l’admissibilité à une audience difficile pour un appliquant. Dans le processus de l’ERAR, une audience peut être tenue si le Ministre, sur la base de facteurs établis, est d’opinion qu’une audience est requise. Trois facteurs établis sous l’article 167 du Règlement sur l’immigration et la protection des réfugiés («RIPR») restreignent la possibilité de la tenue d’une audience dans le cadre du processus de l’ERAR. Ces facteurs enlèvent le pouvoir discrétionnaire des officiers de l’ERAR leur permettant d’ordonner la tenue d’une audience pour évaluer ou reconsidérer la crédibilité de l’appliquant ou de la demande. Sans audience ou avec des obstacles pour en obtenir, l’équité du processus de l’ERAR peut être négativement affectée. Qui plus est, l’audience permet d’adresser des questions procédurales telles le droit de réplique et le devoir de divulgation. Mon mémoire démontrera que : 1) afin d’assurer un niveau plus élevé d’équité procédurale issu de la common law, une audience est requise dans le processus de l’ERAR quant au respect de l’évaluation de la crédibilité; 2) le principe de refoulement est un principe de justice fondamentale; et 3) les facteurs établis quant à la détermination de la nécessité de la tenue d’une audience dans le cadre du processus de l’ERAR violent l’article 7 de la Charte et cette violation ne peut pas être justifiée sous l’article premier, rendant l’article 167 du RIPR inconstitutionnel et invalide.
Abstract

The principle of non-refoulement requires Canada to carry out risk assessments prior to removal of non-citizens from Canada, when they allege the risk of persecution, torture or other forms of cruel and inhuman treatment at their home country. Thus, to ensure compliance of the principle of non-refoulement, Canada established the Pre-Removal Risk Assessment ("PRRA") process. My thesis focuses on the procedural set up of the PRRA process, which makes it difficult for an applicant to qualify for an oral hearing. Oral hearing may be held in the PRRA process if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required. Three prescribed factors under section 167 of the Immigration and Refugee Protection Regulations ("IRPR") restrict the possibility of having an oral hearing in the PRRA process. They remove the discretionary ability of PRRA Officers to call for oral hearings to assess or reassess the credibility of the applicant or the claim. The lack of oral hearing or the difficulty in obtaining one could adversely affect the fairness of the PRRA process. Moreover, oral hearings address procedural issues such as the right to reply and the duty to disclose. My thesis will demonstrate that: 1) higher level of procedural fairness, arising from common law, necessitates an oral hearing for the PRRA process with respect to credibility assessment; 2) the principle of non-refoulement is a principle of fundamental justice; and 3) the prescribed factors, for determining whether an oral hearing is required for the PRRA process, violate section 7 of the Charter and cannot be saved by section 1. Therefore, section 167 of the IRPR is unconstitutional and invalid.
Abbreviations

ACHR - American Convention on Human Rights
Cartagena Declaration - Cartagena Declaration on Refugees
CAT - Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CIC - Citizenship and Immigration Canada
ECHR - European Convention for the Protection of Human Rights and Fundamental Freedoms
I.A.D. - Immigration Appeal Division of Canada's Immigration and Refugee Board
ICCPR - International Covenant on Civil and Political Rights
ICJ - International Court of Justice
IRB - Immigration and Refugee Board of Canada
IRPA - Immigration and Refugee Protection Act, R.S. C 2001, c. 27
IRPR - Immigration and Refugee Protection Regulations
PDRCC - Post-Determination Refugee Claimants in Canada Class
PRRA - Pre-Removal Risk Assessment
Refugee Convention - Convention relating to the Status of Refugees
RPD - Refugee Protection Division
UNHCR - United Nations High Commissioner for Refugees
Vienna Convention - Vienna Convention on the Law of Treaties
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>CHAPTER</th>
<th>TITLE</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>INTRODUCTION</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td><strong>PART I:</strong></td>
<td><strong>REFUGEE PROTECTION THROUGH THE PRE-REMOVAL RISK ASSESSMENT (PRRA) PROCESS</strong></td>
<td></td>
</tr>
<tr>
<td><strong>CHAPTER 1:</strong></td>
<td><strong>REFUGEE PROTECTION IN CANADA</strong></td>
<td>15</td>
</tr>
<tr>
<td>1.1</td>
<td><strong>DEFINITION OF CONVENTION REFUGEES AND ‘PERSONS IN NEED OF PROTECTION’</strong></td>
<td>15</td>
</tr>
<tr>
<td>1.1.1</td>
<td>Refugee Protection</td>
<td>15</td>
</tr>
<tr>
<td>1.1.2</td>
<td>Protection for Convention Refugees</td>
<td>18</td>
</tr>
<tr>
<td>1.1.2.1</td>
<td>Protection against Persecution</td>
<td>20</td>
</tr>
<tr>
<td>1.1.3</td>
<td>Protection for ‘persons in need of protection’</td>
<td>24</td>
</tr>
<tr>
<td>1.1.3.1</td>
<td>Protection against Torture</td>
<td>25</td>
</tr>
<tr>
<td>1.1.3.2</td>
<td>Protection against other forms of cruel and inhuman treatment</td>
<td>25</td>
</tr>
<tr>
<td><strong>CHAPTER 2:</strong></td>
<td><strong>PRINCIPLE OF NON-REFOULEMENT</strong></td>
<td>27</td>
</tr>
<tr>
<td>2.1</td>
<td><strong>OBLIGATIONS ARISING FROM THE PRINCIPLE OF NON-REFOULEMENT</strong></td>
<td>27</td>
</tr>
<tr>
<td>2.2</td>
<td><strong>PRINCIPLE OF NON-REFOULEMENT AS A CUSTOMARY PRINCIPLE AND AS A PEREMPTORY RULE</strong></td>
<td>31</td>
</tr>
<tr>
<td>2.2.1</td>
<td>Principle of non-refoulement is not limited to only formally recognised refugees</td>
<td>35</td>
</tr>
<tr>
<td>2.3</td>
<td><strong>INTERPRETING THE PRINCIPLE OF NON-REFOULEMENT</strong></td>
<td>36</td>
</tr>
<tr>
<td><strong>CHAPTER 3:</strong></td>
<td><strong>PRE-REMOVAL RISK ASSESSMENT (PRRA)</strong></td>
<td>39</td>
</tr>
</tbody>
</table>
3.1 The objectives of the PRRA process ........................................ 41
3.2 Eligibility requirements to qualify for PRRA ....................... 42
3.3 The problems with the PRRA process ................................. 44
  3.3.1 Lack of training and human errors ................................. 45
  3.3.2 Absence of right of appeal in the PRRA process ............... 47

CHAPTER 4:
THE ROLE OF ORAL HEARINGS IN RISK ASSESSMENT PROCESS .... 50
4.1 Oral Hearing in the PRRA process .................................... 50
  4.1.1 Linguistic and purposive interpretation of the prescribed factors for oral hearing .................................................. 53
4.2 Credibility determination in the PRRA process .................... 56
  4.2.1 The problems with credibility determination in PRRA can be alleviated through oral hearings ........................................ 57
    4.2.1.1 Complication and confusion caused by poorly worded prescribed factors ......................................................... 57
    4.2.1.2 Limitations of the objective approach of credibility assessment ................................................................. 59
    4.2.1.3 Judicial deference to credibility assessment .................. 61
    4.2.1.4 Applying a higher standard of proof for PRRA credibility assessment .......................................................... 64
4.3 The right to an oral hearing in the PRRA .............................. 66

PART II:
ADMINISTRATIVE REVIEW OF PROCEDURAL FAIRNESS FOR PRRA APPLICANTS

CHAPTER 5:
PROCEDURAL FAIRNESS IN THE PRRA PROCESS ..................... 77
5.1 Evolution of Procedural Fairness in Canadian Administrative Law ................................................................. 77
5.2 Procedural Fairness and the Principles of Fundamental Justice .............................................................................. 81
5.3 Standard of Review for PRRA Decisions ............................ 85
  5.3.1 The Old Regime: Pragmatic and Functional Review .......... 86
  5.3.2 The New Regime: Standard of Review Analysis ............... 88
  5.3.3 Standard of Review for Procedural Fairness in PRRA .......... 90
5.4 FACTORS AFFECTING THE CONTENT OF THE DUTY OF FAIRNESS FOR PRRA ......................................................................................................................... 91

PART III:

CONSTITUTIONAL REVIEW OF THE PRINCIPLE OF NON-REFOULEMENT AND THE PRESCRIBED FACTORS FOR ORAL HEARING IN THE PRRA PROCESS

CHAPTER 6:
THE PRINCIPLE OF NON-REFOULEMENT IS A PRINCIPLE OF FUNDAMENTAL JUSTICE ................................................................................................. 103

6.1 CONSTITUTING A PRINCIPLE OF FUNDAMENTAL JUSTICE .................. 103

6.1.1 The international perspective in the principles of fundamental justice ............................................................................................................. 107

6.2 THE PRINCIPLE OF NON-REFOULEMENT IS A LEGAL PRINCIPLE ........ 110

6.3 THERE IS SUFFICIENT CONSENSUS THAT THE PRINCIPLE OF NON-REFOULEMENT IS VITAL OR FUNDAMENTAL TO CANADIAN SOCIETAL NOTION OF JUSTICE ...................................................................................... 116

6.3.1 Derivative *jus cogens* obligations arising from the principle of non-refoulement ............................................................................................. 122

6.4 THE PRINCIPLE OF NON-REFOULEMENT IS IDENTIFIED WITH SUFFICIENT PRECISION AND APPLIED TO SITUATIONS IN A MANNER THAT YIELDS PREDICTABLE RESULTS ............................................................................. 126

CHAPTER 7:
THE PRESCRIBED FACTORS FOR ORAL HEARING VIOLATE THE RIGHT TO SECURITY OF THE PERSON FOR PRRA APPLICANTS .......................................................................................................................... 129

7.1 PRRA APPLICANTS’ RIGHT TO SECURITY OF THE PERSON ................. 130

7.2 THE PRESCRIBED FACTORS FOR ORAL HEARING VIOLATE THE RIGHT TO SECURITY OF THE PERSON FOR PRRA APPLICANTS .................. 133

7.2.1 The constitutional right to oral hearing where serious issue of credibility is involved .............................................................................................. 135

7.3 DO THE PRESCRIBED FACTORS FOR AN ORAL HEARING IN PRRA VIOLATE THE PRINCIPLES OF FUNDAMENTAL JUSTICE? .................. 138

7.4 IS THE VIOLATION CAUSED BY THE PRESCRIBED FACTORS FOR AN ORAL HEARING IN PRRA REASONABLE AND JUSTIFIED IN A FREE AND DEMOCRATIC SOCIETY? ................................................................. 147

7.4.1 Pressing and substantial objective ................................................................................................................................. 150
INTRODUCTION

Since law is a kind of rule and measure, it may be in something in two ways. First, as in that which measures and rules and since this is proper to reason, it follows that, in this way, law is in the reason alone. Secondly, as in that which is ruled and measured. In this way, law is in all those things that are inclined to something by reason of some law, so that any inclination arising from a law may be called a law.

- St. Thomas Aquinas, Theologica, Pegis I-II, Q. 90, a.1, ad 1.

Basically, each state has the responsibility of protecting its citizens. However, some states are unable or in some cases unwilling to fulfill their duty of providing protection. Consequently, citizens of these states flee in fear of their lives or security seeking refuge. The problem of protecting those fleeing becomes an international responsibility.\(^1\) This responsibility manifests itself in two areas.\(^2\) First and most primary responsibility is to respect the principle of non-refoulement. The principle of non-refoulement is regarded as the cornerstone of international refugee law.\(^3\) The principle of non-refoulement entails states not to return refugees to countries where their lives or security are at peril. In other words, the principle of non-refoulement forbids the expulsion, removal or deportation of any individual to an area where he or she might be subjected to persecution, torture or other forms of cruel and inhuman treatment. The second is to grant refugee protection or asylum.

The principle of non-refoulement is codified in several international conventions. For instance, the principle of non-refoulement is found in Article 33(1) of the

---


\(^2\) See *ibid*.

Convention relating to the Status of Refugees ("Refugee Convention"),\(^4\) Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT")\(^5\) and Article 7 of International Covenant on Civil and Political Rights ("ICCPR").\(^6\)

Furthermore, the United Nations High Commissioner for Refugees ("UNHCR") argues that the principle of non-refoulement constitutes a rule of international customary law.\(^7\) This principle is normatively established, both in treaties and in custom, and thus, it constitutes an integral part of customary international law. By and large, non-refoulement is an important legal and humanitarian principle of international law.\(^8\) According to an eminent refugee law scholar, Goodwin-Gill, the principle of non-refoulement is "the foundation stone of international protection", which has contributed to the protection of many lives and has reached the recognition of customary international law.\(^9\)

The UNHCR Executive Committee, to which Canada is a member, has made numerous resolutions endorsing the inviolable character of the principle of non-refoulement.\(^10\) Canada has both international\(^11\) and domestic\(^12\) obligations to conform to

---

\(^4\) *Convention relating to the Status of Refugees*, 28 July 1951, 189 U.N.T.S. 150, Can. T.S. No. 6, art. 33(1) (entered into force 22 April 1954, accession by Canada 4 June 1969) [Refugee Convention] "No Contracting State shall expel or return ("refoul") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

\(^5\) *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 Dec. 1984, 1465 U.N.T.S. 85, art. 3 [CAT] "No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture".

\(^6\) *International Covenant on Civil and Political Rights*, Dec. 19, 1966, 999 U.N.T.S.171, art. 7 [ICCPR]: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."


\(^8\) UNHCR, "Advisory Opinion", supra note 3 at para. 5


\(^10\) See Vevstad, supra note 1 at 147

\(^11\) Canada has ratified several treaties which impose the obligation of non-refoulement, such as Article 33 of the Refugee Convention, Article 3(1) of the CAT, Article 7 of the ICCPR, supra note 6 and Article
the principle of non-refoulement. Above all, Canada has a positive obligation under international and domestic law to protect foreign nationals from return or refoulement to a country where they could face the risk of persecution, torture or other forms of cruel and inhuman treatment.\textsuperscript{13}

Consequently, the principle of non-refoulement requires Canada to carry out risk assessment, when individuals allege the risk of persecution, torture or other forms of cruel and inhuman treatment, prior to their removal from Canada.\textsuperscript{14} Moreover, in Canada, the refugee determination process is usually long. As a result, there is a significant lapse of time between the original protection determination and removal of rejected refugee claimants. For these reasons, a risk assessment process is used to determine whether there are any changes in the home countries of failed claimants prior to removal, which would qualify them for refugee protection.\textsuperscript{15} Thus, to ensure compliance of the principle of non-refoulement, Canada established the Pre-Removal Risk Assessment (\textquotedblleft PRRA\textquotedblright) process.

The PRRA ensures Canada's commitment to uphold the principle of non-refoulement by providing timely assessment of the risk of persecution, torture or other forms of cruel and inhuman treatment before removal or deportation of non-citizens.\textsuperscript{16} Indeed, almost anyone under a removal order that is in force, who feels that they would be at risk if returned to their country of origin, may apply for a risk assessment before removal from Canada. In most cases, PRRA applicants with positive risk assessment are

\textsuperscript{5(2) of American Convention on Human Rights, 22 Nov. 1969, 1144 UNTS 123 [ACHR]. Canada signed the CAT on 23 August 1985 and ratified it on 24 June 1987. Canada ratified the ICCPR on 19 May 1976.}

\textsuperscript{12} In Canada, Immigration and Refugee Protection Act, R.S. C 2001, c. 27, s. 115(1) [IRPA] constitutes a statutory codification and incorporation of the principle of non-refoulement.

\textsuperscript{13} Positive obligations in human rights law denote a State's obligation to engage in an activity to secure the effective enjoyment of a fundamental right, as opposed to the classical negative obligation to merely abstain from human rights violations. See Suresh v. Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3 at para. 55 [Suresh]. The Supreme Court of Canada stated that Canada cannot justify refoulement to persecution, torture or other forms of cruel and inhuman treatment on the ground of being an 'involuntary intermediary'.


\textsuperscript{15} Ibid.

\textsuperscript{16} Ibid.
conferred Convention refugee status or 'persons in need of protection' status, which would permit them to stay in Canada, and eventually, apply for permanent residence.\textsuperscript{17} This risk assessment is carried out by PRRA Officers from Citizenship and Immigration Canada ("CIC"). The officers assess the risk faced by the individual based on the same protection grounds considered by the Refugee Protection Division ("RPD") of the Immigration and Refugee Board of Canada ("IRB").\textsuperscript{18}

Although PRRA is considered under the same protection grounds as the IRB and will result in the same protection and status, PRRA is distinct from the IRB process. In other words, a PRRA application is not an appeal of a negative IRB determination.\textsuperscript{19} Moreover, the PRRA claim focuses on new evidence, which highlights a change in situation at the country of origin, exposing the applicant to a new, different or additional risk that was not previewed during the initial RPD hearing.\textsuperscript{20} In addition, the PRRA process considers cases of applicants who are deemed ineligible by CIC to have their claims determined by the RPD.\textsuperscript{21}

Thus, the PRRA Officer or decision-maker has a complex task of carefully analyzing the case.\textsuperscript{22} The officer has to weigh and balance the evidence provided. The PRRA decision must be based on the evidence presented and researched. It should be grounded on the factual weight accorded to the evidence. In other words, the decision should not be founded on any preconceived bias or information. The PRRA decision should show a clear and independent assessment of the facts, which the officer has addressed adequately.

\textsuperscript{17} See \textit{IRPA}, supra note 12, s. 114

\textsuperscript{18} See also Immigration and Refugee Board of Canada, "About the IRB" (2006), online: Immigration and Refugee Board of Canada <http://www.irb-cisr.gc.ca/en/about/irbfacts_e.htm>. The Immigration and Refugee Board of Canada is an administrative body responsible for applying the \textit{Immigration and Refugee Protection Act}, R.S. C 2001, c. 27. Its mission is to make decisions on immigration and refugee matters in Canada. The IRB is made up of four tribunals, which are designated as "divisions". The Refugee Protection Division ("RPD"), which is a part of IRB, decides claims for refugee protection made within Canada.

\textsuperscript{19} PRRA Manual, supra note 14 at para. 5.1

\textsuperscript{20} See Perez v. Canada (Minister of Citizenship and Immigration), [2006] F.C.J. No. 1733 at para. 5 (QL)

\textsuperscript{21} See \textit{IRPA}, supra note 12, s. 101

\textsuperscript{22} See Lai v. Canada (Minister of Citizenship and Immigration), [2007] F.C.J. No. 476 at para. 70 (F.C.) (QL)
That being said, the picture of the PRRA process is not perfect. Amnesty International Canada argues that there are systemic problems with the PRRA process.\textsuperscript{23} According to it, PRRA Officers often dismiss credible evidence without providing the reasons for doing so and make arbitrary choices among documentary evidence.\textsuperscript{24} This is contrary to the presumption that PRRA decision-makers have considered all of the evidence before them, even if they do not refer specifically to each item.\textsuperscript{25} Furthermore, Amnesty raised concerns regarding the failure of PRRA decision-makers to independently consider credibility once the RPD has made a negative finding.\textsuperscript{26}

To add to the existing problems, CIC officials revealed that PRRA decision-makers received only two weeks of training on international and Canadian Refugee Law before making decisions.\textsuperscript{27} In fact, the Parliament’s Standing Committee on Citizenship and Immigration recommended that “CIC provide better training for PRRA Officers, particularly in regard to rules of evidence, the interpretation and application of IRPA, and international human rights standards.”\textsuperscript{28} Above all, Amnesty International Canada continues to express grave concern about the extremely low success rate in the PRRA process.\textsuperscript{29}

This thesis focuses on one of the main problems with the PRRA process, particularly, in respect to its procedures concerning oral hearings. The procedural set up of the PRRA process makes it difficult for an applicant to qualify for an oral hearing. At


\textsuperscript{24}See ibid.

\textsuperscript{25}Thang v. Canada (Solicitor General), [2004] F.C.J. No. 559 at para. 7 [Thang]

\textsuperscript{26}See Standing Committee on Citizenship and Immigration, supra note 23


\textsuperscript{28}Ibid.

\textsuperscript{29}Standing Committee on Citizenship and Immigration, supra note 23. In 2005, the national acceptance rate was 3% out of over 6800 decisions. In Quebec, the rate was just 1%, and did not increase in 2006.
the same time, the procedures for oral hearing removes the discretionary ability of the PRRA decision maker to call for oral hearing to assess or reassess the credibility of the applicant or the claim.

Pursuant to subsection 113(b) of the Immigration and Refugee Protection Act ("IRPA"), 30 oral hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required. The prescribed factors, which outline when oral hearing can be provided, are found in section 167 of the Immigration and Refugee Protection Regulations ("IRPR"). 31 There are three factors provided in section 167 of the IRPR. 32 These factors, essentially, restrict the possibility of having an oral hearing in the PRRA process. The first factor concerns whether the evidence in question raises a serious issue of the applicant's credibility. 33 The second factor requires the evidence to be central to the decision. The third and last factor relates to whether the evidence, if accepted, would justify allowing the PRRA application. On the whole, the three factors restrict the possibility of having an oral hearing in the PRRA process.

In addition, the CIC's program manual used by PRRA Officers, the PP 3: Pre-removal Risk Assessment (PRRA) ("PRRA Manual") 34 further restricts the possibility of conducting an oral hearing in the PRRA process. According to the PRRA Manual, oral hearings are only held in exceptional circumstances to assess the credibility of the applicant and not the credibility of the claim. 35 Again, the possibility to have an oral

---

30 IRPA, supra note 12, s. 113(b)
31 S.O.R./2002-227, s. 167 [IRPR]
32 Ibid.

167. For the purpose of determining whether a hearing is required under paragraph 113(b) of the Act, the factors are the following:

(a) whether there is evidence that raises a serious issue of the applicant's credibility and is related to the factors set out in sections 96 and 97 of the Act;

(b) whether the evidence is central to the decision with respect to the application for protection; and

(c) whether the evidence, if accepted, would justify allowing the application for protection.

33 See ibid.
34 PRRA Manual, supra note 14
35 See ibid, at para. 12.1
hearing in PRRA was further restricted when the Federal Court of Canada ruled that all factors must be present cumulatively to qualify for oral hearing in the PRRA process.\textsuperscript{36}

In brief, to hold an oral hearing in the PRRA process, the following restrictions apply: 1) the prescribed factors must be satisfied based on section 167 of the \textit{IRPR};\textsuperscript{37} 2) all the prescribed factors must be considered cumulatively;\textsuperscript{38} and 3) the oral hearing is allowed only to address the credibility of the PRRA applicant and not the credible basis of the protection claim.\textsuperscript{39} Consequently, these restrictions make it extremely difficult to have an oral hearing in the PRRA process.

The lack of oral hearing or the difficulty in obtaining one could adversely affect the fairness of the PRRA process. It is well known in law that every administrative body is a master of its own procedure.\textsuperscript{40} Also, in \textit{Baker v. Canada (Minister of Citizenship and Immigration)} ("Baker"), L’Heureux-Dubé J. wrote that an oral hearing is not always necessary to ensure a fair hearing and consideration of the issues involved.\textsuperscript{41} Nevertheless, L’Heureux-Dubé J. emphasized that if an administrative decision affects ‘the rights, privileges or interests of an individual’, such as in the PRRA process, then that decision will trigger the application of the duty of fairness.\textsuperscript{42}

The PRRA application is not similar to an application to permit renewal of a driver’s license, even though both decisions fall under the purview of administrative bodies. PRRA decisions affect the applicants in a fundamental manner and these

\begin{itemize}
\item \textsuperscript{36} \textit{IRPR}, supra note 31, s. 167
\item \textsuperscript{37} Ibid.
\item \textsuperscript{39} PRRA Manual, supra note 14 at para. 12.1
\item \textsuperscript{40} See \textit{Knight v. Indian Head School Division No. 19}, [1990] 1 S.C.R. 653 at para. 49 [Knight]. The Court wrote that "[i]t must not be forgotten that every administrative body is the master of its own procedure and need not assume the trappings of a court. The object is not to import into administrative proceedings the rigidity of all the requirements of natural justice that must be observed by a court, but rather to allow administrative bodies to work out a system that is flexible, adapted to their needs and fair. As pointed out by de Smith (Judicial Review of Administrative Action (4th ed. 1980), at p. 240), the aim is not to create "procedural perfection" but to achieve a certain balance between the need for fairness, efficiency and predictability of outcome."
\item \textsuperscript{41} [1999] 2 S.C.R. 817 at para. 33 (QL) [Baker]. L’Heureux-Dubé J. stated that the duty of fairness in can be flexible because meaningful participation occurs in different ways in different situations.
\item \textsuperscript{42} Ibid. at para. 20
\end{itemize}
decisions are final without any avenue for appeal. In most cases, a negative PRRA decision would result in the immediate removal of the applicant from Canada. Once removed from Canada, it is difficult or impossible to ascertain whether the applicant is subjected to any form of persecution, torture or other forms of cruel and inhuman treatment in his or her home country. In such circumstances, it would be too late to provide any form of refugee protection.

As a result, the rule of law requires every administrative decision to be fair. "[A] fair procedure is said to be the handmaiden of justice. Accordingly, procedural limits are placed on administrative bodies by statute and the common law. These include the requirements of "procedural fairness" [...]" Therefore, procedural protections, such as oral hearings, permit PRRA applicants and decision makers to deal with inherently complicated evidentiary issues, where serious issue of credibility is involved. Oral hearings in the PRRA process provides the opportunity for applicants and the decision maker to have dialogue concerning their views, clarify any doubts and discuss the evidence fully so that they could be assessed properly. In addition, oral hearings address procedural issues such as the right to reply and the duty to disclose.

Importantly, the focus of this thesis is not to argue that all PRRA applicants should be given oral hearings. Indeed, the PRRA process would become cumbersome if everyone facing removal demands for an oral hearing. In fact, the "modern state could not function if oral hearings were required any time an administrative decision of some sort were made." Thus, this thesis concerns applicants who face a serious issue of

---

43 PRRA Manual, supra note 14 at para. 5.16
45 The right of reply provides the PRRA applicant with an opportunity to examine the material being used against him or her and to respond to the case against him or her.
46 See Suresh, supra note 13 at para. 122. The Court pronounced that a person facing the risk of deportation to persecution or torture must be informed of the case to be met. Therefore, it could be argued that PRRA applicants have the right of disclosure to the materials which the officers would base their decision
47 See Evan Fox-Decent, "The Charter and Administrative Law: Cross-Fertilisation in Public Law" in Audrey Macklin, Coursepack: Administrative Law (Faculty of Law, University of Toronto, Winter 2008) at 5
credibility, but do not satisfy the restrictive criteria set out for oral hearings in the PRRA process.

For example, the PRRA does not call for an oral hearing when there is an absence or insufficiency of data regarding the PRRA applicant's fear of persecution. For one thing, most human rights "documents may not necessarily include the extent to which women may risk violation of their human rights in the so-called 'private realm,' and therefore cannot be a basis for corroborating women's claim to fear persecution arising from privately-inflicted harms." Consequently, in an application for refugee protection before the IRB, in *G. (T.O.) (Re) Convention Refugee Determination Decisions*, the IRB panel accepted that "[e]ven though there are no reliable statistics on the incidence of wife abuse, qualified observers, including women's rights groups, believe it is widespread." This would not be possible if the same case was made through a PRRA application.

Besides, PRRA applications are made by female refugee claimants who have undergone serious trauma, caused by continuous violent domestic abuse or sexual violence at the domain of family or society as a whole. Such applicants continue to suffer from persistent fear, loss of self-esteem, an attitude of self-blame and memory loss or distortion. Often, in such PRRA applications, there is a lack necessary corroborative evidence to support the risk of persecution. The lack of evidence could cast doubts regarding the credibility of these female claimants. Under these circumstances, oral hearings serve to bring out all the relevant facts and provide the

---


50 Ibid at nn. 18-21. “Further the representative of the Embassy of the Republic of South Korea indicated that there is no legislation dealing specifically with domestic violence in Korea and the reason for the non-existence of such laws was the fact that "domestic violence" is not as much an issue in Korean society as it is in North America. Women from age 4 to 70 years would be a victim of sexual violence which could be varied from rape to child molesting and incest. Even though the present condition is so exigent, there have not been so far any effective countermeasures against sexual violence implemented at the domain of family to social as a whole.”

51 See Adjin-Tettey, supra note 48 at para. 14
PRRA decision-maker an avenue to share the responsibility of drawing out the evidence required to establish the claim.\textsuperscript{52}

My objectives in this thesis are to demonstrate the following: first, it will be shown that higher level of procedural fairness, arising from common law, necessitates an oral hearing for the PRRA process with respect to credibility assessment; second, it would be proven that the principle of non-refoulement is a principle of fundamental justice; and third, it will be demonstrated that the prescribed factors, for determining whether an oral hearing is required for the PRRA process, violate section 7 of the \textit{Canadian Charter of Rights and Freedoms} ("Charter")\textsuperscript{53} and cannot be saved by section 1 of the \textit{Charter}. Therefore, section 167 of the \textit{IRPR},\textsuperscript{54} which sets out the three cumulative factors for oral hearings as required under subsection 113(b) of the \textit{IRPA}\textsuperscript{55} for PRRA applicants, is unconstitutional and invalid.

The thesis is divided into three parts. The first part of the thesis will focus on refugee protection through the PRRA process. Here, the discussion would first be on refugee protection in Canada. It would then look at the principle of non-refoulement. Subsequently, it would analyse the PRRA process and then it would move onto the discussion on the role of oral hearings in the PRRA process.

The second part would make an administrative review of procedural fairness for PRRA applicants. This part would look at procedural fairness in the PRRA process. It would examine the evolution of procedural fairness in Canadian Administrative Law. It would then analyse the operation of procedural fairness at common law and the principles of fundamental justice. The discussion would then focus on the appropriate standard of review for PRRA decisions, narrowing on the applicable standard for

\textsuperscript{52} See generally, Erika Feller, Volker Türk & Frances Nicholson, eds. \textit{Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection} (Cambridge: Cambridge University Press, 2003) at 50. If there very little documented data about an alleged persecution or if there is little information as to refugee claimant’s ability to access meaningful state protection., the UNHCR argues that the decision-maker has a shared responsibility with the refugee claimant to ascertain all the relevant facts, especially for gender-related refugee claims.

\textsuperscript{53} Part I of the \textit{Constitution Act, 1982}, being Schedule B to the \textit{Canada Act 1982} (U.K), 1982, c.11
[\textit{Charter}]

\textsuperscript{54} \textit{IRPR}, supra note 31, s. 167

\textsuperscript{55} \textit{IRPA}, supra note 12, s. 113(b)
procedural fairness. At the end, it would use the factors outlined in *Baker* to establish the content of the duty of fairness for the PRRA process.\(^56\)

The third and final part of the thesis would make a constitutional review of the principle of *non-refoulement* and the prescribed factors for oral hearing in the PRRA process. Here, it would be shown that the principle of *non-refoulement* is a principle of fundamental justice. This part would also demonstrate that the prescribed factors of section 167 of the *IRPR\(^57\)* are unconstitutional and invalid because they violate the right to security of the person protected under section 7 of the *Charter* and such violation cannot be demonstrably justified in a free and democratic society.

There are seven chapters in the thesis. Chapter 1 would introduce the concept of refugee protection in Canadian law. It discusses the expanded definition of refugee protection under the *IRPA*. It attempts to draw out the definitions of refugee protection, Convention refugees and ‘persons in need of protection’. Chapter 1 will look at the refugee protection criteria required for protection under the Refugee Convention, as well as, the criteria for ‘persons in need of protection’. In doing so, this chapter would attempt to define concepts such as persecution, torture and other forms of cruel and inhuman treatment in the context of refugee protection in Canada.

Chapter 2 explains about the principle of *non-refoulement*. This chapter will examine the conventional principle of *non-refoulement*, which is enshrined in several international conventions. In addition, it will examine if the principle of *non-refoulement* exist as a customary principle and as a peremptory rule (*jus cogens*). Furthermore, this chapter would demonstrate that the application of the principle of *non-refoulement* is not limited to only formally recognized refugees but extends to all persons seeking refugee protection.

Chapter 3 will briefly outline the Pre-Removal Risk Assessment process, which makes an assessment of the risk of persecution or torture for those subjected to removal from Canada. The PRRA is to ensure compliance with Canada’s domestic and

---

\(^56\) See *Baker*, supra note 41 at paras. 23-28  
\(^57\) *IRPR*, supra note 31, s. 167
international obligations of the principle of *non-refoulement*. This chapter would discuss the objectives of the PRRA and the problems found in this process.

Chapter 4 will discuss the purpose of oral hearings and the application of the prescribed factors to determine if a PRRA Officer could call for an oral hearing. It would show that these factors are cumulative and address only the credibility of the PRRA applicant. It would argue that linguistic and purposive interpretation would not see the factors as cumulative. The chapter further examines the problems of credibility determination through documentary evidence and the need for oral hearings in credibility evaluation. It looks at the importance of oral hearing when there is insufficiency of human rights data concerning the PRRA applicant’s fear of persecution, especially in relation to harm inflicted on women in the ‘private realm’, which is usually not documented.

Chapter 5 gives an account of the evolution of procedural fairness in administrative law in Canada. It will then examine the interaction between procedural fairness at common law and the principles of fundamental justice. The chapter will also examine the applicable standard of review for procedural fairness. It will look at how deference was applied under the pragmatic and functional approach and how it should be applied under the recent standard of review approach, adopted by the Supreme Court in March 2008.\(^{58}\) At the end of the chapter, the thesis would evaluate the content of the duty of fairness for PRRA process and show that a higher level of procedural fairness is required, which supports the need to hold oral hearings.

Chapter 6 will prove that the principle of *non-refoulement* is a principle of fundamental justice, as outlined in section 7 of the *Charter*. As highlighted by the Supreme Court of Canada in *R. v. Malmo-Levine; R. v. Caine* ("Malmo-Levine") \(^{59}\) and in *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)* ("Canadian Foundation for Children"), \(^{60}\) it will be proven that the principle of *non-refoulement* meets the criteria required to be a principle of fundamental justice. Indeed,

---

\(^{58}\) See *Dunsmuir*, supra note 44 at paras. 34, 44-45


\(^{60}\) [2004] 1 S.C.R. 76 [Canadian Foundation for Children]
it will be shown that the principle of non-refoulement is a legal principle. Also, it would be demonstrated that there is sufficient consensus that the principle of non-refoulement is vital or fundamental to Canadian societal notion of justice. As well, it will be argued that the principle of non-refoulement is identified with sufficient precision and applied to situations in a manner that yields predictable results. Therefore, it would be demonstrated in this chapter that the principle of non-refoulement is a principle of fundamental justice.

Chapter 7 would show that the prescribed factors, which determine the necessity of an oral hearing for the PRRA process, violate the right to security of the person protected under section 7 of the Charter. It will be proven that the violation does not conform to the principles of fundamental justice. Furthermore, it will be shown that the violation cannot be demonstrably justified in a free and democratic society. Consequently, the chapter will prove that section 167 of the IRPR,\(^6\) which enumerates the prescribed factors, is unconstitutional and invalid.

\(^6\) IRPR, supra note 31, s. 167
PART I:

REFUGEE PROTECTION THROUGH THE PRE-REMOVAL RISK ASSESSMENT (PRRA) PROCESS
CHAPTER 1: REFUGEE PROTECTION IN CANADA

This chapter outlines the refugee protection process in Canada. It defines new concepts such as "refugee protection" and 'persons in need of protection', introduced in the IRPA. It will explain how IRPA has expanded the definition of Convention refugee. There will be discussion about who qualifies for refugee protection with reference to pertinent sections of the IRPA and how does the PRRA process fit into the scheme of protection accorded to refugees. This chapter will focus on the protection accorded to convention refugees, where it will briefly examine the elements required for refugee status such as alienage, wellfoundedness, persecution, the nexus between the risk and convention reasons and exclusion/cessation of refugee status. Moreover, this chapter will study the conditions that are needed to be satisfied to become 'persons in need of protection'. It will also discuss how torture is defined in Canada and detail the significance of protection against other forms of cruel and inhuman treatment.

1.1 Definition of Convention Refugees and 'Persons in Need of Protection'

In Canada, under the IRPA\(^{62}\) the refugee law widened its scope of protection for refugees. It has expanded protection for those who fear persecution, torture or other reprisals in their home country.\(^{63}\) The IRPA adopted in 2001, incorporates the definition of Convention refugee from the Refugee Convention into Canadian law. Furthermore, the IRPA introduces new concepts such as "refugee protection" and 'persons in need of protection'.\(^{64}\)

1.1.1 Refugee Protection

---

\(^{62}\) IRPA, supra note 12

\(^{63}\) Lorne Waldman, Canadian Immigration & Refugee Law Practice (Markham: LexisNexis, 2006) at 283 [Waldman, Canadian Immigration]

\(^{64}\) See ibid.
Pursuant to section 95 of the IRPA, refugee protection is accorded to an individual who is either a Convention refugee or a person in need of protection. Refugee protection, as provided in section 95 of the IRPA, is a new concept that expands the definition of Convention refugee from the Refugee Convention, by incorporating the provisions of Article 1 of the CAT and the old Post-Determination Refugee Claimants in Canada Class ("PDRCC").

Pursuant to sections 95, 96 and 97 of the IRPA, refugee protection is provided under the four following circumstances: 1) the person seeking protection has been determined to be a Convention refugee under a visa application or under a temporary resident permit for protection reasons; 2) the RPD of the IRB determines the person to be a Convention refugee or a person in need of protection; 3) 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; and 4) the Minister allows the application for protection, except in the case of a person described in subsection 112(3) of the IRPA.

Consequently, an individual who is outside Canada could seek refugee protection pursuant to section 99(2) of the IRPA and apply for permanent residence as

---

65 IRPA, supra note 12, s. 95
66 See Walman, Canadian Immigration, supra note 63 at 283
67 CAT, supra note 5, art. 3; See Walman, Canadian Immigration, supra note 63 at 283 and 284
68 See Walman, Canadian Immigration, ibid. at 284: The PDRCC class defines persons who will be subject to recognizable risks if forced to leave Canada. Without limiting the interpretation of the definition, the applicant usually has to demonstrate that the risk can be objectively identifiable, not faced by other individuals in or from that country, and present in every part of that country. The type of risk considered has to be a threat to the person’s life, extreme sanctions against that person, or inhumane treatment of that person. The risks involved include actions that would constitute violations of fundamental rights, such as (but not limited to) affronts to the physical and psychological integrity of the individual. One specific example would be the prohibition against returning “a person to a State where there are substantial grounds for believing that he would be in danger of being subjected to torture” (Article 3 of the CAT).
69 IRPA, supra note 12, s. 95
70 See ibid., ss. 95-97; See Walman, Canadian Immigration, supra note 63 at 284
71 IRPA, ibid., s. 112(3) deals with those excluded from refugee protection because they are deemed to be inadmissible on grounds of security, violating human or international rights or organized criminality
72 See ibid., s. 99(2)
a Convention refugee or a person in similar circumstances. Alternatively, pursuant to section 99(3) of the IRPA, a person in Canada, who is not subjected to a removal order, may apply for refugee protection. If that person is deemed eligible to have his or her claim determined by the RPD pursuant to section 100 of the IRPA, then the Division makes the determination as to whether or not refugee protection should be provided.

Finally, pursuant to section 112 of the IRPA, a person in Canada could apply for refugee protection to the Minister prior to removal, using the PRRA process. If a positive PRRA determination is made, then the Minister will accord refugee protection as long as that person does not fall within the exceptions outlined in subsection 112(3) of the IRPA.

Based on subsection 112(3) of the IRPA, individual applications determined to be ineligible for refugee determination because of inadmissibility based on grounds of security, violating human or international rights, serious criminality or organized criminality and individuals named in a security certificate, will not be assessed against Refugee Convention grounds pursuant to section 77 of the IRPA. This is in line with the exclusion clause of Article 1(F) of the Refugee Convention, which excludes individuals from the refugee protection regime.

---

73 See Walman, Canadian Immigration, supra note 63 at 284
74 See IRPA, supra note 12, s. 99(3)
75 See ibid., s. 100
76 See Walman, Canadian Immigration, supra note 63 at 284
77 See IRPA, supra note 12, s. 112
78 See ibid., s. 112(3)
79 See ibid.
80 See ibid., s. 77
81 Refugee Convention, supra note 4, art. 1(F)

F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(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;
That being said, a person who is excluded from refugee protection because of the exclusion clause of the Refugee Convention, would still qualify for the PRRA process. An excluded person would qualify for risk assessment with respect to grounds identified in the CAT, as well as risk to life or risk of cruel and unusual treatment or punishment. This risk assessment may result in a finding that the person is in need of protection. Consequently, those excluded from the Refugee Convention could be accorded with refugee protection through the PRRA, if the Minister is satisfied that the applicant is a person in need of protection. This is to uphold Canada's obligation of the principle of non-refoulement arising from the CAT.

1.1.2 Protection for Convention refugees

The Refugee Convention and the Protocol Relating to the Status of Refugees ("Refugee Protocol") do not define who is a refugee but set out certain parameters for identifying those in need of refugee protection. Article 1A(2) of the Refugee Convention outlines who would qualify for Convention refugee status. Moreover, Article 1A(2) of the Refugee Convention is incorporated in section 96 of the IRPA, which reads as follows:

(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.

82 PRRA Manual, supra note 14 at para. 5.6

83 See CAT, supra note 5, art. 3 ("No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.")


85 Refugee Convention, supra note 4, art. 1A(2) ("For the purposes of the present Convention, the term "refugee", shall apply to any person who:... As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.")
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.

Generally, to be conferred with Convention refugee status, there are five essential elements that have to be established.\(^{86}\) Although the elements required for refugee status is beyond the scope of this thesis, it is necessary to briefly examine the basic elements behind the refugee determination process.

The first necessary condition is known as alienage. According to Article 1A(2) of the Refugee Convention and according to section 96 of the IRPA, refuge is accorded to asylum seekers who have left their country of nationality or who are outside their country of habitual residence if they are stateless persons. Hathaway argues that

this criterion [\(\text{alienage}\),] raises several related questions of claims grounded in post-departure events; the relevance of official authorisation to emigrate; so-called direct flight requirements which suggest a duty to seek protection in the first potential state of refuge; the implication of entry into an asylum state in contravention of applicable immigration laws; and the means by which the country of reference for a particular refuge claim is defined.\(^{87}\)

On a critical note, Andrew Shacknove argues that “alienage is an unnecessary condition for establishing refugee status. It ...is a subset of a much broader category: the physical access of the international community to the unprotected person.”\(^{88}\) Precisely, being outside the country of residence is not a constitutive element of refugee protection, but just a practical condition precedent to place the asylum seeker within the scope of international protection.\(^{89}\)

Namely, the Refugee Convention does not distinguish between those fleeing their country to avoid the risk of persecution or torture and those, while abroad are

---

\(^{86}\) Hathaway, *The Law of Refugee Status*, supra note 84 at vi

\(^{87}\) Ibid.

\(^{88}\) Ibid. at 32

\(^{89}\) Ibid.
unwilling or unable to return to their country of origin or residence because of the presence of a prospective risk of persecution or torture. Refugees, who are already abroad, unwilling to return to their country of origin because of prospective risk of persecution or torture, are known as refugees sur place.90 According to the Refugee Convention, there is no distinction between refugees and refugees sur place. Indeed, refugees sur place are provided equal protection as those refugees fleeing persecution.

The second element refers to the wellfoundedness of the refugee claim. Wellfoundedness requires a claimant to show that there are evidences of "present or prospective risk of harm confronting the claimant in the country of origin at the time the person's claim to refugee status is determined."91 This is based on the subjective and objective fear of the refugee claimant.92 Subjective fear alone may not be sufficient enough to establish the claim. There must be objective evidence which induce the asylum seeker to flee his country of origin and seek protection in another country.93 The refugee claimant must, therefore, demonstrate objective fear of persecution.

1.1.2.1 Protection against persecution

The third element requires the existence of the risk of serious harm.94 This element focuses on the risk of persecution or torture faced by the refugee claimants seeking protection. In Canada (Attorney General) v. Ward ("Ward") the Supreme Court of Canada concluded that whether the claimant is 'unwilling' or 'unable' to avail himself or herself of the protection of his or her country of nationality or habitual residence is irrelevant.95 Consequently, state complicity in the persecution is also

---

90 See ibid. at 33
91 Adjin-Tettey, supra note 48 at n. 5
92 See Rajudeen v. Canada (Minister of Employment and Immigration) (1984), 55 N.R. 129 cited in Adjin-Tettey, ibid. at n. 12. The Court observed that “[t]he subjective component relates to the existence of fear of persecution in the mind of the refugee. The objective component requires that the refugee's fear be evaluated objectively to determine if there is a valid basis for the fear.”
93 See Hathaway, The Law of Refugee Status, supra note 84 at vi
94 See ibid.
95 [1993] 2 S.C.R. 689 at para. 42 (QL) [Ward]
irrelevant. Nevertheless, Ward asserted that the onus is on the refugee claimant to adduce clear and convincing evidence of the state's inability to protect him or her. In the absence of such evidence, a state is presumed capable of protecting its citizens.

Again in Ward, the Court defined persecution using the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status ("UNHCR Handbook").

Persecution, according to the UNHCR Handbook,

is normally related to action by the authorities of a country. It may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned. A case in point may be religious intolerance, amounting to persecution, in a country otherwise secular, but where sizeable fractions of the population do not respect the religious beliefs of their neighbours. Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.

In other words, acts of private citizens, when combined with state inability to protect, constitute to persecution. The Supreme Court concluded that persecution under the Refugee Convention includes situations “where the state is not in strictness an accomplice to the persecution, but is simply unable to protect its citizens.”

Hathaway outlines the traditional Canadian formulation of the persecution standard as the existence of

persistent harassment by or with the knowledge of the authorities of the state of origin.
It involves the constant infliction of some mental or physical cruelty, persistent or urgent efforts to harm or cause to suffer, and pursuit with enmity, such as to provoke an irrepressible fear of asking the authorities... for protection.

---

96 See ibid.
97 See ibid.; See Bowen v. Canada (Minister of Citizenship and Immigration), [2008] F.C.J. No. 125 at para. 22 [Bowen]
98 UNHCR, "Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees" (1 January 1992), online: UNHCR Refworld <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b3314> [UNHCR Handbook]; See also Ward, ibid. at para. 27. Although the UNHCR Handbook is not formally binding on signatory states, it has been endorsed by member states of the Executive Committee of the UNHCR, including Canada, and has been relied upon by the courts of signatory states for interpreting the Refugee Convention.
99 UNHCR Handbook, ibid.; See also Ward, ibid.
100 Ward, ibid. at para. 34
101 Hathaway, The Law of Refugee Status, supra note 84 at 101 and 102
Again, the Supreme Court of Canada in *Ward* endorsed Hathaway's definition of persecution as "actions which deny human dignity in any key way and that the sustained or systemic denial of core human rights is the appropriate standard."\(^{102}\)

Therefore, persecution, which is, undefined in the Refugee Convention, "has been ascribed the meaning of sustained or systemic violation of basic human rights demonstrative of a failure of state protection."\(^{103}\) However, minor forms of harassment, such as harassment in the workplace, may not be sufficiently serious to constitute persecution.

According to the PRRA Manual, it will be necessary to determine whether or not harassment or sanctions suffered by an applicant are sufficiently serious to constitute persecution.\(^{104}\) Usually threats to a person's life and freedom, including violations of other fundamental human rights, would amount to persecution and in some cases the "cumulative effect of a series of incidents constitutes persecution. The sanctions need not be against the individual, but can also encompass acts committed against the individual's family."\(^{105}\)

In *Chan v. Canada (Minister of Employment and Immigration)* ("*Chan*"), the Supreme Court affirmed that "[t]he essential question is whether the persecution alleged by the claimant threatens his or her basic human rights in a fundamental way".\(^{106}\) The Court continued that for the risk of persecution to succeed, there must be clear and convincing evidence of a state's inability to protect its citizens.\(^{107}\) In other words, the quantity and quality of the evidence which a claimant must produce to rebut the presumption of state protection must be clear and convincing. For example, a claimant

\(^{102}\) *Ward*, supra note 95 at para. 63

\(^{103}\) *Ibid.%; See also* Hathaway, *The Law of Refugee Status*, supra note 84 at 101, 104 and 105

\(^{104}\) See PRRA Manual, supra note 14 at para. 6.4

\(^{105}\) See *ibid.*

\(^{106}\) [1995] 3 S.C.R. 593(QL) *Chan* at para. 70; See also *Bowen*, supra note 97 at para. 26 (QL)

\(^{107}\) See *Chan, ibid.* at para. 50
may produce evidence that other individuals in similar circumstances were not able to avail themselves of state protection.  

Prosecution pursuant to due process is not considered as persecution. However, there are particular circumstances in which prosecution can be considered persecution. Usually, prosecutions connected with a refugee claimant’s race, religion, nationality, membership in a social group or political opinion may be seen as persecution. For instance, prosecutions against conscientious objectors could be considered persecution. Similarly, prosecutions arising from desertion or refusal to participate in violent military conflicts that are contrary to international law may amount to persecution.

That being said, the fourth element, also known as the civil or political status criterion, requires some nexus between the risk faced by refugee claimants and their race, religion, nationality, membership in a social group, or political opinion. In *La Hoz v. Canada (Minister of Citizenship and Immigration)*, the Federal Court affirmed that to establish refugee status, there must be a clear nexus between the refugee claimant and the alleged persecution on one of the Convention grounds, that is, race, religion, nationality, membership in a particular social group or political opinion. “[R]efugee law requires that there be a nexus between who the claimant is or what she believes and the risk of serious harm in her home state.” The burden lies with refugee claimants to

---

108 See *Erdogu v. Canada (Minister of Citizenship and Immigration)*, [2008] F.C.J. No. 546 at para. 26 (QL); See also *Elcock v. Canada (Minister of Citizenship and Immigration)*, [1999] [1999] F.C.J. No. 1438 at para. 15 (QL) which states that “[t]he ability of a state to protect must be seen to comprehend not only the existence of an effective legislative and procedural framework but the capacity and the will to effectively implement that framework.”

109 See Walman, *Canadian Immigration*, supra note 63 at 291

110 See PRRA Manual, supra note 14 at para. 10.10. The PRRA Officers look at the following factors: 1) the motivation of the applicant when the offence was committed; 2) the motivation of the government in pursuing prosecution; 3) whether the punishment for the offence is disproportionate to the offence itself; 4) the human rights record of the prosecuting country; 5) the status of the country’s judicial system; 6) the nature of the law which the applicant has violated (if compliance with a law results in a violation of an international legal norm, prosecution may be persecutory); and 7) the nature of the law under which the individual will be prosecuted (arbitrarily punishing acceptable behaviour may be persecutory).

111 See Walman, *Canadian Immigration*, supra note 63 at 291

112 [2005] F.C.J. No. 940 at para. 32 (QL) [La Hoz]

113 Hathaway, *The Law of Refugee Status*, supra note 84 at 137

23
show there is a nexus between their fears and the grounds required to establish refugee status. Any other reasons are irrelevant, unless such reasons are used to support "a claim of persecution, or to show the circumstances that the alien face at home".  

The fifth and final element deals with those who are excluded from refugee status or have ceased to be refugees because they no longer need refugee protection. Pursuant to section 98 of the IRPA, 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. For example, this category would deal with war criminals or serious criminals who must be excluded from refugee status. Also, refugee protection ceases when a refugee can either reclaim the protection of his or her country of origin or has secured other alternative protection such as a permanent residence or citizenship in another safe country.  

1.1.3 Protection for ‘persons in need of protection’

Pursuant to section 97 of the IRPA, ‘persons in need of protection’ refers to those seeking protection, who if removed from Canada would face substantial risk of torture, on the grounds of Article 1 of CAT or would face risk to their life or be subjected to the risk of cruel and unusual treatment or punishment, at their country of origin or country of former habitual residence. A person in need of protection has to satisfy the following criteria: 1) the person is unable or, because of that risk, unwilling to seek protection of that country; 2) the alleged risk should be throughout the whole country and is not faced generally by other individuals in or from that country; 3) the risk should not be based on lawful sanctions, unless it is contrary to acceptable international standards; and 4) the risk does not result from the inability of that country to provide

---

115 See IRPA, supra note 12, s. 98; See also Refugee Convention, supra note 4, arts. 1(E) and 1(F)
116 See Hathaway, The Law of Refugee Status, supra note 84 at 188
117 See IRPA, supra note 12, s. 97; See also Walman, Canadian Immigration, supra note 63 at 299
adequate health or medical care. All the above condition needs to be satisfied to become a person in need of protection.

1.1.3.1 Protection against torture

Under Canadian law, section 97 incorporates Article 1 of the CAT, which outlines the definition of torture as follows:

Torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.\(^{118}\)

Based on Article 1 of the CAT, the definition of torture in Canada could be set out as follows:

Torture is an act that is inflicted by, or at the instigation of, or with the consent or acquiescence of, a public official or other persons acting in an official capacity.

Torture applies to both physical and mental suffering that is caused by such an act.

Torture must result in severe pain or suffering.

The act that causes the suffering must be for “such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind...”.

Torture does not include pain or suffering arising only from, inherent in, or incidental to, lawful sanctions.\(^{119}\)

Therefore, the definition of torture in Article 1 of CAT, only applies to torture practiced by state authorities. Conversely, even acts committed by non-state actors qualify as torture under the CAT, only if there is a causal link between an agent of the state and the non-state actors.\(^{120}\) A more detailed analysis of torture is beyond the scope of this thesis.

1.1.3.2 Protection against other forms of cruel and inhuman treatment

\(^{118}\) CAT, supra note 5, art. 1

\(^{119}\) Walman, Canadian Immigration, supra note 63 at 300

\(^{120}\) Ibid.
Section 97(1) of the IRPA also provides protection against other forms of cruel and inhuman treatment.\textsuperscript{121} Refugee protection is conferred on ‘persons in need of protection’ if there are substantial grounds for believing that the person would be subjected:

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

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

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,

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

the risk is not caused by the inability of that country to provide adequate health or medical care.\textsuperscript{122}

Although international jurisprudence consider the term ‘cruel and unusual treatment or punishment’ to be larger and broader than torture, Canadian courts have not accepted this international standard.\textsuperscript{123} In Canadian law, the term ‘cruel and unusual treatment or punishment’ is also found in section 12 of the Charter.\textsuperscript{124} In R. v. Smith, the Supreme Court of Canada wrote that a punishment will be cruel and unusual and violate section 12 of the Charter if it has any one or more of the following characteristics:

The punishment is of such character or duration as to outrage the public conscience or be degrading to human dignity;

The punishment goes beyond what is necessary for the achievement of a valid social aim, having regard to the legitimate purposes of punishment and the adequacy of possible alternatives; or

The punishment is arbitrarily imposed in the sense that it is not applied on a rational basis in accordance with ascertained or ascertainable standards.\textsuperscript{125}

Even though the criteria announced are in the context of section 12 of the Charter, there are no reasons why they should not be applied to refugee protection claims.\textsuperscript{126}

\textsuperscript{121} See IRPA, supra note 12, s. 97(1)

\textsuperscript{122} Ibid., s. 97(1)(b)

\textsuperscript{123} See Walman, Canadian Immigration, supra note 63 at 302

\textsuperscript{124} Charter, supra note 53, s. 12. “Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.”

\textsuperscript{125} [1987] 1 S.C.R. 1045 at para. 93

26
In *Lai v. Canada (Minister of Citizenship and Immigration)* ("Lai"), the Federal Court confirmed the procedure for assessing the objective risk to life or of cruel and unusual treatment or punishment using the PRRA Manual.\textsuperscript{127} The Court stated that

[The] assessment of whether there are substantial grounds to believe the applicant would be personally subjected to a risk to life or of cruel and unusual treatment or punishment is evaluated on an objective basis. The risk must be personalized to the individual. The assessment may be based on past events but is forward looking: the issue to be determined is whether events related by the applicant, together with all the other evidence, including country conditions at the time of the decision, show that the applicant, if returned, would be subjected to a risk to life or of cruel and unusual treatment or punishment... All relevant considerations include the general situation in a country and, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.\textsuperscript{128}

Any further analysis about cruel and inhuman treatment is beyond the scope of this thesis.

The next chapter would discuss about the principle of *non-refoulement* and how it creates domestic and international obligations for Canada. It will attempt to analyse the extent of these obligations by examining the conventional principle of *non-refoulement*. The chapter will show that with the principle of *non-refoulement*, Canada cannot be 'involuntary intermediary' or be wilfully blind or permit chain *refoulement* by contravening the 'complicity principle'. It will attempt to address the question whether the principle of *non-refoulement* is a customary principle or a peremptory rule (*jus cogens*). Moreover, the next chapter would show that the principle of *non-refoulement* is not limited to only formally recognised refugees but extends to all persons seeking refugee protection, which includes PRRA applicants.

**CHAPTER 2: PRINCIPLE OF NON-REFOULEMENT**

**2.1 Obligations Arising from the Principle of Non-Refoulement**

\textsuperscript{126} See Walman, *Canadian Immigration*, supra note 63 at 303

\textsuperscript{127} See *Lai*, supra note 22 at para. 115; See also PRRA Manual, *supra* note 14 at para. 10.20

\textsuperscript{128} *Lai*, *ibid.*
The central principle of refugee protection is enshrined in Article 33(1) of the Refugee Convention.\(^{129}\) This is called the principle of *non-refoulement*. Article 33(1) creates a prohibition against expulsion or return ("refoulement") of refugees to face persecution, torture or other forms of cruel and inhuman treatment. The principle of *non-refoulement* states that

\[\text{[n]o Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion.}\(^{130}\)

The principle of *non-refoulement* states that a refugee cannot be returned or *refouled* to any country where he or she would face persecution, torture or other forms of cruel and inhuman treatment. In Canada, section 115(1) of the *IRPA*\(^{131}\) constitutes a statutory codification and incorporation of Article 33 of the Refugee Convention,\(^{132}\) ensuring that the principle of *non-refoulement* applies to Convention refugees and ‘persons in need of protection’.

Since the purpose of this principle is to ensure that refugees are protected against forcible return, the principle of *non-refoulement* applies to persons within a State’s territory and to those rejected at the borders.\(^{133}\) The principle of *non-refoulement* reflects

---

\(^{129}\) Refugee Convention, *supra* note 4, art. 33(1)

\(^{130}\) *Ibid.*

\(^{131}\) *IRPA, supra* note 12, s. 115 (“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.”)

\(^{132}\) Refugee Convention, *supra* note 4, art. 33

\(^{133}\) UNHCR, "The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93" *UNHCR Publications* (31 January 1994), online: UNHCR <http://www.unhcr.org/publ/RSDLEGAL/437b6db64.html>; See James C. Hathaway, *The Rights of Refugees under International Law* (Cambridge: Cambridge University Press, 2005) at 325-339 [Hathaway, *The Rights of Refugees*]. According to the European Court of Human Rights and the International Court of Justice, the duty of the principle of *non-refoulement* applies wherever states exercises effective or *de facto* jurisdiction. Therefore, the duty of *non-refoulement* is not just limited to a state's territory. The principle of *non-refoulement* could impact beyond the defined territory of a state. For example, the duty of *non-refoulement* could apply to a state's embassy or to its consular agents. It could also apply to agents of the state, which are abroad. Furthermore, the principle of *non-refoulement* also applies when a state exercises significant public power in a foreign territory. The duty of *non-refoulement*
the concern and commitment of the international community to ensure that those in need of protection would get that protection. The basis of this commitment is the security provided to refugees that they will not be forcibly returned to the countries in which they face persecution, torture or other forms of cruel and inhuman treatment, directly or indirectly.

In emphasizing the importance of the non-refoulement obligation, the Supreme Court of Canada in *Singh v. Minister of Employment and Immigration* ("Singh") affirmed that the Refugee Convention is intended to protect individuals who may not be able to claim state protection in their own country of nationality. Thus, it can be argued that according to Singh, the principle of non-refoulement provides refugees fleeing persecution with certain limited rights. Refugee claimants should not be returned to a country where their life or freedom would be threatened. Next, refugee claimants should have the right to appeal a removal order or a deportation order made against them.

The Supreme Court of Canada in *Suresh* stated that Canada cannot justify refoulement to torture on the ground of being an ‘involuntary intermediary’. The Court affirmed that it disagrees that,

in expelling a refugee to a risk of torture, Canada acts only as an "involuntary intermediary"... Without Canada's action, there would be no risk of torture. Accordingly, we cannot pretend that Canada is merely a passive participant. That is not to say, of course, that any action by Canada that results in a person being tortured or put to death would violate s. 7. There is always the question, as there is in this case, of

---

134 UNHCR, "Cases and Comments" (2000) 12 Int'l J. Refugee L. 268 at 269

135 Ibid.; See also UNHCR & Julian Weis, *The Refugee Convention, 1951: The Travaux Préparatoires Analysed, with a commentary by the Late Dr Paul Weis* (Cambridge: Cambridge University Press, 1995) at 325. The travaux préparatoires of the Refugee Convention reveal that the Committee drafting the Convention concluded that returning refugees back to the country where their life or freedom would be threatened based on their race, religion, nationality, or political opinion would be equivalent to delivering the refugees into the hands of their persecutors.

136 *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 at para. 21

137 Ibid. at para. 16

138 Ibid.

139 *Suresh, supra* note 13 at para. 55

29
whether there is a sufficient connection between Canada's action and the deprivation of life, liberty, or security.\footnote{Ibid.}

Moreover, the principle of non-refoulement requires Canada to ensure that deportation or removals to a third country from Canada does not result in a subsequent refoulement carried by that third country. States that transfer or send refugees to a third country or partner country would be in breach of the principle of non-refoulement if the third country or partner country carries out refoulement of the transferred refugees. Therefore, the sending state would be in breach of Article 33(1) of the Refugee Convention, the principle of non-refoulement, if there is a real risk that the third or partner state would remove the refugee claimant to another state, which may carry out the refoulement.\footnote{Hathaway, The Rights of Refugees, supra note 133 at 325} This argument is based on the 'complicity principle'. According to the complicity principle,

\begin{quote}
no country may return a refugee or asylum seeker to a third country knowing that the third country will do anything to that person that the sending country would not have been permitted to do itself - regardless whether the third country is a party to the 1951 Convention or to any other human rights conventions.\footnote{Stephen H. Legomsky, "Articles -- Secondary Refugee Movements And The Return Of Asylum Seekers To Third Countries: The Meaning Of Effective Protection" (2003) 15 Intl J. Refugee L. 567 (QL): see Savitri Taylor, "Protection Elsewhere/Nowhere" (2006) 18 Intl J. Refugee L. 283 (QL): "Legomsky further argued that the fact that a removing country does not actually desire the mistreatment it foresees is beside the point. It will be complicit in the mistreatment because, whether it wishes the outcome or not, it is knowingly acting in a manner which will, in fact, facilitate mistreatment."}
\end{quote}

It can be argued that the principle of non-refoulement creates a de facto duty on states to admit refugees and not to deport or remove them if there is a danger of persecution.\footnote{Hathaway, The Rights of Refugees, supra note 133 at 301} As a result, the principle of non-refoulement creates an alternative right of entry\footnote{See Tom Clark, "Rights Based Refuge, The Potential of the 1951 Convention and the need for Authoritative Interpretation" (2004) 16 Intl J. Refugee L. 584 at nn. 16-18 (The principle of non-refoulment provides protection from forcible return but it does not promise a right of entry. "Governments were evidently unwilling to grant a clear right of entry which would have completed a full right of asylum. The lack of a right of entry, that is, the lack of a right to arrive in a place of refuge, brings major problems which this essay will not explore. However, if the person can enter a State party to the 1951 Convention, Article 31 provides that an illegal means of arrival will not result in penalties. Article 33 refuge-non-refoulement-is as far towards a right to asylum as governments went when they adopted the 1951 Convention. The Convention offers protection from return, rights while remaining, and an} and a right against removal or deportation for refugees in relation with the
presence of the danger of persecution, torture or other forms of cruel and inhuman treatment. 145

However, some state parties to the Refugee Convention have rejected the arguments that the principle of non-refoulement entails the right of entry and the right against removal or deportation. For example, Australia has argued that

[a] right of entry into a State of which one is not a national does not exist under either Australian national law or under international law. Even if a person is found to be a refugee, international law prevents refoulement to the country in which persecution is feared, but does not give that person a right of permanent entry into the country of refuge. 146

2.2 PRINCIPLE OF NON-REFOULEMENT AS A CUSTOMARY PRINCIPLE AND AS A PEREMPTORY RULE

Taking into consideration the ratification and implementation status of the Refugee Convention, the CAT and the ICCPR, the majority of the international community is bound by at least one of the treaty commitments to prohibit refoulement to persecution, torture or other forms of cruel and inhuman treatment. 147 The principle of non-refoulement is found in Article 3(1) of the CAT, 148 Article 7 of the ICCPR, 149 Article 3 of the European Convention for the Protection of Human Rights and

alternative to a right of entry-the overlooking of illegal entry. The combination of Article 33 with the other relevant articles of the Convention is a form of rights based refuge. It is rights based because it can be asserted by an individual against a State party even when it is inconvenient, but only through domestic tribunals. ... The rights that have been at issue in expulsion or extradition are: the right to freedom of movement; the right to seek and obtain asylum; the right to life; the right to protection from torture and cruel, inhuman or degrading treatment or punishment; family rights and children's rights; and, the right to an effective remedy and/or access to courts.” at nn. 17-18 and 36

145 Hathaway, The Rights of Refugees, supra note 133 at 302
146 Michael Alexander, "Refugee Status Determination Conducted By UNHCR" (1999) 11 Int'l J. Refugee L. 251 at n. 19
147 Lauterpacht & Bethlehem, supra note 7 at 5
148 CAT, supra note 5, art. 3 ("No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture")
149 ICCPR, supra note 6, art. 7 (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”)
Fundamental Freedoms ("ECHR") and Article 5(2) of American Convention on Human Rights ("ACHR").

According to the Article 38(1) Statute of the International Court of Justice, which is annexed to the Charter of the United Nations, international customs are accepted as part of international law. In Reference re: Seabed and subsoil of the continental shelf offshore Newfoundland, the Supreme Court of Canada used Lauterpacht's definition to outline international customs. The Court wrote that "[i]nternational jurists speak of a custom when a clear and continuous habit of doing certain actions has grown up under the aegis of the conviction that these actions are, according to International Law, obligatory or right. In order to constitute a custom there must be substantial uniformity or consistency, and general acceptance."

The principle of non-refoulement exists independently as a customary principle. Customary principles that are incorporated in conventions would continue to exist independently. Indeed, the Cartagena Declaration on Refugees ("Cartagena Declaration") of 1984 states that the principle of non-refoulement "is imperative in regard to refugees and in the present state of international law [it] should be acknowledged and observed as a rule of jus cogens".

\[^{150}\text{European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 Nov. 1950, 213 UNTS 222, art. 3 [ECHR]: ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment.")}\]

\[^{151}\text{ACHR, supra note 11, art. 5(2) ("No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.")}\]

\[^{152}\text{Statute of International Court of Justice, 26 June 1945, Can T.S. 1945 No. 7 (entered into force 24 October 1045), online: United Nations www.icj-cij.org/ icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm}\]

\[^{153}\text{[1984] 1 S.C.R. 86}\]

\[^{154}\text{Ibid.}\]

\[^{155}\text{Lauterpacht & Bethlehem, supra note 7 at 62 : see UNHCR, "Cartagena Declaration on Refugees" Colloquium on the International Protection of Refugees (19 - 22 November 1984) at section III para. 5, online: UNHCR Research/Evaluation <http://www.unhcr.org/cgi-bin/texis/vtx/research/opendoc.htm?bl=RS/LEGAL&lid=3ae6b36e>.[Cartagena Declaration}\]

\[^{156}\text{Cartagena Declaration, ibid.}\]
Furthermore, conventional principles can also influence the formation of customary principles. In the *North Sea Continental Shelf* case, the International Court of Justice ("ICJ") affirmed that customary international law can arise from a convention by its impact and partly on the basis of subsequent state practices. This rule of customary international law becomes binding on all parties, irrespective of their adherence to the convention. In addition, the ICJ also highlighted that a norm-creating provision which has established a rule, regardless of its conventional or contractual origin, that has incorporated into the general *corpus* of international law and is accepted by *opinion juris*, becomes binding even on states that are not parties to the convention.

Therefore, the principle of *non-refoulement* is a conventional norm-creating provision. According to the Executive Committee of the UNHCR, the principle of *non-refoulement* is a fundamental humanitarian principle that is universally accepted by states. Moreover, the Executive Committee also stated that the principle of *non-refoulement* "was progressively acquiring the character of a peremptory rule of international law."

The normative character of the principle of *non-refoulement* has been reflected in the Refugee Convention, the CAT, and the ACHR. The interpretations of the prohibition of torture or other forms of cruel and inhuman treatment, elaborated through Article 3 of the ECHR and Article 7 of the ICCPR, illustrate the normative and fundamental character of the principle of *non-refoulement*.

---


158 Lauterpacht & Bethlehem, *supra* note 7 at 63

159 *Ibid.*; see *North Sea Continental Shelf*, *supra* note 157 at para. 71

160 Made up of 70 member States

161 Lauterpacht & Bethlehem, *supra* note 7 at 63 and 64

162 *Ibid.* at 65

In Soering v United Kingdom ("Soering") decision, the European Court of Human Rights explained that the interpretation of Article 3 of the ECHR upholds the absolute prohibition against refoulement to persecution, torture or other forms of cruel and inhuman treatment, without any possible exceptions or derogations. Moreover, in several subsequent cases, the European Court reaffirmed the inviolability of the principle of non-refoulement. Similarly, the Human Rights Committee concluded that in respect to Article 7 of the ICCPR, state parties cannot expose individuals to the danger of torture or other forms of cruel and inhuman treatment by way of extradition, expulsion or refoulement. Even in times of emergency, states cannot derogate from the provision of Article 7 of the ICCPR.

Furthermore, the widespread and representative participation of states with respect to international treaties such the Refugee Convention, the CAT and the ICCPR indicates that the principle of non-refoulement has attained universal acceptance. The near universal adherence to the principle of non-refoulement has been established by the participation of states in some or other treaty regimes, embodying the principle. Moreover, majority of states had incorporated the principle of non-refoulement into their internal legal regime. This can be taken as an evidence of state practice and opinion juris to support the argument of the customary principle of non-refoulement.

Therefore, the customary principle of non-refoulement would bind all states, including organs and persons exercising governmental authority. Consequently,

---

164 Soering v United Kingdom (1989) 98 ILR 270 at para.88. The applicant, Mr Jens Soering a German national was detained in prison in England pending extradition to the United States of America to face charges of murder in the Commonwealth of Virginia.
165 Lauterpacht & Bethlehem, supra note 7 at 65
167 Lauterpacht & Bethlehem, supra note 7 at 67
168 Ibid. at 68
169 Ibid. at 69
170 Ibid. at 71; See also Colin Yeo, "Agents of the State: When is an official of the State an Agent of the State?" (2002) 14 Intl J. Refugee L. 509 at n. 12 ("It is established law that 'the state' should be defined broadly and that government is responsible for the actions of 'the state'. In the United Kingdom, the Human Rights Act 1998 and the principles governing the jurisdiction of judicial review adopt an inclusive
violation of the principle of non-refoulement will engage the responsibility of states. The customary principle would prohibit any act of refoulement, including rejection at the border\(^{171}\) and removal of non-citizens without fair risk assessment, which may result in either a threat of persecution, torture or other forms of cruel and inhuman treatment including a threat to life, liberty or security.\(^{172}\)

2.2.1 Principle of non-refoulement is not limited to only formally recognised refugees

The argument that the principle of non-refoulement is limited to only formally recognized refugees is devoid of merit. Such an argument stems from the notion that refugee status is conferred in domestic law on the grounds that an asylum seeker satisfies the refugee definition in Article 1A(2) of the Refugee Convention.\(^{173}\) Article 1(A)2 of the Refugee Convention states that a refugee is defined as any person

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.\(^{174}\)

\(^{171}\) See Tara Magner, "A Less than 'Pacific' Solution for Asylum Seekers in Australia" (2004) 16 Int'l J. Refugee L. 53 at nn. 84-86 ("Refoulement is defined by the Convention to mean expulsion or return, implying a prohibition on rejection at the border. While states are not obligated to allow refugees to enter under the terms of the Convention, parties to the Convention may not repulse asylum seekers. International custom supports this reading of the non-refoulement obligation, asserting that non-refoulement has come to represent non-rejection at the border. For example, in 1967, the same year that the Convention Protocol was adopted, the United Nations General Assembly resolved that no person 'shall be subjected to measures such as rejection at the frontier'. Rather, asylum seekers should be admitted for screening and given protection.")

\(^{172}\) Lauterpacht & Bethlehem, supra note 7 at 71 (Moreover, the customary principle of non-refoulement also prohibits refoulement to any territory from which refugees would be subsequently removed to another territory where they would be at risk.)

\(^{173}\) Refugee Convention, supra note 4, art. 1A(2)

\(^{174}\) Ibid.
In Canada, Article 1A(2) of the Refugee Convention has been incorporated in section 96 of the IRPA,\textsuperscript{175} which defines a Convention refugee as having ‘well-founded fear’ of persecution based on race, religion nationality, membership of a particular social group or political opinion.

However, limiting the principle of non-refoulement to only refugees that fall under the refugee definition is an incorrect interpretation of the principle.\textsuperscript{176} Article 1A(2) of the Refugee Convention does not define a ‘refugee’ as an individual formally recognised as having ‘well-founded fear’ of persecution. There is a misconception of equating refugees with the state’s process of conferring refugee status.

In fact, the term ‘refugee’ should apply to all with ‘well-founded fear of persecution’ regardless of whether or not they are conferred with refugee status by the asylum state. According to the reedited 1992 UNHCR’s Handbook on Procedures and Criteria for Determining Refugee Status,

\begin{quote}
[a] person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.\textsuperscript{177}
\end{quote}

If recognition alone would confer refugee status, then contracting states of the Refugee Convention could subtract the application of the principle of non-refoulement and avoid the obligations arising from the Refugee Convention by not according refugee status to refugees.\textsuperscript{178}

\subsection*{2.3 Interpreting the Principle of Non-Refoulement}

In Pushpanathan \textit{v.} Canada (Minister of Citizenship and Immigration) ("Pushpanathan"), the Supreme Court of Canada indicated that rules of interpretation of the \textit{Vienna Convention on the Law of Treaties}\textsuperscript{179} ("Vienna Convention") should apply to

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{175} IRPA, \textit{supra} note 12, s. 96
  \item \textsuperscript{176} Lauterpacht & Bethlehem, \textit{supra} note 7 at 31
  \item \textsuperscript{177} UNHCR \textit{Handbook, supra} note 98 at para. 28
  \item \textsuperscript{178} Lauterpacht & Bethlehem, \textit{supra} note 7 at 32
  \item \textsuperscript{179} \textit{Vienna Convention on the Law of Treaties}, 23 May 1969, 1155 U.N.T.S. 331 [Vienna Convention].
\end{itemize}
\end{footnotesize}
domestic law relating to refugees since there is direct incorporation of the Refugee Convention into the Canadian refugee law.\textsuperscript{180} The Court used Articles 31 and 32 of the Vienna Convention for interpretation of Canadian refugee law.\textsuperscript{181} Therefore, these articles of the Vienna Convention are used to guide the interpretation of the principle of \textit{non-refoulement}, contained in Article 33(1) of the Refugee Convention.\textsuperscript{182} The Court also affirmed that several other interpretative devices could be used to interpret international treaty provisions incorporated into domestic law, such as:

the drafting history of, and preparatory work on the provision in question; the United Nations High Commissioner for Refugees' Handbook on Procedures and Criteria for Determining Refugee Status ("UNHCR Handbook"), and previous judicial comment on the purpose and object of the treaty....[and even] consider submissions of individual delegations in the travaux préparatoires,...[although the Court acknowledged] that, depending on their content and on the context, such statements "may not go far" in supporting one interpretation over another.\textsuperscript{183}

The House of Lords in \textit{Sepet v. Secretary of State for the Home Department} ("\textit{Sepet}")\textsuperscript{184} took the same interpretative approach as in \textit{Pushpanathan}\textsuperscript{185} case of Canada. In addition, the House of Lords stated that the Refugee Convention "must be seen as a living instrument in the sense that while its meaning does not change over time its application will."\textsuperscript{186} Furthermore, according to the House of Lords:

Unless it [the Convention] is seen as a living thing, adopted by civilised countries for a humanitarian end which is constant in motive but mutable in form, the Convention will eventually become an anachronism.... It is clear that the signatory states intended that the Convention should afford continuing protection for refugees in the changing circumstances of the present and future world. In our view the Convention has to be regarded as a living instrument: just as, by the Strasbourg jurisprudence, the European Convention on Human Rights is so regarded.\textsuperscript{187}

\textsuperscript{180} \textit{Pushpanathan v. Canada (Minister of Citizenship and Immigration)}, [1998] 1 S.C.R. 982 at paras. 51 and 52 \textit{[Pushpanathan]}

\textsuperscript{181} See Vienna Convention, \textit{supra} note 179, arts. 31 and 32

\textsuperscript{182} See Refugee Convention, \textit{supra} note 4, art. 33(1)

\textsuperscript{183} \textit{Pushpanathan, supra} note 180 at para. 53


\textsuperscript{185} \textit{Pushpanathan, supra} note 180

\textsuperscript{186} \textit{Sepet, supra} note 184

\textsuperscript{187} \textit{Ibid.} at para. 6
As well, in 1997, Judge Weeramantry of the ICJ, in *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)* ("Gabčíkovo-Nagymaros"),\(^{188}\) stated that treaties that deal with human rights cannot be interpreted in a manner to deny human rights in their application.\(^{189}\) Judge Weeramantry added that a Court cannot endorse violations of human rights just because such violations are sanctioned by a treaty, which dates back to a period when such actions were not considered violations of human rights.\(^{190}\)

Furthermore, in the 2003 *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*,\(^{191}\) the ICJ affirmed that a treaty cannot be read in isolation. Treaties are not “intended to operate wholly independently of the relevant rules of international law”.\(^{192}\) In addition, the ICJ has made it clear that treaty interpretation “cannot be a vehicle for revising treaty obligations, nor for reading into them what they did not contain expressly or by clear implication.”\(^{193}\)

Having discussed the principle of non-refoulement in detail, the next chapter will look at the Pre-Removal Risk Assessment (PRRA) process, which was created to uphold Canada’s obligations arising from the principle of non-refoulement.\(^{194}\) This chapter would distinguish between the refugee protection processes under the PRRA with that offered by the IRB. It would discuss the objectives of the PRRA and outline who qualifies for the process. Again, it would look at the problems with the current PRRA process, such as those caused by lack of training for PRRA Officers, the errors that officers make during risk assessment and the problems that are caused by the absence of appeal for PRRA decisions.

---


\(^{189}\) *Ibid.* at 114 and 115

\(^{190}\) *Ibid.* at 114 and 115

\(^{191}\) *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, [2003] I.C.J. Rep. 1

\(^{192}\) *Ibid.* at 50

\(^{193}\) *Ibid.*

\(^{194}\) PRRA Manual, *supra* note 14 at para. 2
CHAPTER 3: PRE-REMOVAL RISK ASSESSMENT (PRRA)

Canada’s domestic and international obligations require that removals or deportations must comply with the obligation of non-refoulement.\(^{195}\) Canada established the Pre-Removal Risk Assessment ("PRRA") as a mechanism to ensure compliance of its duty of non-refoulement.\(^{196}\) The PRRA was introduced when the \textit{IRPA} came into force in 2002.\(^{197}\) The PRRA is a process of making an assessment of the risk of persecution, torture or other forms of cruel and inhuman treatment, including the risk to life of the applicant, if subjected to removal from Canada.\(^{198}\) The PRRA process is used by CIC to ensure that a person does not fall into the class of Convention refugee or ‘persons in need of protection’ prior to removal or deportation from Canada. Removing or deporting individuals to countries where they would face persecution or torture would contravene Canada’s non-refoulement obligations. Therefore, Canada’s international human rights obligations, arising from the principle of non-refoulement, are entrenched in the PRRA process.

Pursuant to subsection 113(a) of \textit{IPRA}, a PRRA applicant whose claim to refugee protection has been rejected may present only new evidence that: (1) arose after the rejection; (2) was not reasonably available during the refugee protection hearing; or (3) could not reasonably have been expected in the circumstances to have been presented at the time of the rejection.\(^{199}\)

Under section 161 of the \textit{IRPR},\(^{200}\) a PRRA applicant may make written submissions in support of his or her application. These submissions must show that the evidence presented meets the requirements of subsection 113(a) of \textit{IRPA}.\(^{201}\) In other words, the PRRA process only accepts new evidence or evidence that could not be reasonably expected or be presented at the time of the refugee hearing. The PRRA

---

\(^{195}\) Martin Jones & Sasha Baglay, \textit{Refugee Law} (Toronto: Irwin Law Inc., 2007) at 324

\(^{196}\) PRRA Manual, \textit{supra} note 14 at para. 2

\(^{197}\) See \textit{Lai}, \textit{supra} note 22 at para. 26

\(^{198}\) Jones & Baglay, \textit{supra} note 195 at 324

\(^{199}\) See \textit{IRPA}, \textit{supra} note 12, s. 113(a)

\(^{200}\) \textit{IRPR}, \textit{supra} note 31, s. 161

\(^{201}\) See \textit{ibid.}, s. 161; See \textit{Moumaev v. Canada (Solicitor General)}, [2007] F.C.J. No. 961 at para. 27
process does not accept evidences that were previously submitted to the CIC and to the RPD for refugee determination process.

To put it differently, the PRRA process is used to determine whether there are any changes in the home country or country of habitual residence of the ineligible or failed refugee claimants prior to their removal from Canada in order to qualify them for protection under the principle of non-refoulement. Particularly, the PRRA is important to address any changes in the home country of the refugee claimant during the significant lapse of time between the original protection determination and the subsequent removal of the claimant from Canada.

Accordingly, if there is new evidence that was not available when the original refugee determination was made or if there are new events in the home country of the applicant, which establish that the claimant falls within any of the grounds for protection based on section 96 or 97 of the IRPA, then the applicant will be granted refugee protection similar to that conferred by the RPD. Therefore, a positive PRRA will result in conferring a ‘Convention Refugee’ status or ‘persons in need of protection’ status, which would make them eligible to stay in Canada and apply for permanent residence.

It is well-established that a PRRA is not intended to be an appeal of a decision of the RPD. The purpose of the PRRA process is not to create another avenue to reargue the facts that were before the RPD. In essence, PRRA is a distinct and separate process, which examines new evidence that demonstrates a possibility that the applicant could be exposed to a new, different or additional risk that could not have been contemplated at the time of the RPD decision. For instance, after the RPD decision was rendered, a new evidence for PRRA could be a violent coup d'état or an outbreak of civil war in the home country of the applicant. Such material changes put the applicant at a new risk. In such cases, the PRRA assesses those newly-asserted risks and ensures that Canada does not violate the principle of non-refoulement.

---


203 See Perez, ibid. at para. 5
Moreover, the PRRA does not amount to a second RPD hearing for two reasons. First, the PRRA process is carried out by an administrative decision-maker, who is an officer of the CIC. Second, the rejected refugee claimant applying for PRRA may present only new evidence that arose after the rejection of his or her refugee protection claim at the RPD or, alternatively, any evidence that was not reasonably available during the RPD hearing, or that the claimant could not reasonably have been expected in the circumstances to have presented the evidence at the time of rejection of refugee claim.

3.1 THE OBJECTIVES OF THE PRRA PROCESS

According to the PRRA Manual, the main objective of the PRRA is to uphold Canada’s obligation of non-refoulement. It reads as follows:

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.

The PRRA process shares the same protection objectives, is based on the same grounds and it confers the same refugee protection status as the RPD, with some exceptions and restrictions.

Another objective of the PRRA is that it was created to respond to jurisprudence from the Federal Court, which required that an assessment be made prior to removal of

---

204 Jones & Baglay, supra note 195 at 332
205 IRPA, supra note 12, s. 113(a)
206 PRRA Manual, supra note 14 at para. 2
207 See IRPA, supra note 12, s. 112(2): Exception apply to the following: 1) those facing extradition; 2) refugee claim was deemed ineligible under s. 101(1)(e); 3) previous application was rejected and the applicant has not left Canada and the prescribed period has not expired (the prescribed period is yet to be determined by regulation); and 4) the applicant had previously left on a removal order and less than 6 months have elapsed since the applicant has re-entered Canada.
208 See ibid., s. 112(3): Restrictions are outlined in s. 112(3) IRPA: 1) person is determined to be inadmissible on grounds of security, violating human or international rights or organized criminality; 2) determined to be inadmissible on grounds of serious criminality; 3) had a claim to refugee protection that was rejected on the basis of the ‘exclusion clause’, Article 1(F) of the Refugee Convention; and 4) those under security certificate
non-citizens who allege risk of persecution or torture upon removal.\textsuperscript{209} In \textit{Herrada v. Canada (Minister of Citizenship and Immigration)} ("Herrada"), the Federal Court affirmed that the main objective of the PRRA program is to assess the risks that a person could face if he or she is to be removed to his or her native country, in light of new facts arising after the RPD's decision on his or her refugee claim.\textsuperscript{210} The \textit{Herrada} decision indicated that section 113(a) of the \textit{IRPA}\textsuperscript{211} does not leave any room for ambiguity on that point. Similarly, the objective of PRRA originated from the jurisprudence of the Supreme Court of Canada, which affirmed that "everyone, including serious criminals and persons who pose a threat to national security, are entitled to a risk assessment."\textsuperscript{212}

In \textit{Figurado v. Canada (Solicitor General)} ("Figurado"), the Federal Court concluded that the PRRA process was implemented to allow individuals to apply for a review of the conditions surrounding the risk of return prior to their removal from Canada and not after their removal.\textsuperscript{213} \textit{Figurado} concluded that the PRRA process emerged as a result of the jurisprudence of the Federal Court of Appeal and the Supreme Court of Canada, which required a timely risk assessment to comply with section 7 of the \textit{Charter}.\textsuperscript{214} Moreover, the Court also confirmed that it is clear that Parliament's primary intention in enacting the PRRA process was to ensure Canada's compliance to its domestic and international duty of \textit{non-refoulement}.\textsuperscript{215}

\section*{3.2 Eligibility Requirements to Qualify for PRRA}

The PRRA process is used in three different situations. It is used to deal with failed refugee claimants, repeat claims and to deal with protection claims from any

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{209} PRRA Manual, \textit{supra} note 14 at para. 2
\item \textsuperscript{210} \textit{Herrada v. Canada (Minister of Citizenship and Immigration)}, [2006] F.C.J. No. 1275 at para. 27 [\textit{Herrada}]
\item \textsuperscript{211} \textit{IRPA, supra} note 12, s. 113(a)
\item \textsuperscript{212} PRRA Manual, \textit{supra} note 14 at para. 2; See also \textit{Singh, supra} note 136 at para. 35 (Based on section 7 of the Canadian \textit{Charter} " includes every human being who is physically present in Canada and by virtue of such presence amenable to Canadian law." at para. 35)
\item \textsuperscript{213} \textit{Figurado v. Canada (Solicitor General)}, [2005] F.C.J. No. 458 at para. 40 [\textit{Figurado}]
\item \textit{Ibid.}
\item \textit{Ibid.}
\end{enumerate}
\end{footnotesize}
individual found to be ineligible to have his or her claim determined by the RPD. This includes those who have abandoned or withdrawn their refugee claim that was previously referred to the RPD.

First, the PRRA process is open to failed refugee claimants. A refused or rejected refugee claimant, who has been issued with a removal order, can apply to the Minister of Citizenship and Immigration for a PRRA.\textsuperscript{216} Pursuant to section 112(1) of the \textit{IRPA}, a person in Canada may apply to the Minister for protection if he or she is subjected to a removal order that is in force or is named in a security certificate as described in subsection 77(1) of the \textit{IRPA}.\textsuperscript{217} Indeed, the PRRA process is open to almost everyone seeking protection from \textit{refoulement} to torture or persecution, with certain exceptions and restrictions.\textsuperscript{218} Subsection 112(2) of the \textit{IRPA} provides the exceptions to making a PRRA claim.\textsuperscript{219} The restrictions to an application for protection under the PRRA process are outlined in subsection 112(3) of the \textit{IRPA}.\textsuperscript{220}

Second, the PRRA is used to deal with all repeat claims. Pursuant to subsection 112(2)(d) of the \textit{IRPA} even those making ‘repeat’\textsuperscript{221} refugee claims can apply for PRRA after six months from their departure from Canada.\textsuperscript{222} As a rule, individuals who have made a previous refugee claim in Canada are ineligible to have a new claim referred to the RPD for determination. Repeat refugee claimants can only make new refugee protection claims after they have left Canada for more than six months from the time their removal order came into force. Such repeat refugee claim will only qualify for the PRRA process and will not be referred again to the RPD for a new hearing.

\textsuperscript{216} \textit{IRPA}, supra note 12, s. 112(1)

\textsuperscript{217} \textit{Ibid.} (Pursuant to subsection 77(1) of the \textit{IRPA} the Ministry of Public Safety and Emergency Preparedness and the Minister of Citizenship and Immigration could sign a security certificate stating that a permanent resident or foreign national is inadmissible on grounds of national security, violating human or international rights, serious criminality or organized criminality. Individuals named in a certificate will be subjected to a removal order. The non-citizens are detained and subsequently deported.

\textsuperscript{218} Norman Doyle, \textit{supra} note 27

\textsuperscript{219} See \textit{IRPA}, supra note 12, s. 112(2)

\textsuperscript{220} See \textit{ibid.}, s. 112(3)

\textsuperscript{221} Refugee protection claims from those who have a made a previous claim for refugee protection, which was rejected, are usually referred as ‘repeat claims’ in refugee law practice.

\textsuperscript{222} See \textit{IRPA}, supra note 12, s. 112(2)(d)
The third and final situation deals with protection claims from any individual found to be ineligible to have their claims determined by the RPD, including those who have abandoned or withdrawn a refugee claim that was previously referred to the RPD. A person named in a security certificate could also apply for PRRA. Individuals who have withdrawn or abandoned their refugee claims could also make PRRA applications. In addition, asylum seekers who are found to be ineligible by CIC to be referred to the RPD for refugee determination hearings could apply for refugee protection under the PRRA process. The exceptions are individuals who are subjected to extradition procedures and persons found ineligible because of any safe third country agreements.

In most cases, successful PRRA applicants would become eligible for permanent residence in Canada, similar to those with a positive refugee determination from the RPD. However, for those who are ineligible on grounds of security or serious criminality, a positive PRRA determination will only result in a stay of removal from Canada. The Minister could cancel the stay and remove such applicants from Canada if the circumstances change in their home countries.

### 3.3 The problems with the PRRA process

The UNHCR stated that the PRRA process is “an important safety net, especially when there’s a long passage of time between a negative decision [from the RPD] and removal”. However, the UNHCR also acknowledged that the PRRA is a restricted

---

223 See *ibid.*, s. 101(1)(c)
224 See *ibid.*, s. 101
225 See *ibid.*, s. 112(2)
226 See *ibid.*, s. 114(1). Positive PRRA determination will result in a stay of removal for applicants: 1) deemed inadmissible on grounds of security, violating human or international rights or organized criminality; 2) determined to be inadmissible on grounds of serious criminality because the applicants were punished by a term of imprisonment of at least two years in their home countries or if the criminal act is committed in Canada, it would constitute an offence under an criminal law of Canada and punishable by a maximum term of imprisonment of at least 10 years; and 3) rejected on the basis of section F of Article 1 of the Refugee Convention.
227 See *ibid.*, s. 114(2).
228 Norman Doyle, *supra* note 27
process that does not permit the correction of a faulty decision made in the first instance.\textsuperscript{229}

The PRRA has an extremely low acceptance rate of 3%.\textsuperscript{230} Apparently, the low rate makes it difficult to perceive that Canada is living up to its domestic and international obligation of the principle of non-refoulement. Based on the evidence provided on February 13, 2007 to the Standing Committee on Citizenship and Immigration, Amnesty International Canada indicated that it was greatly concerned about the low acceptance rate for the PRRA.\textsuperscript{231} In 2005, the national acceptance rate was 3% out of over 6800 decisions. In Quebec, the rate was just 1% and did not increase in 2006.\textsuperscript{232}

3.3.1 Lack of training and human errors

One of the problems with the PRRA process revolves around the issue of training PRRA decision-makers. A report from the Standing Committee on Citizenship and Immigration highlighted a growing concern on the amount of training received by PRRA decision-makers.\textsuperscript{233} In respect to the training, CIC officials revealed that PRRA decision-makers receive

a two-week training period during which they're trained on refugee evaluation and refugee, international, and Canadian law. They also have decision-making and weighing and balancing - evidence-assessing - skills. They are experienced officers to begin with, in terms of the immigration program and their ability to assess information, but they have two weeks of specific training with respect to refugee protection.\textsuperscript{234}

The Minister stated that PRRA Officers are provided with two-week training in addition to their pre-existing skill set. However, citing privacy laws, the CIC refused to provide the Standing Committee on Citizenship and Immigration with additional information on the competence and qualifications of PRRA Officers. Nevertheless, the

\textsuperscript{229} Ibid.

\textsuperscript{230} Standing Committee on Citizenship and Immigration, supra note 23

\textsuperscript{231} Ibid.

\textsuperscript{232} Ibid.

\textsuperscript{233} Norman Doyle, supra note 27

\textsuperscript{234} Ibid.
Committee was reassured that PRRA decision-makers also receive an “in-depth nine-day mandatory and specialised training on PRRA”.

The issue of human error in the PRRA process was also brought before the Standing Committee on Citizenship and Immigration. For example, PRRA Officers erroneously believe or assume in many instances that the persecutors are unaware of a refused asylum seeker's return to his or her country of origin. In another example, the PRRA decision-maker rejected documents and evidences based on the fact that some of them were in Arabic or because the evidences were not mentioned in the earlier claim for refugee protection before the RPD. In addition, during PRRA, officers consider certain documents as new evidence but fail to consider them during the final analysis before rendering their decision. This is contrary to the presumption that PRRA decision-makers have considered all of the evidence before them.

In Thang v. Canada (Solicitor General), the Federal Court confirmed that there is a presumption that decision-makers have considered all of the evidence before them, even if they do not refer specifically to each item. However, the more central a document is to the issue to be decided, the greater the obligation on the decision-maker to deal with it specifically. This is particularly so when the document contradicts the decision-maker's own conclusions.

Indeed, according to an eminent refugee law scholar, Goodwin-Gill, reasons for decisions are recognised as an essential prerequisite for fundamental justice. Arguably, the decision provided by PRRA Officers should identify the material facts, weigh relevant country-of-origin evidence, assess credibility, identify and interpret the relevant law; apply the law to the facts in a reasoned way, and finally determine whether the claimant would face the risk of persecution, torture or other forms of cruel and inhuman treatment if removed from Canada.

---

235 Ibid.
236 Standing Committee on Citizenship and Immigration, supra note 23
237 Ibid.
238 Ibid.
239 Thang, supra note 25
240 Ibid. at para. 7
241 See Alexander, supra note 146 at n. 79
Amnesty International Canada argued that there are systemic problems with the PRRA process.

These problems include: dismissing apparently trustworthy evidence without providing the reasoning for doing so; arbitrary choices among documentary evidence; failure to independently consider credibility once the IRB has made a negative finding; raising of the evidentiary threshold far beyond that required by statute and jurisprudence.\(^{242}\)

Consequently, the Standing Committee on Citizenship and Immigration concluded that the “CIC provide better training for PRRA Officers, particularly in regard to rules of evidence, the interpretation and application of \textit{IRPA}, and international human rights standards. The training should include consultations with stakeholders and interested parties on the standards to be used in the PRRA.”\(^{243}\)

3.3.2 Absence of right of appeal in the PRRA process

The PRRA decision is a final decision without any avenue for appeal. The PRRA Manual claims that a final PRRA decision cannot be revisited. The Manual states that “PRRA officers are considered to have performed the task for which they were empowered and consequently no longer have jurisdiction to reconsider or otherwise review their decision.”\(^{244}\)

Unsuccessful PRRA claimants do not have an unrestricted right to judicial review. Pursuant to section 72(1) of the \textit{IRPA}, a rejected PRRA applicant seeking judicial review of the PRRA decision must first seek leave of the Court.\(^{245}\) ‘Leave of the Court’ means permission to have the matter resolved before the Federal Court. The mandatory leave requirement is incorporated into the provisions of the \textit{IRPA}.\(^{246}\)

Judicial review provides the means for the courts to oversee decisions of the Minister of Citizenship and Immigration, the Minister of Public Safety and Emergency Preparedness and the Ministers’ officials and to ensure that decisions made under the

\(^{242}\) Standing Committee on Citizenship and Immigration, \textit{supra} note 23

\(^{243}\) Norman Doyle, \textit{supra} note 27

\(^{244}\) PRRA Manual, \textit{supra} note 14 at para. 5.16

\(^{245}\) \textit{IRPA}, \textit{supra} note 12, s. 72(1)

\(^{246}\) Stacey A. Sauert, “Closing the Door to Refugees: The denial of due process for refugee claimants in Canada” (2007) 70 Sask. L. Rev. 27 at para. 20

47
IRPA are in accordance with the law. The Supreme Court of Canada explained judicial review as follows:

Judicial review seeks to address an underlying tension between the rule of law and the foundational democratic principle, which finds an expression in the initiatives of Parliament and legislatures to create various administrative bodies and endow them with broad powers. Courts, while exercising their constitutional functions of judicial review, must be sensitive not only to the need to uphold the rule of law, but also to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures.

By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution. Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.

Although judicial review exists as a possibility to deal with the problems or errors made by PRRA decision-makers, there are several obstacles for seeking judicial review. According to the evidence submitted before the Standing Committee on Citizenship and Immigration, at the first level of getting leave for judicial review, about 89% of the cases are refused judicial review. Again, based on the statistics provided by the Federal Court of Canada, in respect to the number of applications for leave granted to refugees: 1) in the year 2005, out of 6007 applications only 1034 were


248 Dunsmuir, supra note 44 at paras. 27-28

249 Standing Committee on Citizenship and Immigration, supra note 23

250 Federal Court of Canada, "Statistics" (31 March 2008), online: Federal Court of Canada <http://cas-ncr-nter03.cas-satj.gc.ca/portal/page/portal/fc_cf_en/Statistics> [Federal Court of Canada]; See also Mary C. Hurley, "Principles, Practices, Fragile Promises: Judicial Review of Refugee Determination Decisions Before the Federal Court of Canada" (1996) 41 McGill L.J. 317 at n. 242 ("Federal Court annual reports do not show percentages of leave applications granted at the Trial Division level. According to figures obtained from the Federal Court Immigration Registry, 13,228 applications for leave were instituted by refugee claimants from February 1, 1993 to October 31, 1995. The total number of judicial review proceedings commenced over the same period is 1,920. It cannot be assumed that these figures overlap precisely to provide an exact percentage of leaves granted overall. Leave applications filed one year may not be decided until the following year; leave applications allowed may not be reviewed until the following year. Some judicial review proceedings tallied represent files in which leave was granted under the pre-Bill C-86 regime. Nevertheless, assuming substantial overlap, the figures indicate a low acceptance rate at the leave stage. A government statistical summary covering the period up to November 1, 1993 suggested that approximately one leave application in five had been successful since 1989, with the percentage down slightly in 1993. If this approximation holds to the present, only twenty
granted leave, which was about 17 percent of the total applications; 2) in the year 2006, out of 4656 applications only 667 were granted leave, which was about 14 percent of the total applications; and 3) in the year 2007, out of 3259 applications only 661 were granted leave, which was about 20 percent of the total applications.\textsuperscript{251} However, it should be remembered that the statistics provided by the Federal Court do not indicate the number of applications allowed for judicial review. The percentage of successful judicial review applications would always be much lesser than the number of applications granted leave for judicial review.

Furthermore, in \textit{Suresh v. Canada (Minister of Citizenship and Immigration)} ("\textit{Suresh}")\textsuperscript{252}, the Supreme Court of Canada indicated that the assessment of danger of persecution, torture or other forms of cruel and inhuman treatment upon \textit{refoulement} is highly factual and contextual and therefore, the Minister is in a superior position than the courts, in making the risk assessment.\textsuperscript{252} Indeed, the Federal Court in \textit{Augusto v. Canada (Solicitor General)} ruled that substantive review of the weight accorded to evidence does not give rise to judicial review. The Court wrote that "\text{[i]n the absence of having failed to consider relevant factors or having relied upon irrelevant ones, the weighing of the evidence lies within the purview of the officer conducting the assessment and does not normally give rise to judicial review.}\textsuperscript{253}" Therefore, judicial review cannot be considered as a solution for correcting errors made by the PRRA decision-makers.

It is now necessary to examine the role of oral hearing in the PRRA process. This will be done in the subsequent chapter, which will briefly describe the purpose of oral hearings in the PRRA process. It will elucidate about the prescribed factors that are used in assessing whether an oral hearing is required in the PRRA process. Besides, the chapter would reveal that the prescribed factors are cumulative and address only the percent of refugee claimants denied at the Board level are granted access to judicial review, as compared to one-hundred percent access for applicants in any other context. Thus, refugee claimants to whom leave is granted may be said to have already "survived" one lottery-like process. Because judicial review is not finally determinative of refugee claims, some are subjected to the process more than once."

\textsuperscript{251} Federal Court of Canada, \textit{ibid.}

\textsuperscript{252} \textit{Suresh}, supra note 13 at para. 31

\textsuperscript{253} \textit{Augusto v. Canada (Solicitor General)}, [2005] F.C.J. No. 850 at para. 9
credibility of the PRRA applicant and not the credible basis of the claim. However, using linguistic and purposive interpretation, the chapter will demonstrate that the prescribed factors need not be taken cumulatively.

Also, the next chapter would look at credibility determination in the PRRA process. It would explore the problems of credibility determination through documentary evidence and the need for oral hearings in credibility assessment. Furthermore, it will be argued that PRRA applicants have a right to oral hearing when there is absence or insufficiency of human rights data, regarding the basis of an applicant's fear of persecution. In this regard, the chapter would examine credibility assessment problems for women facing persecution in the 'private realm', which justifies the need for oral hearing in the PRRA process.

CHAPTER 4: THE ROLE OF ORAL HEARINGS IN RISK ASSESSMENT PROCESS

4.1 Oral Hearing in the PRRA Process

Under the PRRA process, assessment of the objective wellfoundedness of the fear of persecution does not require oral hearings to be conducted.254 In the same context, any determination carried out to examine if there is objective evidence of the danger of persecution, torture or other forms of cruel and inhuman treatment, does not require oral hearings.255 Objective evidence reveals country conditions through documentary evidence, and therefore, does not require oral hearings.

The purpose of oral hearing pursuant to subsection 113(b) of the IRPA and section 167 of the IRPR is to deal with the issue credibility, which would determine the result of a particular PRRA decision.256 In Zokai v. Canada (Minister of Citizenship and

254 PRRA Manual, supra note 14 at para. 12.1

255 Ibid.

256 See Zokai v. Canada (Minister of Citizenship and Immigration), [2005] F.C.J. No. 1359 at para. 7 (F.C.) [Zokai]
Immigration) ("Zokai"), the Federal Court concluded that the prescribed factors set out in section 167 of the IRPR, relate to whether there is a serious issue of the applicant's credibility. Normally, an oral hearing would not be held in PRRA cases if the applicant had a previous credibility determination made by the RPD during a refugee protection hearing. Likewise, the PRRA Manual claims that an oral hearing “will normally not be held where the [RPD] Board has already heard a claim for refugee protection and made a determination on the credibility of the applicant.”

In Zokai, the Federal Court concluded that when an applicant makes a detailed request in the PRRA application for an oral hearing, with specific reference to the factors set out in 167 of the IRPR, the PRRA decision-maker has an obligation to consider these factors, or to any other factors that led to the decision not to have an oral hearing. The PRRA decision-maker must consider the appropriateness of an oral hearing when there is a written request for one. The Court also affirmed that where credibility is central to the negative PRRA decision and there is a written request for an oral hearing, it is “incumbent on the [PRRA] Officer to consider the request for an oral hearing and to provide reasons for refusing to grant the request. The Officer's failure to do so ... constitutes a breach of procedural fairness.”

Subsection 113(b) of the IRPA provides that an oral hearing may be held in the context of a PRRA application. Section 167 of the IRPR, gives the PRRA Officer direction as to when such a hearing should be held, providing that:

For the purpose of determining whether a hearing is required under paragraph 113(b) of the Act, the factors are the following:

(a) whether there is evidence that raises a serious issue of the applicant's credibility and is related to the factors set out in sections 96 and 97 of the Act;

---

257 Ibid.
258 See Ibid. at para. 7
259 PRRA Manual, supra note 14 at para. 12.1
260 Ibid.
261 IRPR, supra note 31, s. 167
262 See Zokai, supra note 256 at para. 7
263 Ibid. at para. 12
264 IRPA, supra note 12, s. 113(b)
(b) whether the evidence is central to the decision with respect to the application for protection; and
(c) whether the evidence, if accepted, would justify allowing the application for protection. 265

All factors must be present to allow for an oral hearing. As a precondition, the PRRA decision-maker “will first have to thoroughly examine the application and the submissions and evidence provided in support of it, before assessing whether a hearing is necessary.”266 As outlined in the PRRA Manual, “[a] hearing will only be held in exceptional cases.”267

In Selliah v. Canada (“Selliah”), the Federal Court accepted that “these factors are cumulative due to the use of the conjunctive "and" in section 167 of the Regulations.”268 The cumulative nature of the factors was again reaffirmed in Demirovic v. Canada (Demirovic).269 In Demirovic, Dawson J. reaffirmed the cumulative nature by stating the following: “This interpretation flows from the use of the word "and" in paragraph (b) [of section 167 of IRPR] and is supported by the use of the phrase "the evidence" in paragraphs (b) and (c).”270

However, it could be argued that the prescribed factors need not be taken cumulatively because the French version of the text of section 167 of the IRPR reads as follows:

Pour l’application de l’alinéa 113b) de la Loi, les facteurs ci-après servent à décider si la tenue d’une audience est requise :

a) l’existence d’éléments de preuve relatifs aux éléments mentionnés aux articles 96 et 97 de la Loi qui soulèvent une question importante en ce qui concerne la crédibilité du demandeur;

265 IRPR, supra note 31, s. 167
266 PRRA Manual, supra note 14 at para. 12.2
267 Ibid. at para. 12.1
268 Selliah, supra note 38 at para. 25
269 Demirovic, supra note 38
270 Ibid. at paras. 9 and 10 (The Federal Court added that “[i]f paragraphs (b) and (c) were independent of paragraph (a) the words "the evidence" would be of vague and uncertain meaning. When read conjunctively, the section makes sense in that "the evidence" referred to in paragraphs (b) and (c) is the evidence which raises a serious issue of the applicant's credibility.”); See also Sarria v. Canada (Minister of Citizenship and Immigration), [2007] F.C.J. No. 134 at para. 17 [Sarria] (The Court concluded that factors in section 167 of the IRPR are cumulative.)
b) l'importance de ces éléments de preuve pour la prise de la décision relative à la demande de protection;

c) la question de savoir si ces éléments de preuve, à supposer qu'ils soient admis, justifieraient que soit accordée la protection.

Importantly, the Federal Court in Selliah,\textsuperscript{271} Demirovic\textsuperscript{272} and in Sarria v. Canada (Minister of Citizenship and Immigration) ("Sarria"),\textsuperscript{273} failed to consider that there is no use of the conjunctive "et" in the French version of section 167 of the IRPR.

### 4.1.1 Linguistic and purposive interpretation of the prescribed factors for oral hearing

Under section 133 of the Constitution Act, 1867,\textsuperscript{274} Acts of the Parliament of Canada must be printed and published in both the English and the French languages.\textsuperscript{275} The IRPA\textsuperscript{276} is an Act of the Parliament of Canada. The IRPR\textsuperscript{277} is a regulation adopted by the federal government. The ‘equal authenticity rule’ applies to both English and French legislations and regulations.\textsuperscript{278}

According to the Supreme Court of Canada, ‘equal authenticity rule’ “means that both language versions of a bilingual statute or regulation are official, original and authoritative expressions of the law. Neither version has the status of a copy or translation; neither enjoys priority or paramountcy over the other.”\textsuperscript{279} L’Heureux-Dubé J. in Canada (Attorney General) v Messop, stated that [i]t is an established principle of

\textsuperscript{271} See Selliah, supra note 38 at para. 25

\textsuperscript{272} See Demirovic, supra note 38 at paras. 9 and 10

\textsuperscript{273} See Sarria, supra note 270 at para. 17


\textsuperscript{275} Ruth Sullivan, Sullivan and Driedger on the Construction of Statutes, 4th ed. (Markham: Butterworths, 2002) at 73

\textsuperscript{276} IRPA, supra note 12

\textsuperscript{277} IRPR, supra note 31

\textsuperscript{278} See Sullivan, supra note 275 at 74 and 75

\textsuperscript{279} Ibid.
interpretation in Canada that French and English texts of legislation are deemed to be equally authoritative."

The most important implication of the ‘equal authenticity rule’ is that neither version of the bilingual legislation, such as the IRPA, has paramountcy over the other. Therefore, “any rule of interpretation that purports to resolve conflicts or discrepancies between the two versions by giving priority to one of the languages is inconsistent with the rule.” As a result of the ‘equal authenticity rule’, when there is a difference between the two bilingual versions, courts are bound by the rule to read, consider and rely on both versions. Therefore, if there is a difference between the French and English texts of the IRPR, both versions must be “read with care and both must be considered in resolving interpretative issues.” This was not done by the Federal Court in Selliah, Demirovic and in Sarria. The French version was not considered in determining whether the prescribed factors in section 167 of the IRPR were, in fact, cumulative. This is contrary to the ‘equal authenticity rule’.

Furthermore, the Federal Court, in Selliah and Demirovic, did not attempt to find the shared or common meaning between both the French and English texts of section 167 of the IRPR. Under the ‘shared meaning rule’, “the meaning that is shared by both [French and English version] ought to be adopted unless that meaning is for some reason unacceptable.” Before adopting a meaning that is plausible in the English text of section 167 of the IRPR, the Court in Selliah and Demirovic, should have attempted to draw on the interpretation based on the ‘shared meaning rule’. The ‘shared meaning

---

280 Canada (Attorney General) v. Mosop, [1993] 1 S.C.R. 554 at para. 103 [Mosop]. (L’Heureux-Dubé J. wrote that where there is a discrepancy between the two, it is the meaning which furthers the purpose of the legislation which must prevail. In this case, given that the purpose of the Act is to prevent discrimination and provide an equal opportunity to make the type of life one wishes, the broader of the two meanings should prevail.”); See Sullivan, supra note 275 at 75.

281 Sullivan, ibid. at 76

282 See ibid.

283 Ibid. at 78

284 Selliah, supra note 38

285 Demirovic, supra note 38

286 Sarria, supra note 270

287 Sullivan, supra note 275 at 80
rule’ could have been used in identifying “whether a word or expression should be understood in its ordinary sense or given a technical meaning.”

The primary objective of the PRRA is to uphold the human right principle of non-refoulement. The Supreme Court has, on several occasions, concluded that “[h]uman rights legislation is given a liberal and purposive interpretation. Protected rights receive a broad interpretation, while exceptions and defences are narrowly construed.” What does the court mean by purposive interpretation? Purposive interpretation is often used to interpret the Charter. In R. v. Big M Drug Mart Ltd., Dickson J. best describes the exercise of purposive interpretation as follows:

In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be, as the judgment in Southam emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the Charter was not enacted in a vacuum, and must therefore, as this Court's decision in Law Society of Upper Canada v. Skapinker, illustrates, be placed in its proper linguistic, philosophic and historical contexts.

It could be argued that a purposive interpretation would demand judges to examine the purpose and rational of texts of section 167 of the IRPR in light of the overall refugee protection purpose of the IPRA, keeping in mind the obligations arising from the international instruments like the Refugee Convention, the CAT and the ICCPR.

While it is important to balance the societal interest, interpretative doubts in legislation or regulations dealing with human rights must be “resolved in a way that advances the overall purpose of the legislation, which is promotion and protection of human rights.” According to the objective of the IRPA, outlined in section 3(2)(e) of the IRPA, the legislation aims to establish fair and efficient procedures that will

---

288 Ibid. at 85
289 Ibid. at 373
291 See generally Sharpe & Roach, ibid.
292 Sullivan, supra note 275 at 376
maintain the integrity of the Canadian refugee protection system, while upholding Canada’s respect for human rights and fundamental freedoms of all human beings. Under such context, it is well established in the jurisprudence of Supreme Court that legislations, which uphold human rights should be given a large, purposive and liberal interpretation. Consequently, there is no need to see the factors as cumulative based on the ‘equal authenticity rule’, ‘shared meaning rule’ and using purposive interpretation.

At this point, it is important to understand how credibility determination is carried out in the PRRA process. Credibility assessment is acknowledged as a necessary and unavoidable accompaniment to the weighing of evidence done by the PRRA Officer.

4.2 CREDIBILITY DETERMINATION IN THE PRRA PROCESS

Refugee scholar Guy S. Goodwin-Gill argues that

[experience shows that the refugee status determination process is often unstructured. Decision-makers commonly rely on instinct and a feel for credibility, but with inadequate attention to the problems of assessment, identification of material facts, the weight of the evidence, and standards of proof. Even where decisions are felt to be correct, lack of confidence can result from systematically basing oneself on subjective assessments and failing to articulate clearly the various steps which lead to particular conclusions and the reasons which justify each stage. Such lack of confidence can increasingly undermine the capacity to deal effectively with the caseload, whatever the strengths or weaknesses of individual applications, and no matter how many unstructured decisions are in fact right.]

293 Massop, supra note 280 at para. 94 and 95: see para. 95 (“Human rights legislation is intended to give rise, amongst other things, to individual rights of vital importance, rights capable of enforcement, in the final analysis, in a court of law. I recognize that in the construction of such legislation the words of the Act must be given their plain meaning, but it is equally important that the rights enunciated be given their full recognition and effect. We should not search for ways and means to minimize those rights and to enfeeble their proper impact. Although it may seem commonplace, it may be wise to remind ourselves of the statutory guidance given by the federal Interpretation Act which asserts that statutes are deemed to be remedial and are thus to be given such fair, large and liberal interpretation as will best ensure that their objects are attained.”)


Credibility assessment is a crucial step in assessing the genuineness of a refugee protection application. Refugee claims depend on the account of events provided by the claimants. It may be difficult to specifically corroborate the central elements of their claims. In any refugee determination process, assessment of credibility is incremental in nature. "Cumulatively, seemingly small inconsistencies and contradictions may be sufficient to impugn an applicant's credibility." Negative credibility assessment would be reminiscent of the lack of well-founded fear of persecution. This would then result in a negative PRRA determination and subsequently, the removal of the applicant from Canada. At this point, it is virtually impossible to correct the error made by any inaccurate assessment of credibility.

4.2.1 The problems with credibility determination in PRRA can be alleviated through oral hearings

This section would look at four major problems with credibility determination in PRRA. They are: 1) complication and confusion caused by poorly worded prescribed factors; 2) limitations of the objective approach of credibility assessment; 3) judicial deference to credibility assessment; and 4) applying civil standard or balance of probabilities for credibility assessment. These four problems illustrate the need for oral hearing in the PRRA process, particularly in credibility determination.

4.2.1.1 Complication and confusion caused by poorly worded prescribed factors

accepted. In some instances, applicants were rejected on credibility grounds even when they seemed to present more detailed and substantiated cases than accepted applicants.” at n. 36)  


297 Generally speaking, the PRRA process is not going to be error free. Practically, there are going to be PRRA decisions in which true refugee claims are determined as not credible and therefore, refused refugee protection. For instance, according to the Standing Committee on Citizenship and Immigration, in 2005, 97% of over 6800 PRRA decisions were refused refugee protection. However, out of these PRRA rejections, there could be those who are wrongly disbelieved and refused refugee status. Consequently, some of these rejected PRRA applicants are removed by Canada to places where they could be persecuted, imprisoned, tortured, or even killed by their persecutors. Therefore, credibility assessment is an important aspect of the PRRA process.

57
The complication and confusion for credibility assessment in PRRA process arises from poorly worded prescribed factors, outlined in section 167 of the IRPR. In Tekie v. Canada (Minister of Citizenship and Immigration) ("Tekie"), Phelan J., pointed out that

[section 167 is an awkwardly worded section. On one reading of the section, paragraph (a) suggest that the evidence at issue is evidence which challenges the presumption of the Applicant's credibility. However, in paragraph (c), that same evidence would be evidence that would favour an Applicant. In my view, section 167 becomes operative where credibility is an issue which could result in a negative PRRA decision. The intent of the provision is to allow an Applicant to face any credibility concern which may be put in issue.]

Contrary to position adopted in Tekie, the PRRA Manual argues that there is a distinction between an oral hearing to assess the credible basis of the application and a hearing to assess the credibility of the applicant. The Manual claims that a hearing to assess the credible basis of the application will be based on submissions and other documentary evidence. No oral hearing is necessary to assess the credible basis of the application. Here, the PRRA decision-makers determine through documentary evidence what the true facts are and then assess what potential exists in a situation which indicates an applicant is or is not likely to be harmed as defined in the protection grounds. In addition, it is conceivable that, should the PRRA officer conclude that there exists an objective well-foundedness of the fear based on the documentary evidence, the subjective fear is also present. A hearing will not be necessary in such a case. The purpose of the hearing is not to collect information in a general way; this is done through submissions.

Therefore, the PRRA Manual, effectively, removes the use of oral hearings to address issues concerning the credibility of a claim. This, indeed, restricts the discretion of the

---

298 IRPR, supra note 31, s. 167. The factors listed in section 167 of the IRPR reads as follows:

For the purpose of determining whether a hearing is required under paragraph 113(b) of the Act [IRPA], the factors are the following:

whether there is evidence that raises a serious issue of the applicant's credibility and is related to the factors set out in sections 96 and 97 of the Act;

whether the evidence is central to the decision with respect to the application for protection; and

whether the evidence, if accepted, would justify allowing the application for protection.


300 PRRA Manual, supra note 14 at para. 12.2

301 Ibid.
PRRA Officer to call for an oral hearing to make clarifications concerning a serious issue of credibility pertaining to the claim. It could be argued that this restriction may hinder the credibility determination process in the PRRA.

Nevertheless, oral hearings could be used to assess the credibility of the PRRA applicant. Here, an oral hearing will be considered by the officer only if there is new evidence on an issue that is central to the decision and would lead to a positive decision if not for doubts on the applicant’s credibility. This is to say, but for the credibility of the PRRA applicant, the PRRA Officer is inclined to give a positive decision.\textsuperscript{302} Again, the Manual claims that there is no need to assess the credibility of the applicant, if it was assessed earlier by the RPD.

As a result of the confusion in credibility assessment created because of the awkwardly worded section 167 of the IRPR,\textsuperscript{303} the Standing Committee on Citizenship and Immigration recommended that “CIC ensure that section 167 of the Immigration and Refugee Protection Regulations be applied so as to afford an oral hearing whenever credibility is at issue and in all cases where the applicant was denied a hearing before the IRB.”\textsuperscript{304}

\subsection*{4.2.1.2 Limitations of the objective approach of credibility assessment}

The PRRA decision-makers “determine through documentary evidence what the true facts are and then assess what potential exists in a situation which indicates an applicant is or is not likely to be harmed as defined in the protection grounds.”\textsuperscript{305} The PRRA Officer looks for the existences of objective fear based on the documentary evidence that leads the officer to believe the applicant is not credible, and that determination would be central to the decision.”

\textsuperscript{302} \textit{Ibid.} In such cases, “where the application appears to be credible and should be allowed, a hearing need not be conducted. Where the applicant has had a claim for refugee protection that was considered by the [IRB] Board and the [IRB] Board has made a determination on the credibility of the applicant, the PRRA officer will not, in normal circumstances, need to conduct a separate hearing. However, a hearing may be contemplated where the [IRB] Board has either determined that the applicant was credible or did not make any conclusion on the credibility of the applicant, but the PRRA officer is confronted with some evidence that leads the officer to believe the applicant is not credible, and that determination would be central to the decision.”

\textsuperscript{303} See \textit{IRPR, supra} note 31, s. 167; See \textit{Tekie, supra} note 299 at paras. 15 and 16.

\textsuperscript{304} Norman Doyle, \textit{supra} note 27

\textsuperscript{305} PRRA Manual, \textit{supra} note 14 at para. 12.2
evidence. On the whole, the PRRA process has moved credibility assessment away from a traditional subjective and objective approach to a total objective approach.

By providing a list of specific elements on which to base credibility decisions, the U.S. and Canadian guidelines represent a considerable advancement. They move credibility assessment away from a subjective approach, where an applicant's truthfulness is entirely in the eye of the beholder, to a system where decisions should be based on concrete factors. Yet, while they set out the ingredients for sound credibility assessments, they do not completely resolve how to actually make credibility findings. The problem with the current approach is that listing factors to be considered in a credibility assessment does not help decision-makers decide how to weigh them in an individual case, especially in a borderline case.\(^{306}\)

An incorrect assessment of credibility could lead to the removal of the applicant from Canada to the hands of his or her persecutors. PRRA credibility determinations are generally based on personal assessment of the officer handling a particular case.

Despite its importance, credibility-based decisions in refugee and asylum cases are frequently based on personal judgment that is inconsistent from one adjudicator to the next, unreviewable on appeal, and potentially influenced by cultural misunderstandings. Some of the people who need protection most are especially likely to have trouble convincing decision-makers that they should be believed.\(^{307}\)

To address the problem of incorrect credibility assessment, many PRRA applicants requested the disclosure of a draft risk assessment report so that the applicants could deal with perceived errors or omissions. Although this issue has been subjected to considerable litigation, the Federal Court has shown deference to the government's stand. The Federal Court has held that the duty of fairness does not require the disclosure of a preliminary risk opinion to an applicant prior to a final decision.\(^{308}\) In *Rasiah v. Canada (Minister of Citizenship and Immigration)*, the Court ruled that

duty of fairness does not require the disclosure of the draft risk assessment report so that the applicant can correct perceived errors or omissions. Correcting such errors or omissions is possible on judicial review. Requiring every PRRA decision to be circulated in draft would encumber and delay the already cumbersome and slow PRRA application process.\(^{309}\)

\(^{306}\) Kagan, *supra* note 295 at n. 140

\(^{307}\) *Ibid.* at n. 1

\(^{308}\) See Jones & Baglay, *supra* note 195 at 337

\(^{309}\) *Rasiah v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 711 at para. 21. *Rasiah*. “[O]verwhelming and clear jurisprudence of this Court is that there is no obligation on the PRRA officer to provide the applicant with draft reasons.”; See also *Selliah, supra* note 38 at para. 78 (F.C.) where the court ruled that “there was no duty on the Officer to disclose the results of the PRRA
The PRRA decision-makers need to fill the gaps in the prevailing system of credibility assessment. The decision-makers need a framework by which to analyze positive factors, negative factors and considerations that may explain flaws in any written PRRA claims. In other words, there may be legitimate claims in which the written testimony “is coherent in some respects, vague or contradictory in some respects, and potentially influenced by cultural or linguistic misunderstandings, natural memory flaws or trauma.” Therefore, if credibility becomes an issue in the PRRA application, then the officer has to identify credibility as an issue, set it out in clear terms and provide the PRRA applicant with an opportunity to address the issue. Under the PRRA process, this is only possible through oral hearings.

4.2.1.3 Judicial deference to credibility assessment

It is well known in law that questions of credibility, plausibility and the weight to be given to evidence are largely questions of fact and are therefore, within the jurisdiction and the expertise of the PRRA Officer. As indicated in Chakrabarty v. Canada (Minister of Public Safety and Emergency Preparedness), a high level of deference must be granted to the decisions of the PRRA officer on the basis of such findings of fact. The Court will not intervene in the PRRA officer's assessment of these matters, unless it is patently unreasonable. It is only reviewable if it is unsupported by the evidence or is capricious or perverse: Aguebor v. Minister of Employment & Immigration (1993), 160 N.R. 315; Harb v. Canada (Minister of Citizenship and Immigration), 2003 FCA 39, [2003] F.C.J. No. 108. To succeed, an Applicant must demonstrate that the findings are irrational or illogical and cannot be inferred from the evidence: Voice Construction Ltd. v. Construction and General Workers' Union, Local 92, 2004 SCC 23, [2004] S.C.J. No. 2.

As a rule, in judicial review, courts are reluctant to reassess credibility assessment done by PRRA decision-makers. This is because of the expertise of PRRA decision-makers in assessing evidence relating to facts that are within their area of jurisdiction.

---

prior to rendering a decision on the H&C application. The Officer did not breach the duty of fairness. See also Navaratnam v. Canada (Solicitor General), [2005] F.C.J. No. 14 at paras. 11-15 (F.C.) [Navaratnam]; See also Vasquez v. Canada (Minister of Citizenship and Immigration), [2005] F.C.J. No. 96 at paras. 16-28 (F.C.) [Vasquez]; See also Akpataku v. Canada (Minister of Citizenship and Immigration), [2004] F.C.J. No. 862 at para. 19 (F.C.) [Akpataku].

310 Kagan, supra note 295 at n. 140

311 Chakrabarty v. Canada (Minister of Public Safety and Emergency Preparedness), [2007] F.C.J. No. 1558 at paras. 11-13
specialized expertise. In addition, and more generally, considerations of the efficient allocation of decision-making resources between administrative agencies and the courts strongly indicate that the role to be played in fact-finding by the Court on an application for judicial review should be merely residual.

In essence, according to the Federal Court, the standard of review for PRRA Officer's decision on credibility is patent unreasonableness, which has been recently changed to reasonableness. The Federal Court concluded that the evaluation of credibility is a question of fact and the Court cannot substitute its decision for that of the PRRA Officer. The Court can only intervene if the PPRA applicant can show that the decision does not meet the standard of reasonableness. The Court would not interfere with the PRRA Officer's credibility assessment because the officer has specialised knowledge and authority to assess the evidence "as long as inferences are not unreasonable and ... [the] reasons are set out in clear and unmistakable terms."

Above all, when a PRRA Officer finds a lack of credibility based on inferences, there must be a basis in the evidence to support such inferences. PRRA Officers should not base their decision on assumptions and speculations for which there is no real evidentiary basis. In Jones v. Great Western Railway Co., Lord Macmillan explained the distinction between reasonable inference and pure conjecture:

The dividing line between conjecture and inference is often a very difficult one to draw. A conjecture may be plausible but it is of no legal value, for its essence is that it is a mere guess. An inference in the legal sense, on the other hand, is a deduction from the

313 Ibid.
314 E.L.D. v. Canada (Minister of Citizenship and Immigration), [2005] F.C.J. No. 1812 at para. 57 [E.L.D.]; See Dunsmuir, supra note 44 at paras. 34, 44-45. The Supreme Court concluded that conclude that there ought to be two standards of review, correctness and reasonableness. It collapsed patent unreasonableness and reasonableness simpliciter into the single standard of reasonableness.
315 Bilquees v. Canada (Minister of Citizenship and Immigration), [2004] F.C.J. No. 205 at para. 7 [Bilquees]; See also E.L.D., ibid. at para. 61
316 See Dunsmuir, supra note 44 at para. 47. By reasonableness the court looks for a decision "with the existence of justification, transparency and intelligibility within the decision-making process...[and] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."
317 Bilquees, supra note 315 at para. 7; See also E.L.D., supra note 314 at para. 61
evidence, and if it is a reasonable deduction it may have the validity of legal proof. The attribution of an occurrence to a cause is, I take it, always a matter of inference.\textsuperscript{318}

Therefore, PRRA Officers are entitled to make their decision on reasonable inference and not on pure conjecture.

The UNHCR Handbook states how ‘benefit of doubt’ operates in the refugee protection process.

It is a general legal principle that the burden of proof lies on the person submitting a claim. Often, however, an applicant may not be able to support his statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. … Even such independent research may not, however, always be successful and there may be statements that are not susceptible of proof. In such cases, if the applicant’s account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt.\textsuperscript{319}

The Supreme Court added that “the benefit of the doubt should, however, only be given when all available evidence has been obtained and checked and when the examiner is satisfied as to the applicant’s general credibility. The applicant’s statements must be coherent and plausible, and must not run counter to generally known facts. [emphasis added]”\textsuperscript{320}

In addition, the UNHCR Handbook advocates a liberal credibility assessment for refugee claimants taking into consideration the fact that in most cases, refugees fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents.\textsuperscript{321} Therefore, even if the burden of proof in establishing credibility rest with the PRRA applicant, “the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his [or her] disposal to produce the necessary evidence in support of the application.”\textsuperscript{322} Consequently, the requirement of


\textsuperscript{319} UNHCR Handbook, supra note 98 at para. 196

\textsuperscript{320} Chan, supra note 106 at para. 142; See ibid. at para. 204

\textsuperscript{321} See UNHCR Handbook, ibid. at para. 196

\textsuperscript{322} Ibid.
evidence should not be applied too strictly, in view of the difficulty of proof inherent in
the situations in which refugees flee seeking protection from persecution.\textsuperscript{323}

For the most part, in respect to credibility assessment, the PRRA Officers are not
obliged to identify and explain every piece of evidence contrary to their assessment.\textsuperscript{324}
Asking the PRRA Officers to refer to every piece of evidence that they have received,
which is contrary to their finding, and to explain how they have dealt with it would halt
the entire PRRA process. The Federal Court indicated that it

would be far too onerous a burden to impose upon administrative decision-makers who
may be struggling with a heavy case-load and inadequate resources. A statement by the
agency in its reasons for decision that, in making its findings, it considered all the
evidence before it, will often suffice to assure the parties, and a reviewing court, that the
agency directed itself to the totality of the evidence when making its findings of fact.

However, the more important the evidence that is not mentioned specifically and
analyzed in the agency’s reasons, the more willing a court may be to infer from the
silence that the agency made an erroneous finding of fact “without regard to the
evidence”. In other words, the agency’s burden of explanation increases with the
relevance of the evidence in question to the disputed facts. Thus, a blanket statement
that the agency has considered all the evidence will not suffice when the evidence
omitted from any discussion in the reasons appears squarely to contradict the agency’s
finding of fact. Moreover, when the agency refers in some detail to evidence supporting
its finding, but is silent on evidence pointing to the opposite conclusion, it may be easier
to infer that the agency overlooked the contradictory evidence when making its finding
of fact.\textsuperscript{325}

Therefore, oral hearings become an avenue to ensure that a reasonable opportunity is
provided to PRRA applicants to present all necessary evidence. At the same time, PRRA
Officers could use oral hearings to better understand the relevance of the evidence in
question to any seriously disputed facts.

\textbf{4.2.1.4 Applying a higher standard of proof for PRRA credibility
assessment}

The \textit{IRPA} is silent on the standard of proof applicable to prove persecution,
torture or other forms of cruel and inhuman treatment in the PRRA process. The \textit{IRPA}
does not expressly state the standard of proof applicable to refugee protection. In \textit{Adjei

\textsuperscript{323} See \textit{ibid.}.

\textsuperscript{324} See \textit{Wei, supra} note 296 at para. 42 (F.C.); See \textit{Cepeda-Gutierrez, supra} note 312 at para. 16
\textsuperscript{325} \textit{Cepeda-Gutierrez, ibid.} at paras. 16 and 17; See \textit{Wei, ibid.} at para. 42.
v. Canada (Minister of Employment & Immigration), the Federal Court of Appeal stated that anything more than a ‘mere possibility’ is persecution. Again, the Federal Court of Appeal modified the standard to ‘reasonable possibility’ in Ponniyah v. Canada (Minister of Employment and Immigration), by concluding the following:

What is evidently indicated by phrases such as "good grounds" or "reasonable chance" is, on the one hand, that there need not be more than a 50% chance (i.e., a probability), and on the other hand that there must be more than a minimal possibility. We believe this can also be expressed as a "reasonable" or even a "serious possibility", as opposed to a mere possibility. An applicant, according to Adiei, does not have to prove that persecution would be more likely than not. He has to establish "good grounds" or "reasonable chance" for fearing persecution. "Good grounds" or "reasonable chance" is defined in Adiei as occupying the field between upper and lower limits; it is less than a 50% chance (i.e. a probability), but more than a minimal or mere possibility. There is no intermediate ground: what falls between the two limits is "good grounds".

However, the PRRA Manual advocates that a civil standard or balance of probabilities should apply to those seeking protection from the CAT, in the context of subsections 97(1)(a) and (b) of the IRPA. The question here is why should there be a distinction between the standard of proof applied for those seeking protection from the Refugee Convention and those seeking protection from the CAT? In other words, why those seeking protection through the Refugee Convention should be treated more leniently, using the standard of ‘reasonable possibility’ and on the other hand, PRRA applicants seeking protection through the CAT be imposed with a more onerous civil standard or balance of probabilities?

In response to this question, the Federal Court of Appeal, in Li v. Canada (Minister of Citizenship and Immigration), ruled that

nothing in subsection 97(1) suggests that the standard of proof to be applied in assessing the danger or risk described in paragraphs 97(1)(a) and (b) is anything other than the usual balance of probabilities standard of proof.... The standard of proof for purposes of section 97 is proof on a balance of probabilities.

Currently, those seeking protection under the Refugee Convention only need reasonable or serious possibility for their claim to be generally believable. Instead, PRRA

---

326 Adiei v. Canada (Minister of Employment & Immigration), [1989] 2 F.C. 680 (F.C.A.); See Walman, Canadian Immigration, supra note 63 at 299.


328 PRRA Manual, supra note 14 at para. 10.17

329 Li v. Canada (Minister of Citizenship and Immigration), [2005] F.C.J. No. 1 at para. 14
applicants seeking protection from the CAT need a higher threshold of the civil standard of proof to establish their claim. The civil standard of proof could confuse the nature of credibility assessment because credibility assessment is a more limited determination of whether the claimant's testimony can be considered in the ultimate decision on whether or not to grant refugee protection.\textsuperscript{330} In such context, oral hearings would make it much easier for the PRRA process to assess credibility.

Refugees are protected by the principle of non-refoulement elaborated in the Refugee Convention and the CAT. To assess PRRA applicants using a differential standard of proof implies that there are different standards to the principle of non-refoulement. This is not the case with the principle of non-refoulement. The principle of non-refoulement does not mutate differently in different conventions. The danger or risk either exists or not. If danger or risk exists, then it would affect those protected by the Refugee Convention in the same manner as those protected by the CAT. Arguably, the better approach is to apply the same standard of proof for both classes of refugees seeking protection from the Refugee Convention and the CAT.\textsuperscript{331}

4.3 THE RIGHT TO AN ORAL HEARING IN THE PRRA

Article 1A(2) of the Refugee Convention states that a refugee is a person who is outside his or her country of origin owing to a ‘well-founded fear’ of persecution on account of his or her race, nationality, religion, membership in a particular social group, or political opinion. ‘Well-founded fear’ is the essence of international and Canadian refugee protection. Consequently, not everyone who alleges fear of serious harm amounting to persecution may be eligible for Convention refugee protection.

\textsuperscript{330} See Kagan, supra note 295 at n. 67 (‘Various factors make it difficult for adjudicators to determine accurately the applicant’s credibility. These include differences in cultural norms, the effect of an asylum seeker’s past traumatic experiences and flight on her ability to recall events, language barriers, the adversarial nature of the hearing, the asylum seeker’s limited access to legal counsel, and the adjudicator’s sometimes inaccurate perceptions of foreign culture and politics.’ at n.37)

\textsuperscript{331} See Walman, Canadian Immigration, supra note 63 at 299.
The Supreme Court of Canada indicated that the crucial requirement for refugee status is the existence of the ‘well-founded fear’ of persecution in the refugee claim.\textsuperscript{332} In Kwiatkowski v. Canada (Minister of Employment and Immigration), the Supreme Court of Canada confirmed that in reference to a person claiming to be a refugee, the individual should exhibit a subjective fear of persecution “if he [or she] was returned to his [or her] homeland but that his [or her] fear had to be assessed objectively in order to determine if there was a foundation for it.”\textsuperscript{333}

Evaluation of both subjective and objective fear of persecution is outlined as the traditional bipartite test, which is used to determine the ‘well-founded fear’ of persecution in a refugee protection claim. According to the UNHCR, the term ‘well-founded fear’ “contains a subjective and an objective element, and in determining whether ‘well-founded fear’ exists, both elements must be taken into consideration.”\textsuperscript{334} Similarly, the Supreme Court of Canada had confirmed the bipartite test for ‘well-founded fear’ of persecution. According to the Court,

(1) the claimant must subjectively fear persecution; and (2) this fear must be well-founded in an objective sense…. The subjective component relates to the existence of the fear of persecution in the mind of the refugee. The objective component requires that the refugee’s fear be evaluated objectively to determine if there is a valid basis for that fear.\textsuperscript{335}

Particularly, the traditional bipartite test for ‘well-founded fear’ has been the subject of on-going scholarly debate. Some have argued for a single objective test for ‘well-founded fear’. Refugee law scholars, such as Hathaway, argue for a single objective test for ‘well-founded fear’. Hathaway argues that the traditional position is historically unfounded because the term ‘fear’ in the Refugee Convention denotes a prospective assessment of risk and not the examination of the emotional state of mind of the refugee claimant.\textsuperscript{336} In Yusuf v. Canada (Minister of Employment and Immigration),

\textsuperscript{332} Kwiatkowski v. Canada (Minister of Employment and Immigration), [1982] 2 S.C.R. 856 [Kwiatkowski]
\textsuperscript{333} Ibid.
\textsuperscript{334} Adjin-Tettey, supra note 48 at para. 4
\textsuperscript{335} Ward, supra note 95 at para. 47 (QL); See Adjin-Tettey, ibid. at nn. 9-12
\textsuperscript{336} See Hathaway, The Law of Refugee Status , supra note 84 at 69. Hathaway supports his argument for a single objective test for ‘well-founded fear’ using Grahl-Madsen’s argument that “the frame of mind of
the Federal Court of Appeal highlighted the problem with the traditional bipartite test for 'well-founded fear' of persecution. Hugessen J. writing for the Court stated the following:

I find it hard to see in what circumstances it could be said that a person who, we must not forget, is by definition claiming refugee status could be right in fearing persecution and still be rejected because it is said that fear does not actually exist in his conscience. The definition of a refugee is certainly not designed to exclude brave or simply stupid persons in favour of those who are more timid or more intelligent. Moreover, I am loath to believe that a refugee status claim could be dismissed solely on the ground that the claimant is a young child or a person suffering from a mental disability, he or she was incapable of experiencing fear the reasons for which clearly exist in objective terms.\textsuperscript{337}

Furthermore, Hathaway claims that French text of the Refugee Convention states\textit{ craignant avec raison d'être persécutée}, which refers to fear as a prospective assessment of risk and not as the emotional state of mind of the refugee claimant.\textsuperscript{338} Consequently, under the single objective test, evidences about the human rights data on the country of origin provide the basis for objective fear. In other words, "refugee protection is not extended to persons whose fear of persecution is not substantiated by objective conditions in the home country."\textsuperscript{339}

The PRRA does not call for an oral hearing when there is an absence or insufficiency of the data regarding the PRRA applicant's fear of persecution. However, Hathaway reminds that where there is insufficient or "absence of human rights data regarding the basis of a claimant's fear of persecution, the consistent and credible testimony of a claimant can constitute the objective foundation of [his or] her claim."\textsuperscript{340} Similarly, the Canadian Courts have recognised "that a claimant's plausible, credible, and consistent testimony, in the absence of evidence to the contrary, is sufficient to establish the whole of the evidence of objective risk necessary to support a well-founded ...

\textsuperscript{337} Yusuf v. Canada (Minister of Employment and Immigration), [1991] F.C.J. No. 1049 (F.C.A.); See also Adjin-Tettey, \textit{ibid}. at para. 10

\textsuperscript{338} See Adjin-Tettey, \textit{ibid}. at para. 10. "Hathaway further points out that requiring evidence of a subjectively internalised fear is illogical and can lead to absurd results because it results in differential treatments for persons identically situated, but whose individual temperaments or tolerance are different."

\textsuperscript{339} \textit{Ibid}. at para. 23

\textsuperscript{340} \textit{Ibid}. at para. 19

68
fear of persecution."\textsuperscript{341} For example, in \textit{Sathanandan v. Canada (Minister of Employment and Immigration)} ("Sathanandan"), the Federal Court of Appeal took notice that the IRB had no documentation about young females are forcibly recruited by militant groups in Sri Lanka indicating the susceptibility of women to such harm.\textsuperscript{342} Mahoney J., in \textit{Sathanandan}, followed a previous ruling provided in \textit{Maldonado v. Minister of Employment and Immigration} ("Maldonado"), where the Federal Court of Appeal ruled that "[w]hen an applicant swears to the truth of certain allegations, this creates a presumption that those allegations are true unless there be reason to doubt their truthfulness [...]".\textsuperscript{343}

The oral testimony provided during a PRRA oral hearing can be used to clarify and supplement the written submissions previously provided by the PRRA applicant. Hathaway argues that credible and consistent testimony of refugee claimants should be considered as objective evidence.\textsuperscript{344} This is supported by \textit{Sathanandan} and \textit{Maldonado} decisions. Therefore, it can be argued that in the absence or insufficiency of human rights data regarding the basis of a PRRA applicant's fear of persecution, the PRRA decision-maker could conduct an oral hearing to make an objective 'well-founded fear' assessment from the testimony of the PRRA applicant.\textsuperscript{345} Using Hathaway's reasoning, it could be argued that only a consistent and credible testimony of the PRRA applicant can be substituted for 'well-founded fear' of persecution when there is lack of human rights data supporting the risk of persecution, torture or other forms of cruel and inhuman treatment as claimed in the PRRA. Oral hearings provide an avenue to obtain consistent and credible testimony of the PRRA applicant. Consequently, oral hearings can serve to provide the evidence of objective risk necessary to support a well-founded fear of persecution in the PRRA process.

\textsuperscript{341} \textit{Ibid.} at para. 33

\textsuperscript{342} [1991] F.C.J. No. 1016 (F.C.A.); See also Adjin-Tettey, \textit{ibid.} at para. 33


\textsuperscript{344} See Adjin-Tettey, supra note 48 at para. 19

\textsuperscript{345} See \textit{ibid.}
That being said, those in favour of the traditional bipartite test for ‘well-founded fear’ have highlighted the importance of the subjective element of the ‘well-founded fear’. The UNHCR Handbook states that the assessment of the subjective fear cannot be ignored in credibility assessment because psychological reactions of different refugee claimants may not be the same in identical conditions.\textsuperscript{346} For example, some may have stronger political or religious convictions, without which their lives become intolerable.

Moreover, the subjective element is important in the assessment of credibility, particularly, in cases where there is a lack of clarity on the facts provided by the PRRA applicant on record.\textsuperscript{347} In such cases, the PRRA Officer has to take into account the personal and family background of the PRRA applicant. In order to assess well-founded fear, the PRRA Officer has to consider the applicant’s membership of a particular racial, religious, national, social or political group, the applicant’s own interpretation of his or her situation, and his or her personal experiences.\textsuperscript{348}

It could be argued that the PRRA decision-maker has to consider “everything that may serve to indicate that the predominant motive for his application is fear. Fear must be reasonable. Exaggerated fear, however, may be well-founded if, in all the circumstances of the case, such a state of mind can be regarded as justified.”\textsuperscript{349} In such circumstances, the PRRA Officer should consider an oral hearing for credibility assessment.\textsuperscript{350}

However, the prescribed factors for oral hearing in PRRA process make it difficult or impossible to conduct an oral hearing to assess credibility when there is lack of clarity on the facts provided by the PRRA applicant. The PRRA Manual confirms that oral hearings are to be held only in exceptional cases and to assess the credibility of the applicant and not the credibility of the claim.\textsuperscript{351} It can be argued that PRRA process

\textsuperscript{346} See UNHCR Handbook, supra note 98 at para. 40
\textsuperscript{347} See \textit{ibid}. at para. 41
\textsuperscript{348} See \textit{ibid}.
\textsuperscript{349} \textit{Ibid}.
\textsuperscript{350} There can be a strong argument made about the relevance of subjective fear in the PRRA, but such an analysis is beyond the scope of this thesis.
\textsuperscript{351} PRRA Manual, \textit{supra} note 14 at para. 12.1
follows Hathaway’s argument for single objective test to determine the credibility in PRRA claims. However, the PRRA process should not separate the credibility of the applicant and the credibility of the claim into two distinct elements in credibility assessment.

Although there is merit in Hathaway's argument for single objective test in refugee protection, there may be situations in which life in the country of origin of a PRRA applicant has become so insecure that the only way out of his or her predicament is to leave his or her country of origin. In such circumstances, the subjective element has a greater contribution to the ‘well-founded fear’ standard. For example, the UNHCR's Director of International Protection observed:

Persecution cannot and should not be defined solely on the basis of serious human rights violations. Severe discrimination or the cumulative effect of various measures not in themselves alone amounting to persecution, as well as their combination with other adverse factors, can give rise to a well-founded fear of persecution, or, otherwise said: make life in the country of origin so insecure from many perspectives for the individual concerned, that the only way out of this predicament is to leave the country of origin.\(^{352}\)

Even if it is important to analyse refugee protection under the context of the international human rights at the country of origin, the “additional subjective element of the Convention definition captures a need for protection that is outside the realm of a pure human rights assessment and which cautions against tying the concept of persecution exclusively to human rights law.”\(^{353}\) In other words, although persecution will usually involve breaches of human rights law, it is not necessary to identify a violation of human rights law in each and every case in order to establish persecution.\(^{354}\)

Therefore, the proponents of the traditional bipartite test for ‘well-founded fear’ of persecution argue that the single objective standard would collapse the ‘well-founded fear’ analysis into international human rights assessment of the country of origin. Moreover, since there is no accepted international definition as to what constitutes persecution, it would be unwise to restrict persecution to serious human right abuses,


\(^{353}\) Ibid.

\(^{354}\) Feller, Türk & Nicholson, supra note 52 at 50
particularly, because not all forms of persecution have been identified and codified into international human rights law.\footnote{Ibid.}

For instance, some women face considerable difficulty in establishing their claims for refugee protection. In these cases, female PRRA applicants come from countries where they are denied any education and they may be illiterate. They may come from countries where they are denied meaningful participation in life and they may be inarticulate. Some of the female refugee claimants would have lived in seclusion. According to the UNHCR, there may be very little documented data on "their status and treatment, both in their society at large and in the home. Most importantly, there may be little information as to their ability to access meaningful State protection."\footnote{Ibid. at 339; See also N.O. v. Canada (Minister of Citizenship and Immigration), [2004] F.C.J. No. 1884 at para. 17 [N.O.] (The Federal Court of Canada has reiterated that "while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application.")} Under such circumstances, the UNHCR claims that the decision-maker has a shared responsibility with the refugee claimant to ascertain all the relevant facts, especially for gender-related refugee claims. Therefore, the PRRA decision-maker must have the opportunity to conduct oral hearings at the decision-maker's discretion to determine the genuine risk of persecution to bring about a more gender-inclusive PRRA regime.

Oral hearings in the PRRA process can serve to complete or complement the PRRA claim in situations where the "unavailability of corroborative evidence creates doubt regarding the credibility of the claimant."\footnote{Adjin-Tettey, supra note 48 at para. 35} For example, oral hearings could be used to assist in PRRA claims where reports of human rights organisation either fail or are not able to cover extensively on the risk of persecution faced by women. Most human rights "documents may not necessarily include the extent to which women may risk violation of their human rights in the so-called 'private realm,' and therefore cannot
be a basis for corroborating women's claim to fear persecution arising from privately-inflicted harms.”

In many cases, women fleeing privately-inflicted gender-related harms are unable to produce evidence due to lack of documentation of the persecutions occurring in the ‘private realm’. In addition, women who have undergone serious trauma, such as Rape Trauma Syndrome or Battered Women Syndrome are usually reluctant to provide testimony or they tend to confuse the details when presenting their evidence. Such an applicant may suffer from “persistent fear, loss of self-confidence and self-esteem, difficulty in concentration, an attitude of self-blame, a pervasive feeling of loss of control, and memory loss or distortion.” In such cases, the UNHCR and the IRB have advocated that “extreme sensibility is to be employed in eliciting information from or assessing the credibility” of refugee claimants.

Although most of the gender-discriminatory practices such as female genital mutilation, sati, forced marriages, "honour" deaths, and others have been formally outlawed in some countries, these practices still persist. Similarly, although domestic violence may have been criminalised in many countries, women are still susceptible to abuse in the home with no hopes of vindication. Whether it is by the strength of tradition, police ineffectiveness or unwillingness to protect vulnerable women, a weak judiciary or simply the creation of a facade of protecting women's rights, women still live under the threat of these potentially harmful practices in many parts of the world. It will therefore be regrettable to deny refugee status to a woman because her credible testimony of a threat of harm is contradicted by documentary evidence of formal prohibitions.

In gender-related PRRA claims, oral hearings serve to bring out all the relevant facts and provide the PRRA decision-maker an avenue to share the responsibility of drawing out the evidences required to establish the claim.

Again, the credibility of the applicant and the credibility of the claim cannot be separated since they are, at times, intrinsically linked to the risk of harm alleged. This is because the PRRA Officer must look at the totality of the evidence before making an

358 Ibid. at para. 34
359 Ibid. at para. 32
360 Ibid. at para. 14
361 Ibid.
362 Ibid. at para. 39
assessment on the credibility of the applicant. This totality should also include explanations provided by the applicant regarding apparent inconsistencies in the application. Hence, there is a link between the credibility of the applicant and the credibility of the claim. It is obvious that an untrustworthy applicant cannot have a legitimate fear of persecution, torture or other forms of cruel and inhuman treatment. When an applicant is assessed not to be credible, then the PRRA application could be rejected by the officer even if there are extensive human rights abuses in the applicant’s home country. This is because, even though the applicant might have an objective basis for a PRRA application, if the evidence of the applicant is rejected on the basis of negative credibility of the applicant. However, this is not to say that a finding of negative credibility of the applicant is determinative of a negative PRRA decision. The adverse credibility of the PRRA applicant can influence the credibility of the claim. Consequently, the assessment of credibility is central to a claim of refugee protection under the PRRA process.

Thus, in the context of credibility assessment, it could be argued that the PRRA process has an obligation to ensure that the applicant is given an opportunity to explain inconsistencies between his or her evidence and other contradictory documentary evidence. This obligation arises when the evidence is central to the claim for refugee protection and not for every trivial inconsistency in the PRRA application. An oral hearing in the PRRA process would be an avenue to have a dialogue where the officer’s concerns could be put to the applicant and the applicant is provided an opportunity to explain and clear the inconsistencies in the evidence.

That being said, oral hearing is a part of the procedural scheme of the PRRA process. Thus, the next part will attempt to analyse how procedural fairness operates in the context of administrative hearings, such as the PRRA process. The Supreme Court

363 See generally Lorne Waldman, The Definition of Convention Refugee (Markham: Butterworths, 2001) at para. 8.44 [Waldman, The Definition]
364 See ibid. at para. 8.15
365 See generally Attakora v. Canada (Minister of Employment and Immigration), [1989] F.C.J. No. 444 (F.C.A.); See generally ibid. at para. 8.44
366 See generally Waldman, The Definition, ibid.
of Canada has on numerous occasions indicated the importance of procedural fairness in administrative decisions, particularly when such decisions substantively impact the rights of the individual.\textsuperscript{367}

It would be shown in the next part that procedural fairness for ensuring the right to a fair hearing for PRRA applicants would require that they be provided an opportunity to be heard (\textit{audi alteram partem}) either orally or in writing.

\textsuperscript{367} See \textit{Baker, supra} note 41 at para. 28
PART II:

ADMINISTRATIVE REVIEW OF PROCEDURAL FAIRNESS FOR PRRA APPLICANTS
CHAPTER 5: PROCEDURAL FAIRNESS IN THE PRRA PROCESS

This chapter will discuss the evolution of procedural fairness in administrative hearings in Canada. The discussion will examine procedural fairness at common law and the principles of fundamental justice. It would further analyse the level of deference courts should give to PRRA decisions in respect to procedural fairness. This chapter looks at the level of deference applied to PRRA decisions using the previous pragmatic and functional approach. It then deliberates on the current approach of 'standard of review' adopted by the Supreme Court. Here, it will be established that the content of the duty of fairness for PRRA requires a higher level of procedural fairness because the decisions affect the rights, interests, or privileges of the applicants in a fundamental manner, justifying the need to hold oral hearings.

5.1 EVOLUTION OF PROCEDURAL FAIRNESS IN CANADIAN ADMINISTRATIVE LAW

Until the latter half of the twentieth century, natural justice was an essential requirement adopted by Canadian courts for any process dealing with an individual’s right. Nemo judec in sua causa and audi alteram partem are two Latin terms outlining the core principles of natural justice. Nemo judec in sua causa means that no person can judge a case in which he or she is a party. Under audi alteram partem, no one should be condemned without a hearing in which they are given the opportunity to respond.

The concept of procedural fairness was developed from natural justice and applied into administrative decisions. Like natural justice, procedural fairness deals with

368 See Dunsmuir, supra note 44 at paras. 34, 44-45
369 William J. Manuel & Christina Donszelmann, Law of Administrative Investigations and Prosecutions (Aurora: Canada Law Books Inc., 1999) at 7. See Grant Huscroft, "The Duty of Fairness - From Nicholson to Baker and Beyond" in Audrey Macklin, Coursepack: Administrative Law (Faculty of Law, University of Toronto, Winter 2008) at 1, who claims that these ancient rules, audi alteram partem and nemo judec in sua causa were intended to “guarantee unbiased hearings, but their application was limited judicial and quasi-judicial spheres. So-called ‘administrative’ decisions - decisions made by executive actors - could be made without regard to any such rules. This dichotomy between judicial and administrative decisions resulted in a preoccupation with categorization, and judicial review focused on the nature of the power exercised.”
370 Manuel & Donszelmann, ibid.
the process of delivering a fair decision rather than the merits of the decision.\textsuperscript{371} There are two major principles underlying the concept of fairness: the right to be heard (\textit{audi alteram partem}) and the right to be heard by an unbiased decision-maker.\textsuperscript{372} In the course of time, in Canadian jurisprudence, procedural fairness became a more encompassing concept enclosing within its purview the older concept of natural justice.\textsuperscript{373} However, "from time to time ... lawyers and judges have tried to define what constitutes fairness. Like defining an elephant, it is not easy to do, although fairness in practice has the elephantine quality of being easy to recognize."\textsuperscript{374}

The modern concept of procedural fairness was outlined in \textit{Nicholson v. Haldimand Norfolk (Regional) Police Commissioners} ("Nicholson") by the Supreme Court of Canada.\textsuperscript{375} In \textit{Nicholson}, Laskin C.J. writing for the majority outlined the new duty of procedural fairness for administrative decisions. Laskin C.J. wrote that

> the classification of statutory functions as judicial, quasi-judicial or administrative is often very difficult, to say the least; and to endow some with procedural protection while denying others any at all would work injustice when the results of statutory decisions raise the same serious consequences for those adversely affected, regardless of the classification of the function in question.\textsuperscript{376}

The Court agreed that an administrative body is a master of its own procedure, determining the need to hold an oral hearing or have everything done through written submission.\textsuperscript{377} However, it should be noted that the administrative body is under a duty to act fairly. The duty of fairness depends on the nature of the investigation and the consequences which it may have on persons affected by it. Consequently, it is essential that if a person is adversely affected by an administrative decision without adequate

\textsuperscript{371} \textit{Ibid.}

\textsuperscript{372} Robert W. Macaulay & James L.H. Sprague, \textit{Hearings before administrative tribunals} (Toronto: Carswell, 2002) at 12-6

\textsuperscript{373} Manuel & Donszelmann, \textit{supra} note 369 at 8

\textsuperscript{374} \textit{Knight, supra} note 40 at para. 46


\textsuperscript{376} \textit{Ibid.}; See See Huscroft, \textit{supra} note 369 at 2-3.

\textsuperscript{377} See Selvarajan v. Race Relations Board, [1976] 1 All E.R. 13 at 19. In the Court of Appeal, Lord Denning wrote that "[t]he investigating body is, however, the master of its own procedure. It need not hold a hearing. It can do everything in writing. It need not allow lawyers. It need not put every detail of the case against a man," cited in Nicholson, \textit{Ibid.}
remedies or redress, then that person must be told of the case made against him or her and be afforded a fair opportunity to answer it.

In *Nicholson*, Laskin C.J. added that to endow some administrative decisions with “procedural protection while denying others any at all would work injustice when the results of statutory decisions raise the same serious consequences for those adversely affected.” Therefore, procedural fairness according to *Nicholson*, required an opportunity to be heard (*audi alteram partem*) be provided either orally or in writing.

In *Cardinal v. Kent Institution* (“Kent Institution”), a case involving a prison director’s administrative decision to segregate prisoners following alleged involvement in hostage-taking incident, Le Dain J. stated that

> because of the serious effect of the Director's decision on the appellants, procedural fairness required that he inform them of the reasons for his intended decision and give them an opportunity, however informal, to make representations to him concerning these reasons and the general question whether it was necessary or desirable to continue their segregation for the maintenance of good order and discipline in the institution.  

Le Dain J. asserted that all public authorities are bound by a common law duty of fairness. Accordingly, in *Knight v. Indian Head School Division No. 19* (“Knight”), the Supreme Court added that “[t]he existence of a general duty to act fairly will depend on the consideration of three factors: (i) the nature of the decision to be made by the administrative body; (ii) the relationship existing between that body and the individual; and (iii) the effect of that decision on the individual's rights.”

The seminal case on the duty of fairness is *Baker*, in which L’Heureux-Dubé J. concluded that the fact that a decision is administrative and affects the rights, privileges or interests of an individual is sufficient to trigger the application of the duty of fairness. According to L’Heureux-Dubé J., the content of the duty of fairness is

---

378 Manuel & Donszelmann, *supra* note 369 at 9


380 *Ibid.* at para. 21; see Manuel & Donszelmann, *supra* note 369 at 13

381 *Cardinal*, *ibid.* at para. 14

382 *Knight*, *supra* note 40

383 *Baker*, *supra* note 41 at para. 20
determined by a set of factors, which are not exhaustive. L’Heureux-Dubé J. highlighted that the duty of procedural fairness warrants that decision making in administrative bodies must provide “an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.”

Therefore, all the above cases demonstrate that procedural fairness is an integral element in any administrative process. PRRA Officers make decisions that have significant impact on the lives of the applicants. Such exercise of public powers brings along with it the duty to act fairly, particularly, “[t]he observance of fair procedures is central to the notion of the ‘just’ exercise of power.” Consequently, the duty of procedural fairness requires the PRRA Officers to provide the applicants with the right to be heard, audi alteram partem. In Kanda v. Government of Malaya, Lord Denning concluded that

[j]f the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidences has been given and what statements have been made affecting him; and then he must be given a fair opportunity to correct or contradict them.

Baker had widened the spectrum of the duty of fairness. Through Baker, the Supreme Court of Canada reinforces the legal principle that the duty of fairness should apply to decisions of administrative tribunals and in the exercise of discretion that take place in administrative decisions, such as the PRRA process.

384 Ibid. at paras. 23-28
385 Ibid. at para. 22
386 Dunsmuir, supra note 44 at para. 90
387 The term ‘hearing’ could be misleading. Hearing does not mean that oral hearings are required in all administrative decisions. See Huscroft, supra note 369 at 5. Huscroft argues that the “modern state could not function if oral hearings were required any time an administrative decision of some sort were made - a problem not only for is the state but also for those who benefit or are subject to the burden of administrative decisions. As a result, the requirement of the duty of fairness in particular circumstances vary greatly in accordance with a number of factors.”
5.2 **Procedural Fairness and the Principles of Fundamental Justice**

The evolution of procedural fairness at common law cannot be abrogated unless there is an express contrary legislative stipulation.\(^390\) In *Kent Institution*, the Supreme Court of Canada held that a general common law duty of procedural fairness rests on all public authorities. Le Dain J. wrote:

This Court has affirmed that there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual.\(^391\)

In *Kane v. University of British Columbia*, the Supreme Court asserted that “[t]o abrogate the rules of natural justice, express language or necessary implication must be found in the statutory instrument.”\(^392\) Indeed, there is a common law presumption that the “legislature intended procedural protections to apply, and for their part legislatures draft legislation with this in mind. On this approach, the courts acknowledge the supremacy of the legislature and at the same time confer quasi-constitutional protection upon the common law duty of fairness.”\(^393\)

Procedural protection is constitutionally guaranteed by the principles of fundamental justice. In *Canada (Minister of Employment and Immigration) v. Chiarelli* (“Chiarelli”), the Court mentioned that the principles of fundamental justice embrace within them the requirements of procedural fairness.\(^394\) That being said, “the requirements of fundamental justice are not immutable; rather, they vary according to the context in which they are invoked. Thus, certain procedural protections might be constitutionally mandated in one context but not in another.”\(^395\)

---

\(^{390}\) See Huscroft, *supra* note 369 at 9

\(^{391}\) *Cardinal, supra* note 379 at para. 14; See also *Baker, supra* note 41 at para. 20; See also *Dunsmuir, supra* note 44 at para. 87


\(^{393}\) Huscroft, *ibid.* at 10

\(^{394}\) See *Canada (Minister of Employment and Immigration) v. Chiarelli,* [1992] 1 S.C.R. 711 at para. 45 [Chiarelli]

\(^{395}\) *Ibid.* (The Court added that “the rules of natural justice and the concept of procedural fairness, which may inform principles of fundamental justice in a particular context, are not fixed standards” at para. 46).
Unlike the common law presumption of procedural fairness, the constitutional procedural protections becomes operational only in the context of section 7 of the Charter, when there is a limitation to life, liberty or security of the person.\textsuperscript{396} Consequently, a higher threshold has to be met for seeking procedural fairness through section 7 than at common law. Indeed, Parliament or legislatures can restrict or even oust the common law duty of fairness without breaching the constitutional guarantees of the principles of fundamental justice. In contrast, Parliament or legislatures cannot limit or oust the duty of fairness, where section 7 is infringed because such violation cannot be justified under section 1 of the Charter.\textsuperscript{397}

Furthermore, federal statute such as

the Canadian Bill of Rights, and at the provincial level statutes such as the Quebec Charter of Rights, Ontario’s Statutory Powers Procedure Act, Alberta’s Administrative Procedure Act, or the various provincial human rights legislation. As these statutes contain paramountcy provisions, their procedural provisions guarantees can displace the procedural provisions of a particular statute.

Consequently, in approaching in any procedural questions, one first looks to see whether there is a legislative provision dictating the procedure to be followed. To the extent that the procedure does not conflict with the Charter, or the Canadian Bill of Rights (for federal legislation) or any other paramount provincial statute, one follows that procedure.

Where the legislation is silent, or there is a gap to be filled, one looks to the common law principles of natural justice and fairness.\textsuperscript{398}

Therefore, the concept of procedural fairness, emanating from section 7 of the Charter, is intended to increase the procedural protection of natural justice to constitutional status relating to circumstances dealing with life, liberty and security of the person.\textsuperscript{399} Even the most restrictive interpretation of section 7 of the Charter specifically imports procedural fairness to decisions that impact life, liberty and security of the person.\textsuperscript{400} Section 7 of the Charter also eliminates the sovereignty of the legislative branch to oust the principles of natural justice in matters relating to life,

\textsuperscript{396} See Huscroft, supra note 369 at 10
\textsuperscript{397} See Macaulay & Sprague, supra note 372 at 12-9; See ibid. at 9 and 10.
\textsuperscript{398} Macaulay & Sprague, ibid. at 12-10
\textsuperscript{400} Ibid.
liberty and security of the person. Any attempt to do so will be deemed unconstitutional.

In *Knight*, the Supreme Court "analogized procedural fairness to the notion of fundamental justice entrenched in s. 7 of the Charter." The Court stated that like the principles of fundamental justice in section 7 of the *Charter*, the concept of fairness is entrenched in the principles governing Canadian legal system. Indeed, the very entrenchment of s. 7 modified the legal landscape by marking the end of parliamentary immunity from procedural obligations, this analogy suggests that the insistence on the variable nature of procedure potentially applies to a wider field of administrative decisions than that of particularized decisions and includes those of a legislative nature.

Furthermore, in *Kent Institution*, LeDain J. confirmed the relationship between the right to a fair hearing and procedural fairness from fundamental justice under section 7 of the *Charter*. LeDain J. wrote that the denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision. The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have. It is not for a court to deny that right and sense of justice on the basis of speculation as to what the result might have been had there been a hearing.

Therefore, in *Kent Institution*, the Supreme Court of Canada ruled that the minimal requirement of the duty of fairness required the prison director to "inform the inmates of his intended decision to reject the recommendation, provide reasons, and afford them the opportunity to contest his intended decision." Moreover, the duty of fairness applies to decisions that finally dispose the matter. As provided in the PRRA Manual, the officers do not have the authority to

---

401 Ibid. at 242
402 Cartier, supra note 389 at n. 124
403 Knight, supra note 40 at para. 46
404 Cartier, supra note 389 at nn. 124-125
406 Cardinal, ibid. at para. 22; See Huscroft, supra note 369 at 19
revise or reconsider their decisions once they are made. 407 Indeed, there is little argument that the duty of fairness applies to decisions that affect an individual's rights, interests or privileges. 408 As a result, it could be argued that PRRA applicants should benefit from the common law duty of fairness. 409 There is no statutory limitation or exclusion in the IRPA, restricting the common law duty of procedural fairness.

Likewise, in order to benefit from the procedural protections of section 7 of the Charter, PRRA applicants must establish that their right to life, liberty or security of the person is infringed by the decisions rendered by the PRRA Officers. 410 Even if the Charter infringement cannot be established, the applicants could still benefit from the common law presumption of procedural fairness.

Also, at times, legislations determine the required procedures for an administrative process, which may be less stringent than the common law procedural fairness. In such circumstances, the courts are very reluctant to impose onerous common law duty of fairness against a clear legislative intent. 411 On the contrary, procedural fairness requirements of the principles of fundamental justice would apply regardless of any contrary legislative intent if a section 7 right is at stake. Thus, procedural fairness would apply to PRRA applicants through the principles of fundamental justice, if any of their rights under section 7 of the Charter is infringed.

Furthermore, in Suresh, the Supreme Court explains that

[the principles of fundamental justice of which s. 7 speaks, though not identical to the duty of fairness elucidated in Baker, are the same principles underlying that duty. As Professor Hogg has said, “The common law rules [of procedural fairness] are in fact basic tenets of the legal system, and they have evolved in response to the same values and objectives as s. 7”. In Singh v. Minister of Employment and Immigration, [1985] 1 S.C.R. 177, at pp. 212-13, Wilson J. recognized that the principles of fundamental justice demand, at a minimum, compliance with the common law requirements of procedural fairness. Section 7 protects substantive as well as procedural rights: Re B.C. Motor Vehicle Act, supra. Insofar as procedural rights are concerned, the common law

407 See PRRA Manual, supra note 14 at para. 5.16
408 See Huscroft, supra note 369 at 6
409 See also Cartier, supra note 389 at nn. 141-142.
410 See Fox-Decent, supra note 47 at 4.
411 See ibid. at 5.
doctrine summarized in Baker, supra, properly recognizes the ingredients of fundamental justice.\textsuperscript{412}

In Suresh, the Court affirmed that the factors provided in Baker are indicative of not only the common law duty of fairness but also ensure if the demands for constitutional procedural protection under section 7 of the Charter are met.\textsuperscript{413} The Court highlighted that in respect to questions concerning removal or deportation to countries where there is persecution, torture or other forms of cruel and inhuman treatment, common law factors from Baker inform the procedural analysis of section 7 of the Charter. Therefore, it is necessary to look into the factors provided in Baker to understand the requisite common law duty of fairness and also comprehend what procedural protections may be required under section 7 of the Charter. However, before proceeding to analyze the content of duty of fairness in common law, it is essential to understand what level of deference courts should give to PRRA decisions, in regards to procedural fairness.

5.3 STANDARD OF REVIEW FOR PRRA DECISIONS

Judicial reviews of administrative actions are based on certain standards of review. As a rule, the standard of review ensures that administrative decision makers, such as PRRA Officers, do not exceed the authority delegated to them by statutory regimes.\textsuperscript{414} Indeed, due to complexity and specialization required in certain areas, the

\textsuperscript{412} Suresh, supra note 13 at para. 113.

\textsuperscript{413} See ibid. at para. 114.

\textsuperscript{414} See Dunsmuir, supra note 44 at paras. 29-31. The Supreme Court explained that an administrative decision maker “may not exercise authority not specifically assigned to him or her. By acting in the absence of legal authority, the decision maker transgresses the principle of the rule of law. Thus, when a reviewing court considers the scope of a decision-making power or the jurisdiction conferred by a statute, the standard of review analysis strives to determine what authority was intended to be given to the body in relation to the subject matter. This is done within the context of the courts’ constitutional duty to ensure that public authorities do not overreach their lawful powers.” The Court also informed that judicial review upholds the rule of law and maintains legislative supremacy. This is because the courts have the last word on jurisdiction and the standard of review enforces the legislative intent, thereby upholding legislative supremacy. For these reasons, the Court asserted that “[t]he legislative branch of government cannot remove the judiciary’s power to review actions and decisions of administrative bodies for compliance with the constitutional capacities of the government. Even a privative clause, which provides a strong indication of legislative intent, cannot be determinative in this respect. The inherent power of superior
legislature delegates their responsibility to certain specialized administrative bodies to implement statutory programs, such as the refugee protection program carried out by the IRB and the PRRA process. The judiciary has a role to oversee the exercise of delegated responsibility. This relationship creates a tension between the legislature’s intentions, the manner in which the administrative bodies implement the programs and the overseeing role of the judiciary. The judiciary ensures that the administrative bodies remain within their competence and do not violate fundamental constitutional principles.

Because the courts have to implement the intention of the legislature to delegate the administrative decision making to a specialized body, they have scrutinized administrative decision making with differing degrees of intensity by subjecting the administrative decisions to varying standards. In essence, the jurisprudence built upon this analysis represents the nexus at which social program implementation and the rule of law converge. This topic has been dubbed the "standard of review". 415

The standard of review accords deference in terms of reasonableness, requiring courts to give due consideration to the decisions of administrative bodies. 416

5.3.1 The Old Regime: Pragmatic and Functional Review

In Pushpanathan v. Canada (Minister of Citizenship and Immigration) ("Pushpanathan") the Supreme Court outlined the pragmatic and functional approach to judicial review. 417 This approach is used to analyse the intention of Parliament or legislatures regarding the level of deference that courts should show to administrative decisions. 418 In Chamberlain v. Surrey School District No. 36, McLachlin C.J. outlined
courts to review administrative action and ensure that it does not exceed its jurisdiction stems from the judicature provisions in ss. 96 to 101 of the Constitution Act, 1867".


416 See Dunsmuir, supra note 44 at para. 49. The rationale behind judicial deference to determinations made by administrative decision-makers stems from the fact that "those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime".

417 Pushpanathan, supra note 180 at paras. 25-28

418 Four factors must be considered for each question at issue in judicial review proceedings: 1) the presence or absence of a privative clause or statutory right of appeal; 2) the purpose(s) of the legislation as a whole and the provisions at issue in particular; the nature of the question -- being law, fact or mixed fact and law; and the expertise of the tribunal relative to that of the reviewing court with regard to the questions at issue. See ibid. at paras. 29-38; See also Law Society of New Brunswick v. Ryan, [2003] 1 S.C.R. 247 at para. 27
that the pragmatic and functional approach applicable to judicial review permitted for three different types of standards of review: ‘correctness’, ‘patent unreasonableness’ and an intermediate standard of reasonableness known as ‘reasonableness simpliciter’.\textsuperscript{419} McLachlin C.J. stated that

\begin{quote}
[the standard of "correctness" involves minimal deference: where it applies, there is only one right answer and the administrative body's decision must reflect it. "Patent unreasonableness", the most deferential standard, permits the decision to stand unless it suffers from a defect that is immediately apparent or is so obvious that it "demands intervention by the court upon review". The intermediate standard of "reasonableness" allows for somewhat more deference: the decision will not be set aside unless it is based on an error or is "not supported by any reasons that can stand up to a somewhat probing examination".\textsuperscript{420}
\end{quote}

Consequently, the jurisprudence of the Federal Court established that the standard of review of a PRRA Officer's decision, when considered globally and as a whole, was reasonableness simpliciter.\textsuperscript{421} That being said, in \textit{Kim v. Canada (Minister of Citizenship and Immigration)}, the Court went on to explain that “the appropriate standard of review for questions of fact should generally be patent unreasonableness, for questions of mixed law and fact, reasonableness simpliciter, and for questions of law, correctness.”\textsuperscript{422}

In \textit{Dunsmuir v. New Brunswick} (“Dunsmuir”), the Supreme Court of Canada ruled that the three standards of review, correctness, reasonableness simpliciter, patent unreasonableness, were fraught with practical and theoretical difficulties.\textsuperscript{423} The Court mentioned that

\begin{quote}
[one major problem lies in distinguishing between the patent unreasonableness standard and the reasonableness simpliciter standard. The difficulty in distinguishing between those standards contributes to the problem of choosing the right standard of
\end{quote}


\textsuperscript{420} \textit{Ibid.} at para. 6; See also \textit{Canadian Union of Public Employees Local 963 v. New Brunswick Liquor Corp.}, [1979] 2 S.C.R. 227 at 237; See also \textit{Canada (Director of Investigation and Research) v. Southam Inc.}, [1997] 1 S.C.R. 748 at para. 56; See also \textit{Baker, supra} note 41 at para. 63.

\textsuperscript{421} See \textit{Figurado, supra} note 213 at para. 51

\textsuperscript{422} [2005] F.C.J. No. 540 at para. 19; See also Saufert, \textit{supra} note 246 at para. 23. Courts only intervene if it finds that the PRRA decision was based "on an erroneous finding of fact [or one that was made] in a perverse or capricious manner or without regard for material before it". Only if the decision made at the PRRA raises a substantial error, then the decision is invalidated and referred back to another PRRA decision-maker for re-consideration. Importantly, the Federal Court does not have the authority to substitute its own decision for that of the PRRA decision-maker.

\textsuperscript{423} \textit{Dunsmuir, supra} note 44 at para. 39
review. An even greater problem lies in the application of the patent unreasonableness standard, which at times seems to require parties to accept an unreasonable decision.\textsuperscript{424} As a result, the Court collapsed the two variants of reasonableness, patent unreasonableness and reasonableness \textit{simpliciter}, into a single variant called reasonableness. Therefore, the Court proclaimed "that there ought to be two standards of review[,] correctness and reasonableness."\textsuperscript{425}

\section*{5.3.2 The New Regime: Standard of Review Analysis}

Previously, the approach to determine the appropriate standard of review of administrative decisions was referred as the 'pragmatic and functional approach'.\textsuperscript{426} In\textit{ Dunsmuir}, the Court renamed 'pragmatic and functional approach' as 'standard of review analysis'.\textsuperscript{427}

Under the new 'standard of review analysis', the Court uses two standards of review, 'correctness' and 'reasonableness', to ascertain the level of deference required for administrative bodies.\textsuperscript{428} According to the Court,

\begin{quote}
deference is both an attitude of the court and a requirement of the law of judicial review...[Defence requires] not submission but a respectful attention to the reasons offered or which could be offered in support of a decision".... [D]efence requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.\textsuperscript{429}
\end{quote}

The correctness standard requires the least level of deference. In\textit{ Dunsmuir}, the Supreme Court emphasized that the standard of correctness must be maintained when

\textsuperscript{424} \textit{Ibid}. The Court also cited D. M. Mullan’s argument which read as follows: "$[T]o maintain a position that it is only the "clearly irrational" that will cross the threshold of patent unreasonableness while irrationality \textit{simpliciter} will not is to make a nonsense of the law. Attaching the adjective "clearly" to irrational is surely a tautology. Like "uniqueness", irrationality either exists or it does not. There cannot be shades of irrationality." at para. 41

\textsuperscript{425} \textit{Ibid}. at para. 34

\textsuperscript{426} \textit{Pushpanathan, supra} note 180 at paras. 25-28

\textsuperscript{427} See \textit{Dunsmuir, supra} note 44 at para. 63

\textsuperscript{428} See \textit{ibid}, at para. 48. The Court indicated that the notion of deference "is rooted in part in a respect for governmental decisions to create administrative bodies with delegated powers".

\textsuperscript{429} \textit{Ibid}. at paras. 48 and 49.
dealing with jurisdictional questions or questions of law.\textsuperscript{430} The Court reasoned that the correctness standard avoids inconsistent and unauthorized application of law. The Court wrote:

When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.\textsuperscript{431}

Indeed, the Court looks for reasonableness in an administrative decision. The deference to the standard of reasonableness implies that "courts will give due consideration to the determinations of [administrative] decision makers."\textsuperscript{432} According to the Supreme Court, "reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process...[I]t is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."\textsuperscript{433}

To determine whether the administrative decision maker should be given deference and whether the reasonableness test should be applied, in \textit{Dunsmuir}, the Court outlined the following factors:\textsuperscript{434}

1) The existence of a privative clause is a statutory direction from Parliament or legislatures indicating the need for deference;

2) The purpose of the tribunal as determined by interpretation of enabling legislation.

3) The expertise of the tribunal. A discrete and special administrative regime in which the decision maker has special expertise would favor reasonableness; and

4) The nature of the question at issue. Factual questions would entail reasonableness. Correctness standard will be applied for question of law that is

\textsuperscript{430} See \textit{ibid.} at para. 50

\textsuperscript{431} \textit{Ibid.}

\textsuperscript{432} \textit{Ibid.} at para. 49.

\textsuperscript{433} \textit{Ibid.} at para. 47.

\textsuperscript{434} See \textit{ibid.} at paras. 55 and 64. The Court outlined that in many cases, "it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case."
of "central importance to the legal system ... and outside the ... specialized area of expertise" of the administrative decision maker. Conversely, reasonableness standard may be applied if the question does not reach this required level.

The Supreme Court also added that judicial reviews need not be carried out in every single case to determine the appropriate standard of review. A court performing judicial review can rely on existing jurisprudence in identifying questions that generally fall within the scope of the correctness standard. In other words, courts could reuse standard of review analysis from other similar cases and the standard of review need not be repeated.

In brief, under the new regime, standard of review analysis will be based on either correctness or reasonableness. There would be two steps in carrying out judicial review of administrative decisions. First, courts would have to examine existing jurisprudence to see if the requisite degree of deference has already been determined in a satisfactory manner with regard to a particular category of question. Second, "where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review."

5.3.3 Standard of Review for Procedural Fairness in PRRA

There is no deference for procedural fairness. The courts always see themselves as experts in determining "what connotes procedural fairness and have freely substituted their own views on this for those of administrative agencies." In Dunsmuir, Binnie J. asserted that in matters of procedural fairness, courts will have the final say. Binnie J. wrote that

435 Ibid. at para. 55
436 See ibid. at para. 57
437 See ibid. at para. 62
438 Ibid. at para. 62
a fair procedure is said to be the handmaiden of justice. Accordingly, procedural limits are placed on administrative bodies by statute and the common law. These include the requirements of "procedural fairness", which will vary with the type of decision maker and the type of decision under review. On such matters, as well, the courts have the final say. The need for such procedural safeguards is obvious. Nobody should have his or her rights, interests or privileges adversely dealt with by an unjust process.  

Therefore, in questions relating procedural fairness the standard of correctness should apply. For questions of procedural fairness, no ‘standard of review analysis’ is required since they are reviewable on a standard of correctness.  

It should be noted that there is a distinction between standard of review of procedural fairness and determining the content of the duty of procedural fairness. The standard of review for procedural fairness establishes a review relationship between the administrative body and the judiciary. It sets the level of deference or respect that judges should accord for administrative decisions. There is no deference for issues relating to procedural fairness and therefore, there is no need for analyzing the requisite standard of review. According to the Supreme Court “[i]t is for the courts, not the Minister, to provide the legal answer to procedural fairness questions.” Therefore, in PRRA, the courts have the duty to determine the requisite procedural fairness. Hence, questions concerning the need for oral hearings in the PRRA process, which always relate to procedural fairness, are clearly within the domain of the judiciary.

5.4 Factors affecting the content of the duty of fairness for PRRA

In Baker, the Supreme Court pronounced the factors required to determine the common law duty of procedural fairness. The Court provided five factors to consider the degree of fairness, which are not exhaustive. The five factors are as follows:

1. The nature of the decision being made and process followed in making it;

---

440 Dunsmuir, supra note 44 at para. 129.

441 See also Markis v. Canada (Minister of Citizenship and Immigration), [2008] F.C.J. No. 564 at para. 22 [Markis].


443 Ibid. at para. 100; See Markis, supra note 441 at para. 22.

444 Baker, supra note 41 at paras. 23-28.
(2) The nature of the statutory scheme and the terms of the statute pursuant to which the body operates;

(3) The importance of the decision to the individual or individuals affected;

(4) The legitimate expectations of the person challenging the decision; and

(5) Deference to procedure adopted by the agency itself.

Consequently, the five factors enumerated in Baker could be used to determine the content of the common law duty of fairness applicable to the PRRA process.

The first factor examines the nature of the decision being made by the PRRA Officer and the process followed to arrive at that decision.\textsuperscript{445} According to Baker, the closer the function of the administrative tribunal to reach a decision "resembles judicial decision making, the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness."\textsuperscript{446}

The decision making powers of the PRRA Officer could be classified as a 'quasi-judicial' power. The phrase 'quasi-judicial' "refers to discretionary powers which are essentially judicial in nature, but which are exercised by officials other than judges in the courtrooms."\textsuperscript{447} In other words, PRRA Officers, who are not judges, exercise quasi-judicial functions when they apply procedures that hallmark a judicial function, "although the exact content of the procedural requirements may differ with the type of quasi-judicial power involved."\textsuperscript{448}

In Lai, the Federal Court concluded that "PRRA officers are professional decision-makers, undoubtedly very much aware that their decisions are subject to the constraints imposed upon each and every decision made on a quasi-judicial basis."\textsuperscript{449}

Likewise, in Doumbouya v. Canada (Minister of Citizenship and Immigration), the Court affirmed that "PRRA officers are subject to the constraints imposed by the fact

\textsuperscript{445} See ibid. at para. 23

\textsuperscript{446} Ibid.

\textsuperscript{447} Jones & de Villars, supra note 399 at 89

\textsuperscript{448} Ibid. at 90

\textsuperscript{449} Lai, supra note 22 at para. 75
that their decisions are quasi-judicial." Above all, in *Suresh*, the Supreme Court of Canada wrote that "the nature of the decision to deport bears some resemblance to judicial proceedings. While the decision is of a serious nature and made by an individual on the basis of evaluating and weighing risks, it is also a decision to which discretion must attach." PRRA decisions involve the exercise of considerable discretion. The officers confer refugee protection by finding facts and applying the law. PRRA decisions require the consideration of multiple factors, such as the analysis of human rights record of the home state, the personal risk faced by the PRRA applicant and the assessment of substantial risk of torture, persecution or cruel and unusual treatment or punishment at the applicant’s country of origin. Therefore, based on *Baker*, under the first factor a more extensive procedural protection is required.

The second factor to be considered is the nature of the statutory scheme. According to *Baker*, "[g]reater procedural protections, for example, will be required when no appeal procedure is provided within the statute, or when the decision is determinative of the issue and further requests cannot be submitted." Although PRRA appears within the statutory scheme as an exception to the general principles of Canadian immigration law, it could be argued that the lack of appeal in the PRRA process could trigger a higher procedural protection. PRRA decision is final and cannot be reviewed or revised by another officer or by any other administrative body. The decision rendered is final and a negative decision would result in the immediate removal of the applicant from Canada. In such circumstances, usually a higher level of procedural protection is required. Although judicial review may be applied for negative PRRA decision with leave of the Federal Court, it cannot be considered as a substitute

---


451 *Suresh*, supra note 13 at para. 116

452 See *Baker*, supra note 41 at para. 24


454 PRRA Manual, *supra* note 14 at para. 5.16
for an appeal process in the PRRA. Therefore, a higher level of procedural fairness is required according to the second factor outlined in Baker.

In determining the nature and extent of the duty of fairness, the third factor to be considered is the importance of the PRRA decision to the applicants. In Baker, the Supreme Court wrote that “[t]he more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated.” The PRRA decision has exceptional importance and affects in a fundamental manner the lives of the PRRA applicants. For this reason, there are grave and irreparable consequences that flow from the exercise of power by PRRA decision-makers. First, once a person is deported or removed from Canada, it is difficult or impossible to ascertain whether that individual is subjected to any form of persecution, torture or other forms of cruel and inhuman treatment in his or her home country. Second, it would be too late to provide any form of refugee protection. Therefore, a more extensive level of procedural fairness is required to support the third factor in Baker.

The fourth factor focuses on the legitimate expectations of the PRRA applicant challenging the PRRA decision. The legitimate expectation of the applicants in the PRRA process is another contextual consideration determining the level of procedural fairness required. The doctrine of legitimate expectation affords a party affected by the decision of a public official an opportunity to make representations in circumstances in which there otherwise would be no such opportunity. The court supplies the omission where, based on the conduct of the public official, a party has been led to believe that his or her rights would not be affected without consultation.

In Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour), Binnie J. concluded that the doctrine of legitimate expectation looks to the conduct of a Minister or other public authority in the exercise of a discretionary power including established practices, conduct or representations that can be characterized as clear, unambiguous and unqualified, that has induced in the complainants... a reasonable expectation that they will retain a benefit or be consulted

---

455 See Baker, supra note 41 at para. 25

456 Ibid.

457 See ibid. at para. 26


94
before a contrary decision is taken. To be "legitimate", such expectations must not conflict with a statutory duty.\footnote{C.U.P.E. v. Ontario, supra note 442 at para. 131: See Jones & de Villars, supra note 399 at 283}

Although the CIC is not subjected to any statutory or regulatory requirement to provide particulars of the PRRA process, the CIC has prepared and published the PRRA Manual, a policy document relating to PRRA process. The PRRA Manual is available to all PRRA applicants. In the PRRA Manual, it is provided that

\[\text{[i]t is a fundamental matter of procedural fairness that applicants know the case they have to establish. If the PRRA officer is in possession of information which would persuade the PRRA officer to decide against the applicant, and the applicant is unaware of that information, the applicant must be given an opportunity to respond to that evidence. In some cases, the information may be classified, or not directly releasable. The applicant still has to have an opportunity to rebut the evidence. In such situations, PRRA officers will provide applicants with a précis of the information.}\]

\footnote{PRRA Manual, supra note 14 at para. 5.13 (Although it is in the Manual, in most cases PRRA officers do not practise it.)}

However, this is not put into practice. PRRA applicants are not provided the opportunity to respond or rebut the evidence that persuade the PRRA officer to decide against the applicant. For example, in Akpataku v. Canada (Minister of Citizenship and Immigration), the applicant submitted “that he was denied a fair hearing by the PRRA officer, as he was not provided with a copy of the draft report before it was finalized, nor was he provided with the opportunity to comment on the findings of the PRRA officer.”\footnote{Akpataku, supra note 309 at para. 9}

The Court concluded that there was no such duty. Likewise, in Chir v. Canada (Minister of Safety and Emergency Preparedness), the Federal Court ruled that “unlike a risk assessment carried out in the context of an H&C application\footnote{See IRPA, supra note 12, s. 25(1). H&C refers to humanitarian and compassionate considerations. The section reads as follows: "The Minister shall, upon request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act [IRPA], and may, on the Minister’s own initiative or on request of a foreign national outside Canada, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations."; See also Dharamraj v. Canada (Minister of Citizenship and Immigration), [2006] F.C.J. No. 853 at para. 24, in which the Court ruled that “there is a higher burden on the applicants to establish risk for the purposes of a PRRA than there is for H & C purposes. Consequently, there may be circumstances where risk would be relevant for an H & C application but not for a PRRA application."; See also Singh v. Canada (Minister of Citizenship and Immigration), [2007] F.C.J. No. 1756 at para. 36 (F.C.).} , there is
no obligation on a PRRA officer to disclose a draft PRRA decision to an applicant for comment prior to the decision being finalized.\footnote{[2006] F.C.J. No. 960 at para. 21(F.C.); See Rasiah, supra note 309 at para. 19; See Thavachelvan v. Canada (Minister of Citizenship and Immigration), [2004] F.C.J. No. 1944 at para. 7 (F.C.), where the Court stated that "it seems to fly in the face of common sense to allow the Applicant an opportunity to comment on exactly the same document completed by the same officer in the context of the H&C determination and refuse him the same opportunity for the PRRA determination. Nevertheless, the two processes are, by the statute, different. The requirement to provide the risk opinion to the Applicant in the H&C process arises because, in that process, the risk opinion is simply another piece of evidence that must be disclosed to the Applicant prior to the H&C Officer making her decision (Haghighi v. Canada (Minister of Citizenship and Immigration), [2000] 4 F.C. 407 (F.C.A.) (QL)). In contrast, in the PRRA process, the PRRA is prepared by and is the decision of the PRRA Officer. There is no need to disclose a "draft" of the PRRA to the Applicant prior to making a decision."}{463}  

In contrast, the PRRA Manual creates legitimate expectation for PRRA applicants to be given an opportunity to respond to the evidence before the PRRA decision-maker.\footnote{See PRRA Manual, supra note 14 at para. 5.13}{464} The PRRA Manual claims that applicants would have an opportunity to rebut the evidence before the PRRA decision-maker.\footnote{See ibid.}{465} As a result, the PRRA Manual implies a higher level of disclosure standard and the right to be heard (audire alteram partem). Thus, a higher level of procedural fairness is required according to the fourth factor from \textit{Baker}.

The fifth factor in \textit{Baker} takes into account and respects the choices of procedures adopted by the PRRA process. The Court wrote that

\begin{quote}
the analysis of what procedures the duty of fairness requires should also take into account and respect the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances...While this, of course, is not determinative, important weight must be given to the choice of procedures made by the agency itself and its institutional constraints [...]\end{quote}

\footnote{Baker, supra note 41 at para. 27; See Huscroft, supra note 369 at 28}{466}  
The \textit{IRPA}\footnote{IRPA, supra note 12}{467} accords the Minister considerable flexibility to set proper procedures in the PRRA process.

Taking into account the emphasis on the importance of individual’s rights in evaluating the choice of procedures, it is essential that procedures adopted by the Minister must provide all PRRA applicants the opportunity to present their case fully
and fairly.\textsuperscript{468} Given that the PRRA process uphold Canada's domestic and international obligation to the principle of \textit{non-refoulement},\textsuperscript{469} it could be argued that a higher level of procedural fairness is required under the fifth factor in \textit{Baker}.

In fact, the procedures in PRRA do not give PRRA applicants the full opportunity to present evidence and to make submissions.\textsuperscript{470} This is because an explicit limit is placed by the prescribed factors in section 167 of the \textit{IRPR}\textsuperscript{471} on the ability of PRRA decision-makers to grant an oral hearing at their discretion to PRRA applicants to clarify doubts.\textsuperscript{472}

Oral hearing in the PRRA process provides a better avenue to clarify uncertainties and to explore unexpected possibilities. In administrative law, to a great extent, there is a tension in providing effective and expeditious performance of public duties and the protection of individual rights.\textsuperscript{473} In the context of oral hearings, this tension is reflected in determining the form and the degree of participation to be permitted to PRRA applicants in the PRRA process.

Although, there is a general perception that more extensive participatory rights are granted, the longer and more expensive the hearing process becomes.\textsuperscript{474} This is not true for all cases. Often, a more lengthy process considers all issues. In contrast, procedurally restricted hearings are not necessarily cheaper and expeditious. Procedurally restricted hearings, usually, end up at the courts for judicial review. Indeed, in many PRRA cases, it is much cheaper and faster to solicit information from an individual through an oral hearing, where the applicant is available for direct questioning then through written communication. As a result, oral hearings curtail the

\textsuperscript{468} Cartier, \textit{supra} note 389 at n. 164

\textsuperscript{469} See PRRA Manual, \textit{supra} note 14 at para. 2


\textsuperscript{471} \textit{IRPR}, \textit{supra} note 31, s. 167

\textsuperscript{472} See \textit{International Woodworkers}, \textit{supra} note 470 at para. 42

\textsuperscript{473} Macaulay & Sprague, \textit{supra} note 372 at 12-5

\textsuperscript{474} \textit{Ibid.}
time taken to complete the PRRA. Therefore, oral hearing in PRRA provides a better avenue for clarifying uncertainties and for exploring unexpected possibilities.\textsuperscript{475}

In the short term, restricting individual rights in the PRRA process may appear to be expeditious and efficient as it may permit the agency to issue more decisions faster.\textsuperscript{476} However, the long term consequences may not be desirable. Compromising on fairness would likely cost more, incur more time and result in violations of the principle of non-refoulement. Nevertheless, at a practical level, a decision from a flawed PRRA process would be reviewed by the Courts and ordered to be reassessed. This in turn adds more time and expense to an already over-burdened PRRA process.

A PRRA decision that brings about a perception that it was rendered unfairly would not receive any respect. Lord Denning stated in \textit{The Road to Justice}, that

\begin{quote}
[p]eople will respect rules of law which are intrinsically right and just and will expect their neighbours to obey them, as well less obeying the rules themselves: but they will not feel the same about rules which are unrighteous or unjust. If people are to feel a sense of obligation to the law, then the law must correspond with what they consider to be right and just, or, at any rate, must not unduly divert from it. In other words, it must correspond as near as may be, with justice.\textsuperscript{477}
\end{quote}

It should not be misunderstood that fairness of hearing is directly proportional to the degree of participation permitted to its participants.\textsuperscript{478} Fairness is relative and is determined by the nature of the mandate being performed and the individual circumstances involved.\textsuperscript{479} Therefore, if a particular procedure, such as the prescribed factors for oral hearing in section 167 of \textit{IRPR}\textsuperscript{480} to determine whether to hold an oral hearing, does not enable a PRRA applicant to present his or her case adequately or to know the case against him or her, then the procedure may not be fair.

Therefore, by balancing the five factors affecting the content of the duty of fairness provided in \textit{Baker}, it could be concluded that a higher level of procedural fairness is required for PRRA. In four other Supreme Court of Canada decisions relating

\begin{footnotes}
\item\textsuperscript{475} Ibid.
\item\textsuperscript{476} Ibid.
\item\textsuperscript{477} Ibid.
\item\textsuperscript{478} Ibid.
\item\textsuperscript{479} Ibid.
\item\textsuperscript{480} \textit{IRPR}, supra note 31, s. 167
\end{footnotes}
to refugee cases, namely, Singh,481 Pushpanathan,482 Suresh483 and Chieu v. Canada (Minister of Citizenship and Immigration) ("Chieu")484, the Court reminded that a higher standard of procedural protection is required for cases relating to removal or

481 Singh, supra note 136 at para. 22 (In this case, the Supreme Court of Canada determined that the Charter requires that refugee claimants physically present in Canada be given an adequate opportunity to state their case, normally in the form of an oral hearing. The Immigration Act (section 45) in force at that time created a procedure in which a person's claim is referred to the Minister and the Minister shall refer the claim to the Refugee Status Advisory Committee. The Minister after having obtained the advice of that Committee shall determine whether or not the person is a Convention refugee. However, the Immigration Act does not envisage an opportunity for the refugee claimant to be heard other than through his claim and the transcript of his examination under oath. Nor does the Act appear to envisage the refugee claimant's being given an opportunity to comment on the advice the Refugee Status Advisory Committee has given to the Minister.)

482 Pushpanathan, supra note 180 at para. 157 (The Supreme Court of Canada affirmed that “it would be unthinkable if there were not a fair hearing before an impartial arbiter to determine whether there are "substantial grounds for believing" that the individual to be deported would face a risk of torture, arbitrary execution, disappearance or other such serious violation of human rights. In light of the grave consequences of deportation in such a case, there must be an opportunity for a hearing before the individual is deported, and the hearing must comply with all of the principles of natural justice. As well, the individual in question ought to be entitled to have the decision reviewed to ensure that it did indeed comply with those principles. These protections should be available whether or not the individual is excluded from claiming status as a refugee, to avoid unacceptably harsh consequences arising from the exclusion.”)

483 Suresh, supra note 13 at paras. 123-127 (Here, the Supreme Court of Canada elaborated that in respect to removal or deportation, there is no constitutional requirements for the Minister to conduct a full oral hearing or judicial process. However, there is a constitutional requirement to ensure that a refugee facing deportation to persecution, torture or other forms of cruel and inhuman treatment must be informed of the case to be met. The material on which the Minister bases her decision must be provided to the refugee claimant facing removal. "Not only must the refugee be informed of the case to be met, the refugee must also be given an opportunity to challenge the information of the Minister where issues as to its validity arise...The refugee must be provided with an opportunity to respond in writing to the case presented to the Minister, and to challenge the Minister's information. The refugee is entitled to present evidence and make submissions... If the refugee establishes that torture is a real possibility, the Minister must provide the refugee with all the relevant information and advice she intends to rely on, provide the refugee an opportunity to address that evidence in writing, and after considering all the relevant information, issue responsive written reasons. If the Suresh decision is applied to PRRA, it could be argued that oral hearing should be provided when there is credible evidence of the risk of persecution, torture or other forms of cruel and inhuman treatment.)

484 Chieu v. Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 84 at para. 69 [Chieu] (In this case, the Court concluded that “Parliament has equipped the I.A.D. [Immigration Appeal Division of Canada's Immigration and Refugee Board] with all of the tools necessary to ensure that the requirements of natural justice are met when removing individuals from Canada, including providing for an oral hearing, the calling and cross-examination of witnesses, the tendering of evidence, the giving of reasons (when requested), and a right to seek judicial review of the I.A.D.’s decision (during which time the statutory stay of the removal order is in place). That these procedures are designed to meet the requirements of natural justice can be inferred from Wilson J.'s statement in Singh, supra, at p. 199, that a hearing before the I.A.B., the I.A.D.’s predecessor, is "a quasi-judicial one to which full natural justice would apply". These procedures help ensure that any relevant Charter rights will be respected.”)

99
deportation, when there is a risk of persecution, torture or other forms of cruel and inhuman treatment.

The lack of an oral hearing or notice of such a hearing does not always constitute a violation of the requirement of procedural fairness. However, if oral hearings are not provided, then they must be complemented with written hearings. These written hearings at minimum must ensure that the PRRA decision-makers hear the other side and decide on the matter impartially. This can only happen if PRRA applicants are provided with notice of the proceedings and given the full and fair opportunity to respond to the facts, evidence and other contention on which the decision-maker may ultimately rely.\footnote{See Fox-Decent, \textit{supra} note 47 at 3. See also Jones \& de Villars, \textit{supra} note 399 at 268} In other words, implicitly in PRRA decision-maker’s duty to hear the other side, there is a duty to disclose such facts and contention.

In \textit{Baker}, the Supreme Court of Canada reminded that the content of the duty of fairness will depend on the importance of the interest affected by the decision and will not be based on any standard list of rights.\footnote{David Dyzenhaus \& Evan Fox-Decent, "Rethinking the Process \slash Substance Distinction: Baker v. Canada" (2001) 51 Univ. of Toronto L.J. 193 at 194} The Court pronounced that

\begin{quote}
[t]he values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.\footnote{\textit{Baker, supra} note 41 at para. 28}
\end{quote}

Based on \textit{Baker}, it could be said that the right to be heard dictates the PRRA process to ensure that its hearings provide PRRA applicants with the opportunity: 1) to know the case made against them; 2) to dispute, correct or contradict anything which is prejudicial to their positions; and 3) to present arguments and evidences supporting their own case.\footnote{See Macaulay \& Sprague, \textit{supra} note 372 at 12-6} Consequently, the PRRA process must aim to comply with these values to ensure that it respects the common law duty of fairness. The PRRA has to uphold a
higher level of procedural fairness, which may require the need to hold oral hearings without the restrictions set by the prescribed factors in section 167 of the *IRPR*.489

489 *IRPR, supra* note 31, s. 167
PART III:

CONSTITUTIONAL REVIEW OF THE PRINCIPLE OF NON-REFOULEMENT
AND THE PRESCRIBED FACTORS FOR ORAL HEARING IN THE
PRRA PROCESS
CHAPTER 6: THE PRINCIPLE OF NON-REFOULEMENT IS A PRINCIPLE OF FUNDAMENTAL JUSTICE

This chapter will demonstrate that the principle of non-refoulement is a principle of fundamental justice of section 7 of the Charter. It will use criteria elaborated by the Supreme Court of Canada in Malmo-Levine\textsuperscript{490} and in Canadian Foundation for Children\textsuperscript{491} for determining principles of fundamental justice.\textsuperscript{491} In fact, this chapter will show that the principle of non-refoulement is a legal principle and that there is sufficient consensus that the principle of non-refoulement is vital or fundamental to Canadian societal notion of justice. The discussion will then reveal that the principle of non-refoulement is identified with sufficient precision and applied to situations in a manner that yields predictable results. By fulfilling all the criteria, it would be evident that the principle of non-refoulement is a principle of fundamental justice.

6.1 CONSTITUTING A PRINCIPLE OF FUNDAMENTAL JUSTICE

In Motor Vehicle Act, Lamer J. outlined the content of the principles of fundamental justice.\textsuperscript{492} In United States of America v. Burns ("Burns"),\textsuperscript{493} the Supreme Court of Canada reiterated the definition of the principles of fundamental justice presented by Lamer J. in Motor Vehicle Act. According to the Court,

the principles of fundamental justice are to be found in the basic tenets of our legal system. They do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system. Such an approach to the interpretation of "principles of fundamental justice" is consistent with the wording and structure of s. 7, the context of the section, i.e., ss. 8 to 14, and the character and larger objects of the Charter itself. It provides meaningful content for the s. 7 guarantee all the while avoiding adjudication of policy matters.\textsuperscript{494}

Lamer J., in Motor Vehicle Act, pointed out that dividing the principles of fundamental justice into a substantive and procedural dichotomy would narrow and

\textsuperscript{490} Malmo-Levine, supra note 59

\textsuperscript{491} Canadian Foundation for Children, supra note 60

\textsuperscript{492} Reference re Section 94(2) of the Motor Vehicle Act (British Columbia), [1985] 2 S.C.R. 486 at para. 30 [Motor Vehicle Act]

\textsuperscript{493} [2001] 1 S.C.R. 283 [Burns]

\textsuperscript{494} Ibid. at para. 70

103
restrict the open-minded approach needed to determine the principles.\textsuperscript{495} The substantive and procedural dichotomy imports into the Canadian constitutional law, the “American experience with substantive and procedural due process.”\textsuperscript{496}

Especially, the search for the meaning of the principles of fundamental justice can be a difficult exercise. Lamer J., in \textit{Motor Vehicle Act}, claimed that the principles of fundamental justice “are not a protected interest, but rather a qualifier of the right not to be deprived of life, liberty and security of the person.”\textsuperscript{497} He cautions against narrow interpretation of the principles so as to frustrate them or stultify them.\textsuperscript{498} According to Lamer J., providing a narrow meaning to the principles of fundamental justice increases the risk that individuals may be “deprived of these most basic rights. This latter result is to be avoided given that the rights involved are as fundamental as those which pertain to the life, liberty and security of the person.”\textsuperscript{499}

Consequently, in \textit{Motor Vehicle Act}, the Supreme Court concluded that it would be wrong to interpret the term ‘fundamental justice’ as the equivalent of natural justice.\textsuperscript{500} The Supreme Court of Canada claimed that such an interpretation would reduce and remove much of the protection and content of section 7 of the \textit{Charter}. Moreover, to see ‘fundamental justice’ as natural justice would be inconsistent with the

\begin{itemize}
\item \textsuperscript{495} See \textit{Motor Vehicle Act}, supra note 492 at para. 18; See Carol Rogerson \textit{et al.}, eds., \textit{Canadian Constitutional Law}, 3rd ed. (Toronto: Emond Montgomery Publications Limited, 2003) at 1074
\item \textsuperscript{496} \textit{Motor Vehicle Act}, ibid. at para. 18 (Such analysis would amount to importing into the Canadian context “[a]merican concepts, terminology and jurisprudence, all of which are inextricably linked to problems concerning the nature and legitimacy of adjudication under the U.S. Constitution. That Constitution, it must be remembered, has no s. 52 nor has it the internal checks and balances of ss. 1 and 33. We would, in my view, do our own Constitution a disservice to simply allow the American debate to define the issue for us, all the while ignoring the truly fundamental structural differences between the two constitutions. Finally, the dichotomy creates its own set of difficulties by the attempt to distinguish between two concepts whose outer boundaries are not always clear and often tend to overlap. Such difficulties can and should, when possible, be avoided.”)
\item \textsuperscript{497} ibid. at para. 24
\item \textsuperscript{498} ibid. at para. 25
\item \textsuperscript{499} ibid.
\item \textsuperscript{500} ibid. at para. 26 (The main argument in \textit{Motor Vehicle Act} was that natural justice was about process. \textit{Motor Vehicle Act} clarified that fundamental justice, as used in the \textit{Charter}, involves more than natural justice, which is largely procedural, and includes a substantive element.); See also Tapash Gan Choudhury, \textit{Penumbra of Natural Justice} (New Delhi: Eastern Law House, 2001) at 2 explains that the term natural justice means that a result or process should be just.
\end{itemize}
broad and affirmative language in which the right to life, liberty and security of the person is construed. Furthermore, the Court held that to construe the principles of fundamental justice narrowly as natural justice would be equally inconsistent with the large and liberal interpretation of Charter rights.\(^{501}\) Indeed, Lamer J., went on to explain that sections 8 to 14 of the Charter are illustrative of deprivations of those rights to life, liberty and security of the person in breach of the principles of fundamental justice. For they, in effect, illustrate some of the parameters of the "right" to life, liberty and security of the person; they are examples of instances in which the "right" to life, liberty and security of the person would be violated in a manner which is not in accordance with the principles of fundamental justice. To put matters in a different way, ss. 7 to 14 could have been fused into one section, with inserted between the words of s. 7 and the rest of those sections the oft utilised provision in our statutes, "and, without limiting the generality of the foregoing (s. 7) the following shall be deemed to be in violation of a person's rights under this section". Clearly, some of those sections embody principles that are beyond what could be characterized as "procedural".

Thus, ss. 8 to 14 provide an invaluable key to the meaning of "principles of fundamental justice". Many have been developed over time as presumptions of the common law, others have found expression in the international conventions on human rights. All have been recognized as essential elements of a system for the administration of justice which is founded upon a belief in "the dignity and worth of the human person".\(^{502}\)

Moreover, in *R. v. Oakes* ("Oakes"),\(^{503}\) Dickson C. J. outlined examples of a few principles that fall within the scope of the principles of fundamental justice such as the respect for human dignity, social justice and equality, accommodating beliefs, cultural and group identity, and belief in social and political institutions which enhance individual and group participation in society.\(^{504}\)

Seven years after the *Motor Vehicle Act* decision, the Supreme Court of Canada, in *Rodriguez v. British Columbia (Attorney General)* ("Rodriguez"),\(^{505}\) again clarified the principles of fundamental justice. In *Rodriguez*, Sopinka J. rejected the argument that human dignity was a principle of fundamental justice on the basis that 'dignity' was

\(^{501}\) See *Motor Vehicle Act*, *ibid.* at para. 26

\(^{502}\) *Ibid.* at para. 29 and 30

\(^{503}\) [1986] 1 S.C.R. 103 [*Oakes*]

\(^{504}\) *Ibid.* at para. 64

\(^{505}\) [1993] 3 S.C.R. 519 [*Rodriguez*]
too vague to be a principle of fundamental justice. Sopinka J. explained that to determine the principles of fundamental justice the following should be observed:

Discerning the principles of fundamental justice with which deprivation of life, liberty or security of the person must accord, in order to withstand constitutional scrutiny, is not an easy task. A mere common law rule does not suffice to constitute a principle of fundamental justice, rather, as the term implies, principles upon which there is some consensus that they are vital or fundamental to our societal notion of justice are required. Principles of fundamental justice must not, however, be so broad as to be no more than vague generalizations about what our society considers to be ethical or moral. They must be capable of being identified with some precision and applied to situations in a manner which yields an understandable result. They must also, in my view, be legal principles.

The Supreme Court has been using the criteria elaborated by Sopinka J., in Rodriguez, to determine the principles of fundamental justice. In addition, to identify a specific principle of fundamental justice, the Supreme Court has also enumerated the relevant criteria in Malmo-Levine.

In Malmo-Levine, the Supreme Court concluded that for a rule or principle to be constituted as a principle of fundamental justice, it must qualify as a legal principle. Furthermore, there must be significant societal consensus that such legal principle is fundamental for the operation of a fair legal system. In addition, the legal principle can be identified with sufficient precision to set a manageable standard against which it could be used to measure deprivations of life, liberty or security of the person.

In other words, according to Malmo-Levine, there are three criteria required to be satisfied to determine if the principle of non-refoulement is a principle of fundamental justice. First, the principle of non-refoulement has to be a legal principle. Second, there must be sufficient consensus that the principle of non-refoulement is vital or fundamental to Canadian societal notion of justice. Third, the principle of non-

---

507 Rodriguez, supra note 505 at para. 141; see ibid. at 162
508 Rodriguez, ibid.
509 Malmo-Levine, supra note 59 at para. 112
510 Ibid. at para. 113
511 Ibid.
512 Ibid. at para. 97
refoulement must be identified with sufficient precision and has a manageable standard against which to measure deprivation of life, liberty or security of the person.

The analysis to determine the principles of fundamental justice was again confirmed in Canadian Foundation.\textsuperscript{513} The Supreme Court stated that the principle of fundamental justice must satisfy three criteria.

First, it must be a legal principle. This serves two purposes. First, it "provides meaningful content for the s. 7 guarantee"; second, it avoids the "adjudication of policy matters": Second, there must be sufficient consensus that the alleged principle is "vital or fundamental to our societal notion of justice": The principles of fundamental justice are the shared assumptions upon which our system of justice is grounded. They find their meaning in the cases and traditions that have long detailed the basic norms for how the state deals with its citizens. Society views them as essential to the administration of justice. Third, the alleged principle must be capable of being identified with precision and applied to situations in a manner that yields predictable results. Examples of principles of fundamental justice that meet all three requirements include the need for a guilty mind and for reasonably clear laws.\textsuperscript{514}

6.1.1 The international perspective in the principles of fundamental justice

There is no legal theoretical justification to understand the reason as to why Canadian judges make frequent references to international human rights' conventions. However, such references have never seemed particularly controversial.\textsuperscript{515} The Supreme Court of Canada in Slaight Communications Inc. v. Davidson stated that Canada's international human rights obligations provide important evidence to the meaning of the full Charter protection.\textsuperscript{516} The Court stated that the Charter should be construed as providing protection at least as equivalent as that afforded by similar international human rights provisions ratified by Canada. Therefore, the Canadian international human rights obligations not only inform the interpretation of guaranteed rights in the Charter but also outline what may justify the restriction of rights in a free and democratic society.\textsuperscript{517}

\textsuperscript{513} Canadian Foundation for Children, supra note 60
\textsuperscript{514} Ibid. at para. 8
\textsuperscript{515} See William A. Schabas & Stéphane Beaulac, International Human Rights and Canadian Law - Legal Commitment, Implementation and the Charter (Toronto: Thomson Carswell, 2007) at 50
\textsuperscript{516} Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038 at para. 23
\textsuperscript{517} See ibid.
In addition, in *Reference Re Public Service Employee Relations Act (Alberta)*, the Supreme Court of Canada again highlighted that international treaties and customary norms establish global human rights standards. The *Charter* conforms to the global human rights movement and "it incorporates many of the policies and prescriptions of the various international documents pertaining to human rights. The various sources of international human rights law ...[are] relevant and persuasive sources for interpretation of the Charter's provisions." Furthermore, the Supreme Court emphasized that when approaching the often general and open textured language of the *Charter*, international treaties and customary norms "may aid in supplying content to such imprecise concepts as the right to life, freedom of association, and even the right to counsel". Moreover, the Court added that Canada is a party to a number of international human rights conventions. The provisions in the *Charter* are often similar to the provisions found in these international human rights conventions. The Court concluded that constitutional interpretation requires the consideration of Canada's international obligations to be a relevant and persuasive factor in *Charter* interpretation.

In *United States of America v. Burns* ("Burns"), the Supreme Court of Canada reiterated the argument proposed by Lamer J., in *Motor Vehicle Act*, that the principles of fundamental justice represent principles,

which have been recognized by the common law, the international conventions and by the very fact of entrenchment in the *Charter*, as essential elements of a system for the administration of justice which is founded upon the belief in the dignity and worth of the human person and the rule of law.

Indeed, in *Malmo-Levine*, the Supreme Court of Canada stated that values and principles that become the principles of fundamental justice are numerous, going

---


519 Ibid.

520 Ibid. at para. 58

521 See ibid. at para. 59

522 See ibid. (The Court affirmed that the *Charter* "should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.")

523 *Burns, supra* note 493

524 Ibid. at para. 79; See *Motor Vehicle Act, supra* note 492 at para. 63

108
beyond the guarantees protected by the Charter.\textsuperscript{525} The principles of fundamental justice have, therefore, extended beyond the Canadian perspective to include a broader international consensus surrounding important legal issues.\textsuperscript{526} For example, in the context of extradition, in Burns, the Supreme Court of Canada held that to order extradition of an individual without obtaining assurances that death penalty will not be imposed would violate the principles of fundamental justice.\textsuperscript{527} The Court justified its argument claiming that

\begin{quote}
[i]nternational experience, particularly in the past decade, has shown the death penalty to raise many complex problems of both a philosophic and pragmatic nature…. International experience thus confirms the validity of concerns expressed in the Canadian Parliament about capital punishment. It also shows that a rule requiring that assurances be obtained prior to extradition in death penalty cases not only accords with Canada’s principled advocacy on the international level, but is also consistent with the practice of other countries with whom Canada generally invites comparison, apart from the retentionist jurisdictions in the United States.\textsuperscript{528}
\end{quote}

Moreover, in Suresh, the Supreme Court affirmed that it would be inconsistent with the principles of fundamental justice to deport an individual to another country, where he or she would face a substantial risk of torture.\textsuperscript{529}

In addition, the Court added that the principles of fundamental justice are “informed not only by Canadian experience and jurisprudence, but also by international law, including \textit{jus cogens}.”\textsuperscript{530} The Court, in Suresh, went on to elaborate that Charter interpretation should take into account Canada’s international commitments, obligations and values, which are conveyed in “various sources of international human rights law - declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, [and] customary norms.”\textsuperscript{531}

\textsuperscript{525} Malmo-Levine, supra note 59 at para. 97

\textsuperscript{526} Philip Bryden, "Section 7 of the Charter Outside the Criminal Context" (2005) 38 U.B.C. L. Rev. 507 at para. 14

\textsuperscript{527} Burns, supra note 493 at para. 124; See \textit{ibid.}

\textsuperscript{528} Burns, \textit{ibid.} at para. 127 and 128

\textsuperscript{529} See Suresh, supra note 13 at para. 5: See Bryden, \textit{supra} note 526 at para. 14

\textsuperscript{530} Suresh, \textit{ibid.} at para. 45

\textsuperscript{531} \textit{Ibid.}
However, much of the customary and codified international law represents a "low common denominator of the world community." At times, the standards set by international treaty or conventions may not always be appropriate for Canadian values, which are more advanced than the current international human rights law and practice. Consequently, it could be argued that the success of the Canadian courts lie in the fact that they are able to incorporate international law, especially in the protection of human rights, fundamental freedom and liberties, enhancing the dynamism of Canadian law without the need to adopt a legal theoretical justification or go into the 'binding' debate of international law in Canadian courts. Based on Canadian values, courts may have to go beyond the standards set by the current international human rights law and practice. Similarly, in the following parts, it would be shown that the principle of non-refoulement is a principle of fundamental justice by satisfying the three criteria set out in Malmo-Levine.

6.2 The Principle of Non-Refoulement is a Legal Principle

The principle of non-refoulement, which prohibits the removal or refoulement of any individual to a country where he or she faces a substantial risk of persecution, torture or other forms of cruel and inhuman treatment, is a legal principle. According to the UNHCR, the principle of non-refoulement prohibits the involuntary return of refugees, in any manner whatsoever, to the borders of territories where their lives or freedom would be threatened, whether or not those refugees are granted asylum by the country in question. In addition, based on the North Sea Continental Shelf decision

---

532 Schabas & Beaulac, supra note 515 at 51
533 Ibid. at 51 and 52: "On how little is gained by placing the discourse within a "binding vs. non-binding" dichotomy".
534 Malmo-Levine, supra note 59 at para. 97
535 Chantal Marie-Jeanne Bostock, "The International Legal Obligations Owed To The Asylum Seekers On The Mv Tampa" (2002) 14 Int'l J. Refugee L. 279 at n. 57
536 North Sea Continental Shelf, supra note 157 at para. 70 and 71: See also ibid. at n. 66: "In the North Sea Continental Shelf case, the International Court of Justice stipulated that three elements must be satisfied, when determining whether conventional rules reflect, or, have become, customary international law. Those elements are as follows:
by the ICJ, Lauterpacht and Bethlehem argued that the principle of *non-refoulement* has a fundamental norm creating character.\(^{537}\)

The Supreme Court of Canada has been quite expressive in its affirmation that torture cannot be tolerated and would definitely violate the principles of fundamental justice in section 7 of the *Charter*.\(^{538}\) Although the Supreme Court has never directly addressed the issue of whether breaching the principle of *non-refoulement* would be inconsistent with the principles of fundamental justice, the Court had indicated on several occasions that extraditing an individual to face persecution, torture or other forms of cruel and inhuman treatment would violate the principles of fundamental justice.\(^{539}\)

In Canada, section 115(1) of the *IRPA*\(^{540}\) constitutes a statutory codification and incorporation of Article 33(1) of the Refugee Convention into Canadian refugee law. Section 115(1) of the *IRPA* ensures that the principle of *non-refoulement* applies to Convention Refugees and ‘protected persons’ in Canada. This was confirmed by the Federal Court in *Fabian v. Canada (Minister of Citizenship and Immigration)*.\(^{541}\) Therefore, it is evident that the principle of *non-refoulement* is a legal principle. Indeed,

---

1. The conventional rule should be of a fundamentally norm-creating character;
2. Widespread and representative participation in the convention “may itself be sufficient, if specially affected” states are included;
3. State practice, including that of specially affected states must have been “both extensive and virtually uniform” and “should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.”

\(^{537}\) Bostock, *ibid.* at n. 69

\(^{538}\) See *Suresh*, *supra* note 13 at para. 5

\(^{539}\) *Ibid.* at para. 56

\(^{540}\) *IRPA*, *supra* note 12, s.115 (“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.”)

\(^{541}\) [2005] F.C.J. No. 1331 at para. 7: the Federal Court concluded that section 115 of the *IRPA* “constitutes a statutory codification and incorporation of Article 33 of the United Nations Convention Relating to the Status of Refugees (the Convention) and ensures that the principle of non-refoulement applies to a Convention refugee or a protected person”.

111
the Supreme Court of Canada has applied the principle of non-refoulement in *Pushpanathan*, *Chieu*, *Suresh* and *Charaoui v. Canada* ("Charaoui").

Similarly, the Federal Court, in *Harkat (Re)*, affirmed that

section 115(1) provides that a protected person shall not be removed from Canada to a country where there 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 ... 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.

Furthermore, in *Suresh*, the Supreme Court of Canada accepted that the *Burns* principle with respect to extradition would equally apply to deportations and removals of non-citizens from Canada. The Court concluded that the *Burns* principle, applied in the context of extradition, would also apply in the context of refoulement. The *Burns* principle states that

---

542 *Pushpanathan, supra* note 180 at para. 8. The Court looks at Article 33 of the Refugee Convention and the exceptions to the principle of non-refoulement.

543 *Chieu, supra* note 484 at para. 58 where the Court explains that under “Canada's international commitment under Article 33 of the 1951 Geneva Convention to protect against refoulement, the principle of international law which requires that no state shall return a refugee to a country where his or her life or freedom may be endangered, except where a refugee is a danger to national security or a danger to the community in the host state. As a result, most Convention refugees cannot be removed to their country of nationality or citizenship, but often no other country will be obliged or willing to accept them. In such cases, there will be no likely country of removal at the time of the appeal and the I.A.D. [Immigration Appeal Division of Canada's Immigration and Refugee Board] cannot therefore consider foreign hardship.”

544 *Suresh, supra* note 13 at paras. 66-69. (The Court refers to the principle of non-refoulement outlined in Article 7 of the ICCPR and explains that “Article 7 is intended to cover that scenario, explaining that ‘... States parties must not expose individuals to the danger of torture ... upon return to another country by way of their extradition, expulsion or refoulement’” at para. 66. The Court also discusses about the principle of non-refoulement imposed by the CAT. The Court looks at Articles 1, 2, 3 and 16, where it concludes that according to the CAT “a state is not to expel a person to face torture, which includes both the physical and mental infliction of pain and suffering, elsewhere” at para. 68.

545 *Charaoui v. Canada (Citizenship and Immigration)*, [2007] S.C.J. No. 9 at para. 7[Charaoui]. The Court wrote that “a refugee or a protected person determined to be inadmissible on any of the grounds for a certificate loses the protection of the principle of non-refoulement under s. 115(1) [of the IRPA] 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: s. 115(2). This means that he or she may, at least in theory, be deported to torture.”

the guarantee of fundamental justice applies even to deprivations of life, liberty or security effected by actors other than our government, if there is a sufficient causal connection between our government’s participation and the deprivation ultimately effected. ... At least where Canada’s participation is a necessary precondition for the deprivation and where the deprivation is an entirely foreseeable consequence of Canada’s participation, the government does not avoid the guarantee of fundamental justice merely because the deprivation in question would be effected by someone else’s hand.\footnote{Suresh, supra note 13 at para. 54}

In other words, based on the Burns principle it could be argued that Canada cannot extricate itself from its responsibility of the principle of non-refoulement by expelling a refugee or rejected refugee claimant to face a substantial risk of persecution, torture or other forms of cruel and inhuman treatment.\footnote{See ibid. at paras. 54 and 55} Consequently, Canada has to actively ensure that there is no risk of torture or other forms of persecution for the individual within the state to which he or she is deported or removed. According to the Supreme Court, where there is sufficient causal connection between Canada’s action and the deprivation of life, liberty or security of the person would violate the principles of fundamental justice.\footnote{See ibid. at para. 55} Likewise, any removal or deportation by Canada that results in a person being persecuted, tortured or put to death would violate the principles of fundamental justice.

Indeed, in Suresh, the Supreme Court of Canada indicated that a Minister’s decision to remove or deport an individual in the presence of substantial risk of torture or other forms of cruel and inhuman treatment will come under the scrutiny of section 7 of the Charter.\footnote{Ibid. at para. 36} In essence, a unanimous Court, in Suresh, affirmed that based on Canadian law, the deportation of a convention refugee to a country where the refugee faces serious risk of torture violates the principles of fundamental justice.\footnote{Ibid. at para. 59} This argument, a fortiori, establishes that the principle of non-refoulement is a principle of fundamental justice.

However, the Supreme Court cautioned that the inquiry does not end here. The Court concluded that deportation provisions dealing with immigration law must be

\footnote{Suresh, supra note 13 at para. 54} \footnote{See ibid. at paras. 54 and 55} \footnote{See ibid. at para. 55} \footnote{Ibid. at para. 36} \footnote{Ibid. at para. 59}
considered in their international context, as explained in *Pushpanathan*.\(^{552}\) In *Suresh*, the Supreme Court indicates that the principles of fundamental justice expressed in section 7 of the *Charter* "cannot be considered in isolation from the international norms which they reflect. A complete understanding of the...\([IRPA]\) and the *Charter* requires consideration of the international perspective.\(^{553}\) Therefore, the principle of *non-refoulement* and the principles of fundamental justice must always take the international perspective into consideration. The meaning and the evidence of the principles of fundamental justice are informed and guided by international law.\(^{554}\)

Consequently, an international perspective is crucial to understand whether the principle of *non-refoulement* is a principle of fundamental justice. In fact, the *IRPA*\(^{555}\) makes reference to the Refugee Convention by affirming that the objective of the *IRPA* is to "fulfil Canada's international legal obligations with respect to refugees and affirm Canada's commitment to international efforts to provide assistance to those in need of resettlement."\(^{556}\) The Supreme Court of Canada, in *Suresh*, affirmed that international law prohibits deportation to persecution, torture or other forms of cruel and inhuman treatment. The Court concluded that the

Canadian rejection of torture is reflected in the international conventions to which Canada is a party. The Canadian and international perspectives in turn inform our constitutional norms. The rejection of state action leading to torture generally, and deportation to torture specifically, is virtually categoric. Indeed, both domestic and international jurisprudence suggest that torture is so abhorrent that it will almost always be disproportionate to interests on the other side of the balance, even security interests. This suggests that, barring extraordinary circumstances, deportation to torture will generally violate the principles of fundamental justice protected by s. 7 of the *Charter*.\(^{557}\)

\(^{552}\) *Pushpanathan*, *supra* note 180 at para. 52; The Court concluded that refugee provisions of Canada's Immigration Law were direct incorporation from the Refugee Convention and therefore, interpretation of the refugee provisions should conform with the rules of interpretation laid out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, Can. T.S. 1980 No. 37 ("Vienna Convention"). Particularly, relevant rules of international law have to be taken into consideration.

\(^{553}\) *Suresh*, *supra* note 13 at para. 59

\(^{554}\) *Ibid.* at para. 60

\(^{555}\) *IRPA*, *supra* note 12, s.3(2)(b)

\(^{556}\) *Ibid.*, s.3(2)(b); See also Schabas & Beaulac, *supra* note 515 at 57

\(^{557}\) *Suresh*, *supra* note 13 at para. 76

114
International treaties such as the Refugee Convention,\(^{558}\) the CAT,\(^{559}\) the ICCPR,\(^{560}\) the ECHR\(^{561}\) and the ACHR\(^{562}\) reveal the growing global consensus on the importance of the legal principle of non-refoulement. Canada is a party to most of these treaties.\(^{563}\) Specifically, in respect to the principles of fundamental justice, courts "look to international law as evidence of these principles and not as controlling in itself."\(^{564}\)

Therefore, the principle of non-refoulement is an established legal principle in international and domestic law. Canada is a party to international conventions that treat the principle of non-refoulement as a legal principle. The IRPA refers to the principle of non-refoulement.\(^{565}\) As outlined in Canadian Foundation for Children, the principle of non-refoulement provides meaningful content for the section 7 guarantee and avoids the adjudication of policy matters.\(^{566}\) The principle of non-refoulement can be contrasted from the 'realm of general public policy'. Clearly, the principle of non-refoulement has met the threshold of being a legal principle.

---

\(^{558}\) Refugee Convention, supra note 4, art. 33(1)

\(^{559}\) CAT, supra note 5, art. 3(1)

\(^{560}\) ICCPR, supra note 6, art. 7

\(^{561}\) ECHR, supra note 150, art. 3: ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment.")

\(^{562}\) ACHR, supra note 11, art. 5(2) ("No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.")

\(^{563}\) To begin with, the principle of non-refoulement is found in Article 33(1) of the Refugee Convention. Article 33(1) states that "[n]o Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever [...]" The principle of non-refoulement is also elaborated in Article 3(1) of the CAT. Canada signed the CAT on 23 August 1985 and ratified it on 24 June 1987. Article 3(1) of the CAT states that "[n]o State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." Furthermore, Article 7 of the ICCPR prohibits refoulement to torture. Article 7 of the ICCPR mentions that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Canada ratified the ICCPR on 19 May 1976. In addition, the legal principle of non-refoulement is strengthened by Article 3 of the ECHR and Article 5(2) of the ACHR, supra note 11.

\(^{564}\) Suresh, supra note 13 at para. 60

\(^{565}\) See IRPA, supra note 12, s.115

\(^{566}\) Canadian Foundation for Children, supra note 60 at para. 8
6.3 **There is sufficient consensus that the principle of non-refoulement is vital or fundamental to Canadian societal notion of justice.**

The inquiry at this point is whether the principle of *non-refoulement* is vital or fundamental to Canadian societal notion of justice. Although the *Charter* does not give the courts the mandate to set the policy relating to persecution or torture risk assessment for non-citizens removed from Canada, the courts as guardians of the *Charter* have to ensure that fundamental constitutional rights protected by the *Charter* are applied to those removed from Canada.\(^\text{567}\) As mentioned by Lamer J., in *Motor Vehicle Act*, there is a distinction between the 'general public policy' and the 'inherent domain of the judiciary'.\(^\text{568}\)

Definitely, risk assessment for persecution, torture or other forms of cruel and inhuman treatment, such as the PRRA process, which is based on the principle of *non-refoulement*, falls under the 'inherent domain of the judiciary'. Indeed, in *Suresh*, the Supreme Court affirmed that Canada cannot pretend to be a mere passive participant in removal or deportation of any individuals to persecution, torture or other forms of cruel and inhuman treatment.\(^\text{569}\) Similarly, in *Charkaoui*, the Supreme Court stated that deportation of a non-citizen in the context of immigration may not infringe *Charter* rights but the manner in which deportations are carried out can offend the *Charter*.\(^\text{570}\) As mentioned in *Burns*,

> the protection of the innocent, the avoidance of miscarriages of justice, and the rectification of miscarriages of justice where they are found to exist. These considerations are central to the preoccupation of the courts, and directly engage the responsibility of judges "as guardian[s] of the justice system".\(^\text{571}\)

Therefore, there is sufficient consensus that the principle of *non-refoulement* is vital or fundamental to Canadian societal notion of justice. In *Kindler v. Canada*

\(^{567}\) See *Burns, supra* note 493 at para. 35  
\(^{568}\) *Motor Vehicle Act, supra* note 492 at para. 30  
\(^{569}\) *Suresh, supra* note 13 at para. 55  
\(^{570}\) *Charkaoui, supra* note 545 at para. 16  
\(^{571}\) *Burns, supra* note 493 at para. 71
(Minister of Justice) ("Kindler"), the Supreme Court explained that the end of World War II signalled a massive movement towards the greater protection of human rights. Cory J. (dissenting) in Kindler, highlighted that Canada supported and voted in favour of the _Universal Declaration of Human Rights_. Article 5 of the _Universal Declaration of Human Rights_ states that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” Furthermore, in respect to _refoulement_ to persecution, torture or other forms of cruel and inhuman treatment, in _Singh_. Wilson J. mentioned that the _Charter_ “affords freedom not only from actual punishment but also from the threat of punishment.” The _Singh_ principle was used for an extradition case by La Forest J. in _Canada v. Schmidt_ ("Schmidt"). Citing a case that arose before the European Commission on Human Rights, _Altun v. Germany_, La Forest J. stated that

where it was established that prosecution in the requesting country might involve the infliction of torture. Situations falling far short of this may well arise where the nature of the criminal procedures or penalties in a foreign country sufficiently shocks the conscience as to make a decision to surrender a fugitive for trial there one that breaches the principles of fundamental justice enshrined in s. 7.

Indeed, it could be concluded from La Forest J.'s argument in _Schmidt_ that removing an individual to a country, which inflicts persecution, torture or other forms of cruel and inhuman treatment, sufficiently ‘shocks the conscience’ of Canadians and breaches the principles of fundamental justice enshrined in section 7 of the _Charter_. The same argument from _Schmidt_ was adopted by the Supreme Court of Canada in _Burns_. The Court concluded that torture or other forms of cruel and inhuman treatment is

---

574 Ibid.; See _Kindler, supra note 572_ at para. 53
575 _Singh, supra_ note 136: Refugee claimants contended that Canada's decision not to extend convention refugee status to them placed them at risk that they would be prosecuted in their home country for their political beliefs
576 _Kindler, supra note 572_
577 [1987] 1 S.C.R. 500 [Schmidt]
578 _Altun v. Germany_ (1983), 5 E.H.R.R. 611
579 _Schmidt, supra note 577_ at para. 47
580 See _Burns, supra note 493_ at para. 60
repugnant enough that it ‘shocks the conscience’ of Canadians. Therefore, it can be said with certainty that contravening the principle of non-refoulement would breach the principles of fundamental justice.

In addition, Cory J. in *Kindler* explains the European position on the prohibition of torture or other forms of cruel and inhuman treatment. The Europeans use Article 3 of the ECHR to prohibit persecution, torture or other forms of cruel and inhuman treatment. Article 3 of the ECHR expresses the principle of non-refoulement. This Article states that “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.” In *Altun v. Germany*, using Article 3 of the ECHR, the Commission refused to return a fugitive even when assurances were provided that torture or other forms of cruel and inhuman treatment would not be inflicted.

Furthermore, Cory J. in *Kindler* added that an objective possibility of being persecuted or tortured was sufficient to trigger the responsibility under Article 3 of the ECHR. Furthermore, in United Kingdom, which is bound by Article 3 of the ECHR, the European Court of Human Rights stated in the *Soering* case that when a member state knowingly “surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture” then it

---

581 *Kindler*, supra note 572 at para. 103
582 ECHR, supra note 150, art. 3
583 Ibid.
584 Ibid.
585 *Kindler*, supra note 572 at para. 103
violates Article 3 of the ECHR.\textsuperscript{587} Moreover, the European Court added that under Article 3 of the ECHR “inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment”.\textsuperscript{588} The European Court concluded that the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3 [of the ECHR], and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country.\textsuperscript{589}

Therefore, the European position is that a decision to return an individual to face persecution, torture, or inhuman or degrading treatment or punishment is a violation of the individual’s right not to be subjected to such treatment. Even the threat of persecution, torture or other forms of cruel and inhuman treatment can contravene Article 3 of ECHR. Consequently, a state party to the European Convention must ensure that the principle of non-refoulement is adhered in all removals or deportations.

Furthermore, in \textit{Kindler}, La Forest J. added that torture or other forms of cruel and inhuman treatment “would be so outrageous to the values of the Canadian community”.\textsuperscript{590} In respect to death penalty, La Forest J. argued that free votes taken in the Canadian House of Commons in 1976 and 1987\textsuperscript{591} suggested that “capital punishment is not viewed as an outrage to the public conscience. One could not imagine a similar vote on the question of whether to reinstate torture.”\textsuperscript{592}

However, the Supreme Court of Canada made the ‘Suresh exception’ by indicating that deporting people to face substantial risk of torture in ‘exceptional circumstances’ might be justified, either as a consequence of the balancing process

\begin{itemize}
\item \textsuperscript{587} \textit{Kindler}, supra note 572 at para. 105
\item \textsuperscript{588} \textit{Ibid.}
\item \textsuperscript{589} \textit{Ibid.}
\item \textsuperscript{590} \textit{Ibid.} at para. 129
\item \textsuperscript{591} \textit{Ibid.}: In 1987 the reinstatement of the death penalty was voted down by the relatively narrow margin of 148 to 127 attests to the contrary
\item \textsuperscript{592} \textit{Ibid.}
\end{itemize}
mandated by section 7 or under section 1 of the Charter. There is no idea as to what may be exceptional circumstances, also known as the ‘Suresh exception’, which justify deportation to persecution or torture.

Many legal scholars argue that the ‘Suresh exception’ remains a blemish in Canada's human-rights reputation. University of Toronto’s Law Professor, Kent Roach, claims that the ‘Suresh exception’ is not something that has brought credit to Canada and the Supreme Court of Canada. The ‘Suresh exception’ is “also being cited in the European Court of Human Rights to back a bid by Lithuania, the Netherlands and the United Kingdom to overturn a previous court ruling that absolutely banned deporting people to face a substantial possibility of torture.” Moreover, in Burns, even the brutal and shocking cold blooded murders committed by Burns and Rafay did not qualify as exceptional circumstances. Therefore, it is unimaginable what threshold would meet the ‘Suresh exception’.

Accordingly, Law Professor Audrey Macklin claims that when the Supreme Court of Canada created the ‘Suresh exception’, it probably hoped that it would never be used. Similarly, other legal scholars, such as Grant Huscroft, argue that the ‘Suresh exception’

---

593 Suresh, supra note 13 at para. 78 (The Court mentioned that “[a] violation of s. 7 will be saved by s. 1 only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics and the like”... Insofar as Canada is unable to deport a person where there are substantial grounds to believe he or she would be tortured on return, this is not because Article 3 of the CAT directly constrains the actions of the Canadian government, but because the fundamental justice balance under s. 7 of the Charter generally precludes deportation to torture when applied on a case-by-case basis. We may predict that it will rarely be struck in favour of expulsion where there is a serious risk of torture. However, as the matter is one of balance, precise prediction is elusive. The ambit of an exceptional discretion to deport to torture, if any, must await future cases.”)

594 Kirk Makin, "Arbour's role in torture case under fire : UN rights chief calls for ban, but critics cite her part in 2002 Supreme Court ruling" The Globe and Mail (27 June 2006), online: The University of Western Ontario <http://communications.uwo.ca/making_headlines/coverage/060627-1.htm> : Human rights advocates have complained that the Suresh exception was greeted enthusiastically by torture states around the world and created a serious stain on Canada's human-rights reputation.

595 Ibid.

596 Burns, supra note 493 at para. 10: “[T]hree members of the Rafay family were bludgeoned to death by the respondent Burns while the respondent Rafay watched.... The respondent Rafay is also alleged to have told the officer the killings were “a necessary sacrifice in order that he could get what he wanted in life”. With the death of all other members of his family, Rafay stood to inherit his parents’ assets and the proceeds of their life insurance. Burns, it is alleged, participated in exchange for a share in the proceeds under an agreement with Rafay. He was, the prosecution alleges, a contract killer.”

597 Makin, supra note 594
exception’ may be of symbolic importance to its opponents, but it is very unlikely to be ever used. The ‘Suresh exception’ was a product of the post September 11 circumstances because very few judges or politicians could have absolutely relinquished any tool for defeating terrorists following September 11 attacks in the United States.

Indeed, Huscroft argues that the Supreme Court of Canada may have to revisit the ‘Suresh exception’ because of two reasons. First, the ‘Suresh exception’ has ignited a growing clamour in the international human-rights circles. Second, the world is no longer swirling in the confusion of the September 11 attacks and currently, many states are unwilling to cling on to the security measures adopted after the attacks.

Therefore, it could be argued that in Suresh, a unanimous Supreme Court concluded that Canadians do not accept torture as fair or compatible with justice. This is evidenced by the fact that the Criminal Code prohibits torture. Moreover, the Supreme Court affirmed that the “Canadian people, speaking through their elected representatives, have rejected all forms of state-sanctioned torture.” Indeed, the Court stated that “the fact that successive governments and Parliaments have refused to inflict torture and the death penalty surely reflects a fundamental Canadian belief about the appropriate limits of a criminal justice system.” This outlines that the principle of non-refoulement is vital or fundamental to Canadian societal notion of justice. Indeed, in Suresh, torture is described as

so inherently repugnant that it could never be an appropriate punishment, however egregious the offence...The prospect of torture induces fear and its consequences may be devastating, irreversible, indeed, fatal. Torture may be meted out indiscriminately or arbitrarily for no particular offence. Torture has as its end the denial of a person’s humanity; this end is outside the legitimate domain of a criminal justice system...

---

598 Ibid.
599 Ibid.
600 Ibid.
601 Ibid.
602 Suresh, supra note 13 at para. 50
603 See Criminal Code, R.S. C. 1985, c. C-46, s. 269.1 : “Every official, or every person acting at the instigation of or with the consent or acquiescence of an official, who inflicts torture on any other person is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.”
604 Suresh, supra note 13 at para. 50
605 Ibid.
Torture is an instrument of terror and not of justice... [and] will always be grossly disproportionate and will always outrage our standards of decency.... As such, torture is seen in Canada as fundamentally unjust.\(^{606}\)

Again in \textit{Suresh}, the Supreme Court rejected the argument that Canada is an ‘involuntary intermediary’ in expelling a refugee to the risk of torture. The Court applied the principle enumerated in \textit{Burns},\(^{607}\) in relation to extradition, to deportation, switching the section 7 analysis from extradition to \textit{refoulement}. The Court reaffirmed the governing principle of \textit{Burns} in \textit{Suresh}, which states that

the guarantee of fundamental justice applies even to deprivations of life, liberty or security effected by actors other than our government, if there is a sufficient causal connection between our government’s participation and the deprivation ultimately effected.... At least where Canada’s participation is a necessary precondition for the deprivation and where the deprivation is an entirely foreseeable consequence of Canada’s participation, the government does not avoid the guarantee of fundamental justice merely because the deprivation in question would be effected by someone else’s hand.\(^{608}\)

Moreover, the principle of \textit{non-refoulement} is a \textit{jus cogens} norm, which entails other derivative \textit{jus cogens} obligations such the right to an oral hearing in the PRRA process in Canada. The Cartagena Declaration acknowledged that the principle of \textit{non-refoulement} is a rule of \textit{jus cogens}.\(^{609}\) The source of international law with the greatest authority is \textit{jus cogens}. \textit{Jus cogens} is non-derogable, peremptory law and it is associated with human rights and humanitarian protections.\(^{610}\) The next section will elaborate and explain about the derivative \textit{jus cogens} obligations arising from the principle of \textit{non-refoulement}.

\section{6.3.1 Derivative \textit{jus cogens} obligations arising from the principle of \textit{non-refoulement}.}

\(^{606}\) \textit{Ibid.} at para. 51

\(^{607}\) \textit{Burns}, supra note 493

\(^{608}\) \textit{Suresh}, supra note 13 at para. 54 (Therefore, Canada cannot rely on the ‘passive participant’ argument just because the torture of a deportee from Canada is carried out by another country. This does not mean that Canada would violate section 7 of the \textit{Charter} whenever someone is tortured by some foreign government. The important aspect is to find a causal connection between Canada’s action and the deprivation of life, liberty, or security of the person.)

\(^{609}\) Cartagena Declaration, supra note 155

According to Article 53 of Vienna Convention, *jus cogens* "is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."\(^{611}\) Also, Article 64 of Vienna Convention provides that "[i]f a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates."\(^{612}\) A central concept of *jus cogens* is that it is law that is always binding, even in times of emergency and war. Such laws never cease to exist. Moreover, states do not need to consent to be bound by a *jus cogens* norm.\(^{613}\) Under international law, a norm of *jus cogens* overrides rules of treaty and customary international law in conflict with it.

Furthermore, because certain crimes inherently threaten the peace and security of mankind or may even shock human consciousness, it can be concluded that prohibition of these crimes are part of *jus cogens*, such as the prohibition against persecution, torture or other forms of cruel and inhuman treatment. Consequently, the principle of *non-refoulement* has become an inviolable norm. Indeed, to determine if a norm has attained the status of *jus cogens*, the following must be observed: 1) the historical and legal evolution of the norm; 2) the number of states that have outlawed activities that the norm prohibits at a national level; and 3) the number of prosecutions based on this norm and their characterisation.\(^{614}\)

As a result, the principle of *non-refoulement* is supported by a number of binding international conventions such as the Refugee Convention,\(^{615}\) the CAT,\(^{616}\) the ICCPR,\(^{617}\) the ECHR\(^{618}\) and the ACHR.\(^{619}\) The prohibition of *refoulement* to

\(^{611}\) Vienna Convention, *supra* note 179, art. 53

\(^{612}\) *Ibid.*, art. 64

\(^{613}\) *Martin et al.*, *supra* note 610 at 33

\(^{614}\) Nicolaos Strapatsas, "Universal Jurisdiction and the International Criminal Court" (2002) 29 Man. L.J. 1 at para. 32

\(^{615}\) Refugee Convention, *supra* note 4, art. 33(1)

\(^{616}\) CAT, *supra* note 5, art. 3(1)

\(^{617}\) ICCPR, *supra* note 6, art. 7

123
persecution, torture or other forms of cruel and inhuman treatment ranks higher than other international treaty or customary rules. This argument is supported by the fact that there is no human right treaty or customary rule permitting the use of persecution, torture or other forms of cruel and inhuman treatment. In addition, international criminal law instruments outlaw the use of any forms of torture or other forms of cruel and inhuman treatment either directly or indirectly.

Derivative *jus cogens* obligations are other norms that may not appear as non-derogable provisions of multilateral treaties or other sources. However, derivative *jus cogens* obligations “have been proposed as having the status of *jus cogens* because of their necessity in ensuring protection of other *jus cogens* norms.”\(^{620}\) Such norms could be referred as derivative *jus cogens* norms. For instance, the principle of *non-refoulement* is a *jus cogens* norm.\(^{621}\) The right to an oral hearing, the right to due process and procedural fairness surrounding the application of the principle of *non-refoulement* could be classified as derivative *jus cogens* norms. In other words, derivative *jus cogens* norms surround and support the application of *jus cogens* norms.

Above all, the use of the term “derivative *jus cogens*” does not indicate that these norms are in any way lesser than *jus cogens* norms. The term “derivative” is a mere indication of the way in which “one can discern them through the lens of international law when international instruments have omitted their description as non-derogable or peremptory.”\(^{622}\) The most important aspect is to determine the context from which the derivative *jus cogens* obtain its status.

Indeed, for refugee claimants, derivative *jus cogens* norms, such as the right to status determination, right to appeal a removal or deportation order and the right to seek

\(^{618}\) ECHR, *supra* note 150, art. 3: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

\(^{619}\) ACHR, *supra* note 11, art. 5(2) (“No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.”)

\(^{620}\) Martin *et al.*, *supra* note 610 at 36.

\(^{621}\) See Cartagena Declaration, *supra* note 155. The Cartagena Declaration of 1984 states that the principle of *non-refoulement* “is imperative in regard to refugees and in the present state of international law [it] should be acknowledged and observed as a rule of *jus cogens*”.

\(^{622}\) Martin *et al.*, *supra* note 610 at 37
protection against *refoulement*, co-exist with the principle of *non-refoulement*, which is the *jus cogens* norm. In fact, the Inter-American Court of Human Rights held that “judicial guarantees essential for the protection of the enumerated non-derogable rights in the ACHR were also non-derogable in states of emergency, thereby effectively reflecting *jus cogens* status.”\textsuperscript{623} This means that derivative *jus cogens* norms hold the same status as *jus cogens* norms.

However, it could also be argued that derivative *jus cogens* norms are at times difficult to implement because they entail affirmative duties on states. There may be lack of resources to give derivative *jus cogens* norms the right effect.\textsuperscript{624} For instance, in Canada, the risk of persecution or torture assessment, known as PRRA, determines objective *wellfoundedness* of the fear of persecution, torture or other forms of cruel and inhuman treatment without providing PRRA applicants the right to an oral hearing before removal.\textsuperscript{625} The right to an oral hearing is a derivative *jus cogens* norm for an accurate assessment of the risk of persecution, torture or other forms of cruel and inhuman treatment, so that the principle of *non-refoulement*, being a *jus cogens* norm, is not breached. Nevertheless, the lack of resources in the PRRA program, to hold oral hearings for all PRRA applicants, does not remove the right to an oral hearing from losing its derivative *jus cogens* status. Therefore, the lack of affirmative state action to provide an obligatory oral hearing in PRRA process, where there is a serious issue of credibility, does not prevent the right to an oral hearing from losing its derivative *jus cogens* status in relation to the principle of *non-refoulement*.\textsuperscript{626} Thus, oral hearing is required to support the principle of *non-refoulement* in the PRRA process.

All things considered, it is evident that the principle of *non-refoulement* has the societal consensus of the Canadian public that it is vital or fundamental to Canadian societal notion of justice. The principle of *non-refoulement* is an established legal principle in international and domestic law. Canada is a party to international

\textsuperscript{623} *Ibid.* at 36

\textsuperscript{624} *Ibid.*

\textsuperscript{625} PRRA Manual, *supra* note 14 at para. 12.1

\textsuperscript{626} Martin et al., *supra* note 610 at 36
conventions, which treat the principle of non-refoulement as a legal principle. Therefore, the principle of non-refoulement is a vital legal principle that cannot be subordinated to other concerns in appropriate contexts.

6.4 The principle of non-refoulement is identified with sufficient precision and applied to situations in a manner that yields predictable results.

The third requirement to qualify as the principle of fundamental justice is that the principle of non-refoulement must be capable of being identified with sufficient precision and applied to situations in a manner that yields predictable results. Applying the argument provided in Canadian Foundation for Children, it could be concluded that the principle of non-refoulement is a primary consideration when removing or deporting individuals from Canada.627 The PRRA process exemplifies the primacy of the principle of non-refoulement.

Indeed, the principle of non-refoulement is not contextual and not subject to dispute. There are no disagreements about what is meant by the principle of non-refoulement. The principle is clear in expressing the actions that contravene or offend it. The purpose of the principle of non-refoulement is to provide a right not to be returned to a country where there is a risk of persecution, torture or other forms of cruel and inhuman treatment. In Canada, subsection 115(1) of the IRPA628 constitutes a statutory codification of the principle of non-refoulement from Article 33(1) of the Refugee Convention.629 Besides, Canada is also bound by the principle of non-refoulement codified in other international treaties, such as Article 3(1) of the CAT630 and Article 7 of the ICCPR.631 Therefore, the principle of non-refoulement from case law, from

627 See Canadian Foundation for Children, supra note 60 at para. 11
628 IRPA, supra note 12, s. 115
629 Refugee Convention, supra note 4, art. 33(1)
630 CAT, supra note 5, art. 3
631 ICCPR, supra note 6, art. 7
section 115(1) of the IRPA\textsuperscript{632} and from various international treaties provides a fairly complete picture of it.

At the same time, reasonable people agree about the result that the principle of non-refoulement yields, particularly in areas of immigration and refugee law, where the principle is a paramount consideration in the context of refugee protection. The principle of non-refoulement is rooted in the inherent knowledge that refoulement of individuals to face persecution, torture or other forms of cruel and inhuman treatment is wrong. Contravening the principle of non-refoulement is a universally condemned social reality. Removing or deporting individuals to countries where they would be persecuted or tortured cannot be accepted from a moral, religious, philosophical or even social standpoint.

In Singh v. Canada, the Federal Court stated that the principle of non-refoulement from the Refugee Convention “is a fundamental principle of international law, and as with other instruments dealing with extreme forms of human rights violations such as torture, extra judicial execution and disappearance, permits no exceptions”\textsuperscript{633} to deport a refugee or a refugee claimant to face torture or persecution. According to the Court, the principle of non-refoulement prohibits removal, deportation or expulsion back to a country where a refugee or a protected person would be at risk of serious human rights violations. Similarly, the Federal Court of Canada explained that Article 3 of the CAT does not allow any exception to the principle of non-refoulement.\textsuperscript{634}

In Say v. Canada (Solicitor General),\textsuperscript{635} the Federal Court reiterated that the policy basis for PRRA is found in Canada’s domestic and international commitments to the principle of non-refoulement, which holds that none should 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. Principle of non-refoulement requires

\textsuperscript{632} IRPA, supra note 12, s. 115
\textsuperscript{634} Ibid.
\textsuperscript{635} Say v. Canada (Solicitor General), [2005] F.C.J. No. 931
that the risk of persecution, torture or other forms of cruel and inhuman treatment be reviewed prior to removal.\textsuperscript{636}

Moreover, Canada is part of the international community that favours the principle of non-refoulement and condemns refoulement to persecution, torture or other forms of cruel and inhuman treatment, which is the sort of practice that should be amenable to legal intervention. Consequently, the principle of non-refoulement cannot be negated by any circumstances, no matter how extreme. A violation of the principle of non-refoulement amounts to an endorsement of persecution, torture or other forms of cruel and inhuman treatment.

In fact, there is no disagreement in law about the application of the principle of non-refoulement in Canadian immigration and refugee law. It could be argued that the principle of non-refoulement implicitly functions as a principle of fundamental justice, setting out the minimum requirements for individuals seeking protection or refuge in Canada, including those subjected to removal or deportation from Canada. The principle of non-refoulement ensures the well-being of those seeking the protection of fundamental human rights, including the rights to life, liberty and security of the person, to be free from persecution, torture or cruel inhuman degrading treatment or punishment.\textsuperscript{637}

All in all, the principle of non-refoulement is a principle of fundamental justice as outlined in section 7 of the Charter. The principle of non-refoulement meets the criteria required to be recognized as a principle of fundamental justice as set out by the Supreme Court of Canada in Malmo-Levine and in Canadian Foundation for Children. Consequently, the principle of non-refoulement is found to be a legal principle. The principle also has sufficient consensus to be vital or fundamental to Canadian societal notion of justice. In addition, the principle of non-refoulement is identified with sufficient precision and provides a justiciable standard. Thus, it is clear at this point that

\textsuperscript{636} Ibid. at para. 25

\textsuperscript{637} See UNHCR, "Cases And Comments : UNHCR-Application No. 43844/98-T.I. v. United Kingdom - Submission to the European Court of Human Rights" (2000) 12 Int'l J. Refugee L. 268 at para. 5 (According to the UNHCR, fundamental human rights "are threatened when refugees are forcibly returned, directly or indirectly, to countries in which they face persecution or similar dangers.")
the principle of non-refoulement functions as a principle of fundamental justice setting out the minimum requirements for the dispensation of justice under Canadian law.

The next chapter would demonstrate that the prescribed factors set out in section 167 of the *IRPR*,\(^{638}\) which gives the PRRA Officer direction as to when an oral hearing should be held, violate the right to security of the person protected under section 7 of the *Charter* for PRRA applicants. This violation cannot be demonstrably justified in a free and democratic society. Therefore, the next chapter will reveal that section 167 of the *IRPR*, which enumerates the prescribed factors for oral hearing in the PRRA process, is unconstitutional and invalid.

**CHAPTER 7: THE PRESCRIBED FACTORS FOR ORAL HEARING VIOLATE THE RIGHT TO SECURITY OF THE PERSON FOR PRRA APPLICANTS**

Section 7 of the *Charter* states that “[e]veryone 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”.\(^{639}\) The violation of section 7 of the *Charter* would be analysed using a three step process.\(^{640}\) First, it will be demonstrated that the prescribed factors for oral hearing limit the right to security of the person for PRRA applicants. Second, the analysis will show that this limitation is not in accordance with the principles of fundamental justice. Third, it will be demonstrated that this particular limitation is not reasonable and justified in a free and democratic society.

Basically, Supreme Court of Canada, in *Singh*, applied the theory of reciprocity of obligations and rights. Under this theory, if refugee claimants are subjected to the full force of Canadian law, then they are logically entitled to all benefits from the

---

\(^{638}\) *IRPR*, supra note 31, s. 167

\(^{639}\) *Charter*, supra note 53, s. 7.

\(^{640}\) See *Singh*, supra note 136
protections, flowing from Canadian standards of respect for human dignity. The position taken by the Court, in Singh, is that it is hypocritical to impose Canada’s domestic law on refugee claimants on one hand, and on the other hand, deny them of relevant fundamental safeguards set by the Constitution of Canada. Therefore, according to Singh, entitlement of rights under section 7 of the Charter cannot be deprived for refugee claimants except in accordance with the principles of fundamental justice.

Applying Singh to the PRRA process, it can be argued that the Supreme Court has accepted that PRRA applicants may invoke the protection of section 7 of the Charter, which guarantees the right to security of the person.

7.1 PRRA Applicants’ Right to Security of the Person

The Supreme Court of Canada stressed in R. v. Morgentaler (“Morgentaler”), Rodriguez and Suresh that the phrase “life, liberty and security of the person” implicates interest associated with the integrity of the human body. The words in the text of section 7 do not reveal the interpretative limits of the rights except that limitation of the right to life, liberty and security of the person must conform to the principles of fundamental justice. According to the Supreme Court, section 7 of the Charter ought to be interpreted in a manner that corresponds with the traditional role of courts as guardians of the integrity of the legal system. This would mean that the types of individual “liberty” and “security of the person” that would be protected by s. 7 would be interests that are interfered with through the interaction of individuals with the legal system, and that individuals would be guaranteed the protection of the “principles of fundamental justice” in the sense of governmental compliance with generally accepted legal norms.

---


642 Ibid.


644 See Rogerson et al., supra note 495 at 1109

645 Bryden, supra note 526 at para. 5: “Although there are exceptions to this rule, the most notable being the Supreme Court of Canada’s recent decision in Chaoulli, [Chaoulli v. Quebec (Attorney General), [2005] 1 S.C.R. 791] for the most part, Canadian courts seem to have been persuaded that the way to establish limits that are appropriate to the institutional capacities of judges engaging in constitutional review using s. 7 is to severely restrict the meaning of "liberty" and "security of the person". This is done in order to prevent interests that have an economic dimension from falling within the scope of this
In Singh, the Supreme Court of Canada made its first decision extending the scope of section 7 of the Charter beyond its traditional domain of criminal law.\textsuperscript{646} Wilson J., in Singh, stated that "it is incumbent upon the Court to give meaning to each of the elements, life, liberty and security of the person, which make up the "right" contained in s. 7."\textsuperscript{647} The Court conceded that "it is true that the concepts of the right to life, the right to liberty, and the right to security of the person are capable of a broad range of meaning."\textsuperscript{648} Again, the Court emphasized that the right to life, liberty and security of the person contained in section 7 of the Charter are to be considered as three distinct rights and "independent interests, each of which must be given independent significance by the Court."\textsuperscript{649} The infringement of any of these section 7 rights is sufficient to trigger a constitutional analysis whether such infringement accords with the principles of fundamental justice.\textsuperscript{650}

Moreover, the jurisprudence of the Supreme Court of Canada reveals that the protections guaranteed by section 7 of the Charter would not be engaged by the mere fact that an individual is engaged in a legal proceeding. Indeed, section 7 "has not been construed as a generic constitutional guarantee that all legal proceedings must be consistent with the 'principles of fundamental justice' any more than it has been understood to require all laws to comply with the 'principles of fundamental justice'".\textsuperscript{651} In other words, the rights of section 7 are, obviously, not absolute and are limited by the principles of fundamental justice.

In New Brunswick (Minister of Health and Community Services) v. G. (J.) [J.G.], Lamer C.J. asserted that section 7 applies beyond the scope of criminal law, where the government in the course of the administration of justice can deprive an

\textsuperscript{646} Ibid. at para. 8
\textsuperscript{647} Singh, supra note 136 at para. 43
\textsuperscript{648} Ibid.
\textsuperscript{649} Morgentaler, supra note 643 at para. 13; See ibid. at para. 42
\textsuperscript{650} Morgentaler, ibid. at para. 13
\textsuperscript{651} Ibid. at para. 11
individual’s rights to liberty and security of the person. According to the Supreme Court, security of the person encompasses “a notion of personal autonomy involving, at the very least, control over one’s bodily integrity free from state interference and freedom from state-imposed psychological and emotional stress.”

Indeed, Wilson J. confirmed that the security of the person includes the freedom from the threat of physical punishment or suffering. As well, according to Wilson J., the security of the person is breached if a convention refugee is removed from Canada to a country where his or her life or freedom would be threatened. Therefore, in Singh, the denial of protection, contrary to the principle of non-refoulement, must amount to a deprivation of security of the person within the meaning of section 7 of the Charter.

In addition, in Singh, it was decided that the risk to security of the person can be invoked when there is a threat to any of the three rights that are statutorily and conventionally guaranteed to a refugee. The three rights are, namely, the right to status determination, the right to appeal a removal or deportation order, and right to protection against refoulement. Specifically, in Singh, the Supreme Court of Canada decided that the impairment of any of the three rights that uphold the principle of non-refoulement would threaten the security of the person because the three rights opened avenues for refugee claimants to escape from the risk of persecution, torture or other forms of cruel and inhuman treatment. Consequently, “the right to protection against refoulement, standing alone, was said to be sufficient to ground a section 7 claim”. The Court said that even if one adopts the narrow approach advocated by counsel for the Minister, "security of the person" must encompass freedom from the threat of physical punishment or suffering as well as freedom from such punishment itself. I note particularly that a Convention refugee has the right ... not to "...be removed from Canada to a country where his life or freedom would be threatened...". In my view, the

---

652 [1999] 3 S.C.R. 46 at para. 65
653 See Hathaway & Neve, supra note 641 at para. 32; See Morgentaler, supra note 643 at para. 240
654 Singh, supra note 136 at para. 47
655 See ibid.
656 Hathaway & Neve, supra note 641 at para. 33
657 Ibid.
658 Ibid.
denial of such a right must amount to a deprivation of security of the person within the meaning of s. 7.669

In the forthcoming sections, it will be demonstrated that the prescribed factors set out in section 167 of the IRPR660 limit the right to security of the person enshrined in section 7 of the Charter for PRRA applicants. The limitation is not in accordance with the principles of fundamental justice. According to section 52(1) of the Constitution Act, 1982, “[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.”661 Therefore, the prescribed factors cannot apply.

7.2 THE PRESCRIBED FACTORS FOR ORAL HEARING VIOLATE THE RIGHT TO SECURITY OF THE PERSON FOR PRRA APPLICANTS

The subsection 113(b) of the IRPA provides that the consideration of an oral hearing under PRRA shall be as follows: “[a]n oral hearing] may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required”.662 The prescribed factors to be considered, when determining whether to hold an oral hearing, are set out in section 167 of the IRPR.663 Section 167 of the IRPR664 reads as follows:

For the purpose of determining whether a hearing is required under paragraph 113(b) of the Act, the factors are the following:

(a) whether there is evidence that raises a serious issue of the applicant's credibility and is related to the factors set out in sections 96 and 97 of the Act;

(b) whether the evidence is central to the decision with respect to the application for protection; and

(c) whether the evidence, if accepted, would justify allowing the application for protection.

---

669 Singh, supra note 136 at para. 47
660 IRPR, supra note 31, s. 167
661 Constitution Act, 1982, s. 52(1) being Schedule B to the Canada Act 1982 (U.K), 1982, c.11. [Constitution Act, 1982]
662 IRPA, supra note 12, s. 113(b)
663 IRPR, supra note 31, s. 167
664 Ibid.
In *Singh*, the Supreme Court of Canada was clearly aware that the appellants who were refugee claimants were not entitled to assert rights as convention refugees.\(^{665}\) Yet, the Court accepted that refugee claimants are entitled to procedural protections under the principles of fundamental justice from section 7 of the *Charter*. This is, indeed, similar to the case of PRRA applicants. With regard to refugee claimants, the Court reasoned that the *Charter* should apply to entitle them to fundamental justice in the adjudication of their refugee status if they have a well-founded fear of persecution or if they face substantial risk of torture or other forms of cruel and inhuman treatment.\(^{666}\) This is because of the potential consequences arising from denial of refugee protection.

PRRA is a refugee determination process and is part of Canada’s refugee protection obligation. The Supreme Court of Canada concluded that the interests under section 7 of the *Charter* are at stake in the refugee determination process.\(^{667}\) Indeed, Wilson J., in *Singh*, added that the Court need concern itself only with the question whether the procedural scheme set up by the [Immigration] Act for the determination of that status is consistent with the requirements of fundamental justice articulated in s. 7 of the Charter. I see no reason why the Court should limit itself in this inquiry or establish distinctions between classes of refugee claimants which are not mandated by the Act itself.\(^{668}\)

Similarly, the interests under section 7 of the *Charter* are at stake in the PRRA process. Also, the procedures that make up the administration of the PRRA process come under the scrutiny of section 7 of the *Charter*.

In short, section 7 of the *Charter* can be applied to the PRRA process to assess whether someone would face the risk of torture or persecution if removed from Canada. Essentially, the PRRA process makes an assessment whether the applicant could be considered a convention refugee or a person in need of protection based on Canada’s *IRPA*. Consequently, to remove or deport a PRRA applicant, without proper inquiry of

\(^{665}\) See *Singh*, supra note 136 at para. 49 ("It must be recognized that the appellants are not at this stage entitled to assert rights as Convention refugees; their claim is that they are entitled to fundamental justice in the determination of whether they are Convention refugees or not.")

\(^{666}\) See *ibid. at para. 52*

\(^{667}\) See *ibid.*

\(^{668}\) *Ibid.* at para. 55
the risk of persecution, torture or other forms of cruel and inhuman treatment could potentially jeopardize his or her right to security of the person.669

7.2.1 The constitutional right to oral hearing in credibility assessment

Subsection 113(b) of the IRPA670 and section 167 of the IRPR671 do not cover all that is relevant under section 7 of the Charter. They have made it only possible to have oral hearings when all the prescribed factors are cumulatively satisfied.672 This imposes a heavy burden on PRRA applicants to qualify for oral hearings. This is indeed a violation of the right to security of the person found in section 7 of the Charter. The prescribed factors cumulatively prevent PRRA applicants from having a “meaningful opportunity to state their case and to know the case they have to meet.”673

The PRRA process requires those facing removals to make a written submission and demonstrate on the balance of probabilities that they face a persecution or substantial risk of torture or other forms of cruel and inhuman treatment if removed from Canada. The procedural scheme in the PRRA process sets the onus on the applicant to file a clear application and submit the relevant documentary evidences. In case of any ambiguities or contradictions, the PRRA decision-maker does not have any obligation to seek clarification.674 In respect to clarifying ambiguities or contradictions, in Selliah, the Federal Court concluded that

670 IRPA, supra note 12, s. 113(b)
671 IRPR, supra note 31, s. 167
672 PRRA Manual, supra note 14 at para. 12.2: See also Demirovic, supra note 38 at paras. 9 and 10 (The Federal Court stated that the prescribed factors contained in section 167 of IRPR must be considered as cumulative. “This interpretation flows from the use of the word "and" in paragraph (b) and is supported by the use of the phrase "the evidence" in paragraphs (b) and (c).”)
673 Singh, supra note 136 at para. 57 (The prescribed factors are not sufficient and that there are other situations outside the scope of the cumulative factors, in which there may be serious violation of section 7 rights. Therefore, the prescribed factors are not sufficient under section 7 of the Charter. The prescribed factors violate section 7 by under inclusiveness.); See also Morgentaler, supra note 643 at para. 52 (Parliament adopted the PRRA process to ensure that the principle of non-refoulement is observed. However, if the procedural structure of the PRRA is manifestly unfair violating section 7 rights and the principles of fundamental justice, then this structure of the PRRA must be deemed unconstitutional.)
674 Jones & Baglay, supra note 195 at 336
[a] visa officer [or PRRA officer] may inquire further if he or she considers a further enquiry is warranted. Obviously, a visa officer cannot be wilfully blind in assessing an application and must act in good faith. However, there is no general obligation on a visa officer to make further inquiries when an application is ambiguous. The onus is on an applicant to file a clear application together with such supporting documentation as he or she considers advisable. The onus does not shift to the visa officer and there is no entitlement to a personal interview if the application is ambiguous or supporting material is not included.675

Although, Canadian courts have consistently held that there is no common law right to an oral hearing *per se*, the Supreme Court of Canada, in *Singh* outlined that there are two important factors determining the necessity of an oral hearing.676 Beetz J., in *Singh*, said that “[t]he most important factors in determining the procedural content of fundamental justice in a given case are the nature of the legal rights at issue and the severity of the consequences to the individuals concerned.”677

Again, the *Singh* decision stressed that threats to life, liberty or security of the person by a foreign power have a considerable impact on the type of hearing warranted in the circumstances.678 Beetz J. asserted that a full oral hearing is required for assessment of the merits.679 On the contrary, the prescribed factors for oral hearing in the PRRA process and the cumulative nature of the factors do not permit the evidences and issues to be fully discussed and reviewed by the decision-makers and the applicants.680

Also, the prescribed factors prevent oral hearing from being conducted to assess the credibility of the PRRA application based on the discretion of the PRRA decision-maker. Consequently, the PRRA runs the risk of written submissions being based on unanticipated and unaddressed issues. Therefore, an incorrect determination could lead

---

675 *Selliah*, *supra* note 38 at para. 21
676 Jones & de Villars, *supra* note 399 at 274
677 *Singh*, *supra* note 136 at para. 103 (“[F]airness requires depends on the nature of the investigation and the consequences which it may have on persons affected by it. The fundamental rule is that, if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings or deprived of remedies or redress, or in some such way adversely affected by the investigation and report, then he should be told the case made against him and be afforded a fair opportunity of answering it.”); See also Jones & de Villars, *ibid.* at 269
678 See *Singh*, *ibid.* at para. 107
679 See *ibid.*
680 Jones & Baglay, *supra* note 195 at 337
to removal of the applicant to face persecution or torture in his or her country of origin. This violates the PRRA applicant’s fundamental right to the security of the person.

The absence of oral hearing does not infringe section 7 of Charter in all cases. However, the procedural scheme envisaged for the PRRA process by section 167 of the IRPR brings about inadequacy of the opportunity for PRRA applicants to state their case and to know the case they have to meet. Therefore, the cumulative prescribed factors remove the ability of the PRRA decision-maker to conduct an oral hearing at his or her discretion to determine the well-foundedness of the protection claim and the genuine risk of persecution, torture or other forms of cruel and inhuman treatment. Consequently, the effect of the cumulative prescribed factors for oral hearing in PRRA conflicts with the ruling of the Federal Court of Canada that “the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his [or her] disposal to produce the necessary evidence in support of the application.”

In Singh, both Wilson J. and Beetz J. highlighted the importance of oral hearing particularly when assessment of credibility is involved. Consequently, it can be concluded that section 167 of the IRPR creates a set of prescribed factors which violate the right to security of the person, protected under section 7 of the Charter. Therefore, as mentioned in Morgentaler, the effect of section 167 of the IRPR, which restricts the situations in which an oral hearing could be conducted, breaches the right to security of the person under section 7 of the Charter. At this point, it is necessary to consider whether the limitation of the right to security of the person for PRRA applicants accords with the principles of fundamental justice.

681 IRPR, supra note 31, s. 167
682 See Singh, supra note 136 at para. 60; See also Jones & de Villars, supra note 399 at 271
683 N.O., supra note 356 at para. 17
684 Jones & de Villars, supra note 399 at 271
685 IRPR, supra note 31, s. 167
686 Morgentaler, supra note 643 at para. 34 (“It is important to note that, in speaking of the effects of legislation, the Court in R. v. Big M Drug Mart Ltd. was still referring to effects that can invalidate legislation under s. 52 of the Constitution Act, 1982 and not to individual effects that might lead a court to provide a personal remedy under s. 24(1) of the Charter.”)
7.3 Do the prescribed factors for an oral hearing in PRRA violate the principles of fundamental justice?

According to Wilson J., in Singh, refugee claimants physically present in Canada must have a meaningful opportunity to state their case and to know the case they have to meet. Furthermore, Wilson J. stated that a minimum concept of fundamental justice includes the notion of procedural fairness for section 7 of the Charter.687 According to the Court, the notion of procedural fairness from section 7 imposes that that no law of Canada shall be construed or applied so as to deprive a refugee claimant, including PRRA applicants of “a fair hearing in accordance with the principles of fundamental justice”.688 In Pushpanathan, Cory J. argued, in dissent, that when a person faces the prospect of removal from Canada to a country where there is substantial risk of torture or persecution or other serious violation of human rights, there is a need for a fair hearing. Cory J. stated that

[]In light of the grave consequences of deportation in such a case, there must be an opportunity for a hearing before the individual is deported, and the hearing must comply with all of the principles of natural justice. As well, the individual in question ought to be entitled to have the decision reviewed to ensure that it did indeed comply with those principles. These protections should be available whether or not the individual is excluded from claiming status as a refugee, to avoid unacceptably harsh consequences arising from the exclusion.689

Section 167 of the IRPR690 sets up very restrictive criteria under which an oral hearing can be held in the PRRA process. The difficulty of getting an oral hearing in the PRRA process is attributed to the procedures set out in section 167 of the IRPR, which constitutes an infringement of the right to security of the person. In Singh, Wilson J. stated that based on the principles of fundamental justice, serious credibility assessment requires oral hearing.691 Although the absence of an oral hearing need not be inconsistent with the principles of fundamental justice in every case, in Suresh, the Supreme Court held that elevated procedural protection is required under the principles of fundamental

---

687 Singh, supra note 136 at para. 57
688 Ibid.
689 Pushpanathan, supra note 180 at para. 157
690 IRPR, supra note 31, s. 167
691 See Singh, supra note 136 at para. 59
justice when an individual is removed to a country where there is a risk of persecution, torture or other forms of cruel and inhuman treatment. 692

In Suresh, the Supreme Court of Canada reminded that the elevated level of procedural protections is "mandated by the serious situation of refugees like Suresh, who if deported may face torture and violations of human rights in which Canada can neither constitutionally, nor under its international treaty obligations, be complicit." 693 As indicated in Suresh, the Minister has to ensure that those subjected to removals, facing the risk of persecution or torture "must be informed of the case to be met." 694 If written submissions are used to assess the risk of persecution or torture upon removal from Canada, in place of oral hearing, then principles of fundamental justice requires that "[n]ot only must the refugee be informed of the case to be met, the refugee must also be given an opportunity to challenge the information of the Minister where issues as to its validity arise." 695

Furthermore, based on Singh, it could be argued that the restrictions set up by section 167 of the IRPR 696 violate the principles of fundamental justice because they bring about an inadequacy for the PRRA applicant to state his or her case and to know the case he or she has to meet. 697 The Supreme Court of Canada asserted that whenever there is a serious issue of credibility or issues concerning full assessment of all relevant facts, fundamental justice requires that credibility and full assessment of all relevant facts to be determined on the basis of an oral hearing. 698 In Singh, Wilson J. explained that the right to life, liberty and security of the person are invoked in matters where individuals may face death, severe restriction to physical liberty or may be subjected to

692 Jones & de Villars, supra note 399 at 272
693 Suresh, supra note 13 at para. 120; See also ibid. at 272
694 Suresh, ibid. at para. 122
695 Ibid. at para. 123
696 IRPR, supra note 31, s. 167
697 Singh, supra note 136 at para. 60
698 See ibid. at paras. 58 and 59
physical punishment. Consequently, the Court added that it would seem on the surface at least that matters concerning death, physical liberty or physical punishment, which are of fundamental importance to those affected, “procedural fairness would invariably require an oral hearing.”

It could be argued that according to Wilson J. ‘serious issue of credibility’ refers to credibility of the refugee claim in the context of the procedures established in the PRRA scheme. In Singh, the procedures setup by the Immigration Act that was applicable during that period required refugee claimants “to make a written submission which demonstrated on the balance of probabilities that he would be able to establish his claim at a hearing. If the applicant failed to bring forward the requisite facts his claim would not be allowed to proceed” for refugee determination. These procedures are similar to the PRRA process.

Moreover, as stated in Singh, the Supreme Court affirmed that even if it could be accepted that written hearings are consistent with the principles of fundamental justice in section 7 of the Charter for some purposes, they will not be satisfactory for all purposes. In cases “where a serious issue of credibility [of both applicant and application] is involved, fundamental justice requires that credibility be determined on the basis of an oral hearing.” Therefore, oral hearings can apply to the assessment of subjective credibility of the PRRA applicant or the credibility of the description contained in the application.

---

699 See ibid.

700 Ibid. at paras. 58 and 59 (Wilson J. speaking for the Court added that “[i]f ‘the right to life, liberty and security of the person’ is properly construed as relating only to matters such as death, physical liberty and physical punishment, it would seem on the surface at least that these are matters of such fundamental importance that procedural fairness would invariably require an oral hearing. I am prepared, nevertheless, to accept for present purposes that written submissions may be an adequate substitute for an oral hearing in appropriate circumstances. I should note, however, that even if hearings based on written submissions are consistent with the principles of fundamental justice for some purposes, they will not be satisfactory for all purposes. In particular, I am of the view that where a serious issue of credibility is involved, fundamental justice requires that credibility be determined on the basis of an oral hearing.”)

701 R.S.C. 1985, c. 1-2 (repealed). Now see IRPA, supra note 12

702 Singh, supra note 136 at para. 60

703 Ibid. at para. 59
The Court, in *Singh*, emphasised that “it is difficult to conceive of a situation in which compliance with fundamental justice could be achieved by a tribunal making significant findings of credibility solely on the basis of written submissions.”\(^{704}\) Furthermore, in *Singh*, the Supreme Court concluded that “[a]ppellate courts are well aware of the inherent weakness of written transcripts where questions of credibility are at stake and thus are extremely loath to review the findings of tribunals which have had the benefit of hearing the testimony of witnesses in person.”\(^{705}\)

Moreover, in *Dehghani v. Canada (Minister of Employment and Immigration)* ("*Dehghani*"), the Supreme Court of Canada reiterated that where the “question of whether the appellant's claim to Convention refugee status involves an issue of credibility, the appellant is entitled to an oral hearing.”\(^{706}\) The Court added that the concern raised by Wilson J. in *Singh* is related to the adequacy of “the opportunity the [procedural] scheme provides for a refugee claimant to state his [or her] case and know the case he [or she] has to meet.”\(^{707}\)

In addition, oral hearing provides the PRRA applicants with the opportunity to orally respond to credibility concerns that the PRRA Officers may have.\(^{708}\) Oral hearing may partly satisfy the right to reply because “fundamental justice requires that an opportunity be provided to respond to the case presented to the Minister.”\(^{709}\) The right to reply provides the PRRA applicant with an opportunity to examine the material being used against him or her and to respond to the case against him or her. Likewise oral hearings in the PRRA process would ensure that the applicant is provided with the right to reply to the case against him or her, which is an essential requirement under the principles of fundamental justice.

---

\(^{704}\) *Ibid.*

\(^{705}\) *Ibid.*

\(^{706}\) *Dehghani v. Canada (Minister of Employment and Immigration)*, [1993] 1 S.C.R. 1053 at para. 49


\(^{708}\) See *Suresh*, supra note 13 at paras. 16 and 122

\(^{709}\) See *ibid.* at para. 122

141
Indeed, in Suresh, the Court was clear when it said that a person facing the risk of deportation to persecution, torture or other forms of cruel and inhuman treatment must be informed of the case to be met. The PRRA applicants have the right of disclosure of the materials on which the officers would base his or her decision. In R. v. Stinchcombe, the Supreme Court of Canada outlined the importance of the right to disclosure in the context of criminal cases, which is protected by the principles of fundamental justice. It could be argued that the duty to disclose in administrative law “advances the search for truth [which] supports the position that the disclosure of documents is a necessary component of procedural fairness and natural justice.” On the contrary, the Federal Courts have consistently held that there is no duty or obligation to disclose on the part of the PRRA Officer. The central difficulty with the Federal Court’s position is its failure to provide a detailed analysis of why disclosure does not form a part of procedural fairness in administrative law.

It is accepted that administrative decision-makers are required to be fair. It is also accepted that it is not, in most cases, necessary for administrative decision-makers to adopt the full trappings of a court. However, it is rare for courts to offer an analysis of why processes viewed as essential to ensuring procedural fairness in civil or criminal litigation can be dispensed with in an administrative proceeding without compromising the fairness of that proceeding. For example, it is trite to observe that the strict rules of evidence dealing with matters such as hearsay and similar fact evidence will not be followed in administrative tribunals. It is rare, however, to find any analysis explaining why these concepts are necessary to ensure a just outcome in a court proceeding but have no place in an administrative tribunal. That they are unnecessary is accepted, but the reasons why are not addressed.

Even if there is no complete duty of disclosure for PRRA Officers, oral hearings would be an avenue to partially satisfy any qualms about the lack of disclosure. In administrative decision, aiming at the collective or societal good than individual rights,
efficiency may plausibly outweigh procedural safeguards. Instead, where essential fundamental interests of the individual are at stake, the efficient and effective operation of the PRRA process cannot and should not justify the restrictions set up by section 167 of the *IRPR*.

In addition, according to the PRRA Manual, the PRRA process does not permit any avenues for a PRRA applicant to address the credibility of his or her claim.\(^{715}\) In fact, the PRRA scheme prevents the use of oral hearings to determine credibility of the claims. This is done through the use of prescribed factors, outlined in section 167 of the *IRPR*.\(^{716}\) The PRRA process only permits an oral hearing in exceptional circumstances and the hearing is limited to assess the credibility of the applicant and not the evidences concerning the assessment of the *wellfoundedness* of the fear of persecution or substantial risk of torture or other forms of cruel and inhuman treatment.\(^{717}\) Therefore, in respect to credibility, the PRRA applicant may not have an avenue to make an effective challenge against the reasons, which underlie the PRRA Officer’s decision to reject the claim. There is a further risk of the applicant not being informed of the case against him or her. Consequently, an incorrect determination could lead to torture or persecution of the PRRA applicant at his or her country of origin upon removal from Canada and violate the applicant’s fundamental right to the security of the person. Such a violation cannot be in accordance with the principles of fundamental justice.

It is apparent that a PRRA application will usually be rejected before the applicant had an opportunity to discover the PRRA Officer’s case against him or her. This had prompted many PRRA applicants to demand for a preliminary or draft risk assessment. However, the Federal Court continues to deny the request for a preliminary or draft risk assessment. In *Rasiah v. Canada*,\(^{718}\) the Federal Court was asked if the PRRA Officer is required to provide draft reasons to the applicant or the applicant’s counsel before a final decision was rendered. The Federal Court replied that the

---

\(^{715}\) See PRRA Manual, *supra* note 14 at para. 12.1

\(^{716}\) *IRPR, supra* note 31, s. 167

\(^{717}\) PRRA Manual, *supra* note 14 at para. 12.1

\(^{718}\) *Rasiah, supra* note 309
issue [of preliminary or draft risk assessment] has been decided by this Court on eleven occasions. On all occasions the Court has ruled the duty of fairness does not require the disclosure of the draft risk assessment report so that the applicant can correct perceived errors or omissions. Correcting such errors or omissions is possible on judicial review. Requiring every PRRA decision to be circulated in draft would encumber and delay the already cumbersome and slow PRRA application process.\textsuperscript{719}

That being said, the opportunity to participate in administrative decisions affecting life, liberty or security of the person has been recognized by the Supreme Court of Canada, as an essential aspect of the right to be treated in accordance with the principles of fundamental justice under section 7 of the \textit{Charter}.\textsuperscript{720} Besides, the correction of errors relating to credibility may not be possible in a judicial review. In \textit{Suresh}, the Supreme Court pointed out that the inquiry into the existence of substantial risk of torture is largely fact-driven. Consequently, such an inquiry requires analysis into the human rights conditions of the deportee’s home state, deportee’s personal risks, reliability of assurances provided by the home state, political stability of the home state and its ability to control its own security forces.\textsuperscript{721} Therefore, in \textit{Suresh}, it was concluded that

\begin{quote}
\[t]he court may not reweigh the factors considered by the Minister, but may intervene if the decision is not supported by the evidence or fails to consider the appropriate factors. It must be recognized that the nature of the evidence required may be limited by the nature of the inquiry. This is consistent with the reasoning of this Court in \textit{Kindler, supra}, at pp. 836-37, where considerable deference was shown to ministerial decisions involving similar considerations in the context of a constitutional revision, that is in the context of a decision where the s. 7 interest was engaged.\textsuperscript{722}
\end{quote}

Furthermore, in \textit{Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)} ("\textit{Thomson Newspapers"}), the Supreme Court affirmed that the "\textit{[f]undamental justice in our Canadian legal tradition...is primarily designed to ensure that a fair balance be struck between the...}

\textsuperscript{719} \textit{Ibid.} at para. 21. "[O]verwhelming and clear jurisprudence of this Court is that there is no obligation on the PRRA officer to provide the applicant with draft reasons."); See also \textit{Selliah, supra} note 38 at para. 78 (F.C.) where the court ruled that "there was no duty on the Officer to disclose the results of the PRRA prior to rendering a decision on the H&C application. The Officer did not breach the duty of fairness."; See also \textit{Navarainam, supra} note 309 at paras. 11-15; See also \textit{Vasquez, supra} note 309 at paras. 16-28 (F.C.); See also \textit{Akpataku, supra} note 309 at para. 19.

\textsuperscript{720} \textit{Jackman, supra} note 405 at para. 22

\textsuperscript{721} \textit{See} \textit{Suresh, supra} note 13 at para. 39

\textsuperscript{722} \textit{Ibid.}
interests of society and those of its citizens."\textsuperscript{723} La Forest J. elucidated that in assessing whether a procedure accords with the principles of fundamental justice, it is essential to balance competing individual interests and the interests of the state. Therefore, the individual rights and the interests of the PRRA applicant must be balanced with the needs of the state. This balancing approach was further elaborated in \textit{Suresh}, a case concerning the deportation of an alleged terrorist to Sri Lanka who faces a substantial risk of torture if deported.\textsuperscript{724}

Moreover, in \textit{Chiarelli}, the Supreme Court of Canada reiterated the position of La Forest J. in \textit{Thomson Newspapers}, that "in assessing whether a procedure accords with fundamental justice, it may be necessary to balance competing interests of the state and the individual".\textsuperscript{725} Therefore, there is a need to balance the individual’s interests at stake with the societal interests that the law advances and consideration should be given to the context of the impugned legislation or state action.\textsuperscript{726} Again, the Supreme Court highlighted the importance of the balancing approach in \textit{Godbout v. Longueuil (City)} ("\textit{Godbout}"),\textsuperscript{727} making it clear that the principles of fundamental justice require a balancing of the state’s interests with the individual’s life, liberty or security of the person at stake.\textsuperscript{728}

\textsuperscript{723} \textit{Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)}, [1990] 1 S.C.R. 425 at para. 262

\textsuperscript{724} \textit{Suresh}, supra note 13 at para. 45 (The Court said that the “relevant principles of fundamental justice are determined by a contextual approach that “takes into account the nature of the decision to be made”...The approach is essentially one of balancing... It is inherent in the...balancing process that the outcome may well vary from case to case depending on the mix of contextual factors put into the balance”. Deportation to torture, for example, requires...[the Court] to consider a variety of factors, including the circumstances or conditions of the potential deportee, the danger that the deportee presents to Canadians or the country’s security, and the threat of terrorism to Canada. In contexts in which the most significant considerations are general ones, it is likely that the balance will be struck the same way in most cases.")

\textsuperscript{725} \textit{Chiarelli}, supra note 394 at para. 47

\textsuperscript{726} Burstein, supra note 506 at 164

\textsuperscript{727} \textit{Godbout v. Longueuil (City)}, [1997] 3 S.C.R. 844

\textsuperscript{728} \textit{Ibid.} at para. 76 (The Court affirmed that the principles of fundamental justice “often involves the more general endeavour of balancing the constitutional right of the individual claimant against the countervailing interests of the state. In other words, deciding whether the principles of fundamental justice have been respected in a particular case has been understood not only as requiring that the infringement at issue be evaluated in light of a specific principle pertinent to the case, but also as
The primary interest of the state in the PRRA is to uphold the principle of non-refoulement. According to the PRRA Manual, the “policy basis for assessing risk prior to removal is found in Canada’s domestic and international commitments to the principle of non-refoulement.” The state also has the right and the duty to keep out non-citizens, who are deemed inadmissible to live in Canada. Also, the state has an interest in ensuring that ‘back-door’ economic migrants do not abuse the PRRA process to immigrate into Canada. Furthermore, the state has to ensure that the PRRA process is not overly burdened by procedures that affect its administrative expediency. Indeed, administrative expediency certainly has its place in administrative law.

However, when administrative expediency brings about an inadequacy for PRRA applicants to state their case and to know the case they have to meet, then it raises a question whether the procedural scheme, envisaged for the PRRA process by section 167 of the IRPR, conforms to the principles of fundamental justice. In Rodriguez, the Supreme Court held that if the “deprivation of the right in question does little or nothing to enhance the state's interest (whatever it may be), ...[then] a breach of fundamental justice will be made out, as the individual's rights will have been deprived for no valid purpose.” As indicated in Singh, it is difficult to make credibility assessment solely on the basis of a written hearing. Moreover, the principles of

---

729 PRRA Manual, supra note 14 at para. 2
730 Ibid.
731 IRPR, supra note 31, s. 167
732 See Singh, supra note 136 at para. 60; See also Jones & de Villars, supra note 399 at 271
733 Rodriguez, supra note 505 at para. 147
734 See Singh, supra note 136 at para. 59

146
fundamental justice require that a serious issue of credibility be analysed on the basis of an oral hearing when the right not to be removed to a country where life, liberty or security of the person is threatened i.e. the right of non-refoulement is at stake. Accordingly, it can be concluded that the prescribed factors for oral hearing set out in section 167 of the IRPR \textsuperscript{735} deprive PRRA applicants of their right to a fair hearing. Therefore, section 167 of the IRPR violates PRRA applicants’ right to security of the person guaranteed under section 7 of the Charter. This violation is not in accordance with the principles of fundamental justice.

7.4 **Is the violation caused by the prescribed factors for an oral hearing in PRRA reasonable and justified in a free and democratic society?**

According to section 1 of the Charter "[t]he Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."\textsuperscript{736} Under section 7 of the Charter, it should be first proven that one or more legal rights have been violated. First, the impairment of the right to life, liberty or security of the person must be established. Once this is established, then it has to be determined whether that impairment has been effected in accordance with the principles of fundamental justice.\textsuperscript{737} If this threshold is met within section 7, then the Court must then consider whether the violation can be saved under section 1 of the Charter as a limit prescribed by law and whether the violation is both reasonable and justified in a free and democratic society.\textsuperscript{738}

There is some debate as to the necessity of section 1 analysis for section 7 of the Charter. According to Wilson J., if the limit of legal rights under section 7 is achieved by breaching the principles of fundamental justice, then the enquiry should end in section 7 itself, without pursuing whether the violation is acceptable in a free and

\textsuperscript{735} IRPR, supra note 31, s. 167

\textsuperscript{736} Charter, supra note 53, s. 1.

\textsuperscript{737} See Motor Vehicle Act, supra note 492 at para. 104

\textsuperscript{738} See ibid.
democratic society under section 1 of the Charter. In other words, once it is established that the PRRA applicants' legal right, which is the right to security of the person, is violated and the violation does not conform to the principles of fundamental justice, then there is no need to show if the violation is reasonable and demonstrably justified in a free and democratic society. In essence, Wilson J. argues that the limits placed on the most basic fundamental rights under section 7 of the Charter, which are not in accordance with the principles of fundamental justice, cannot be considered reasonable or justifiable in a free and democratic society.

Another reason provided by Wilson J. is that there is a requirement in section 7 that the principles of fundamental justice be observed for limits placed on legal rights. This requirement "restrict[s] the legislature's power to impose limits on the s. 7 right under s. 1." Therefore, the legislature can only limit rights under section 7, if the limit is in accordance with the principles of fundamental justice. Even here, the legislature has to ensure that the limit imposed fall within the confines of section 1 of the Charter.

To put it differently, according to Wilson J., "a law which interferes with the liberty of the citizen in violation of the principles of fundamental justice cannot be saved by s. 1 as being either reasonable or justified. The concepts are mutually exclusive." She cautions that this does not mean that no limits can be placed on the right to life, liberty or security of the person. Limits can be placed on these legal rights as long as the limits are "imposed in accordance with the principles of fundamental justice and survive the tests in s. 1 as being reasonable and justified in a free and democratic society."

---

739 See ibid.
740 See ibid.
741 See ibid.
742 See ibid.
743 See ibid. at para. 118
744 Ibid. (Wilson J. wrote as follows: "I cannot think that the guaranteed right in s. 7 which is to be subject only to limits which are reasonable and justifiable in a free and democratic society can be taken away by the violation of a principle considered fundamental to our justice system. Certainly the rule of law acknowledged in the preamble as one of the foundations on which our society is built is more than mere procedure. It will be for the courts to determine the principles which fall under the rubric "the
Another way for the government to set limits on the rights protected under section 7 is to use section 33 of the Charter, which is the ‘override’ or ‘notwithstanding’ clause, a controversial part of the Charter. The ‘notwithstanding’ clause could be used to dispense with the requirements of fundamental justice and impose restrictions on section 7 of the Charter in cases of emergency.\textsuperscript{745} This is a policy decision for the government. The government will be politically accountable to the people for applying the ‘notwithstanding’ clause against a protected legal right of the Charter.\textsuperscript{746}


[i]n a case where the violation of the principles of fundamental justice is as a result of overbreadth, it is even more difficult to see how the limit can be justified. Overbroad legislation which infringes s. 7 of the Charter would appear to be incapable of passing the minimal impairment branch of the s. 1 analysis.\textsuperscript{748}

That being said, this thesis will analyse if the prescribed factors for oral hearing set out in section 167 of the \textit{IRPR}, which limits a legal right provided in section 7 of the Charter and not in accordance with the principles of fundamental justice, could be demonstrably justified in a free and democratic society.

The test to be applied to determine whether a violation can be justified under section 1 of the Charter, known as the Oakes test,\textsuperscript{749} requires 1) a pressing and substantial objective and 2) proportional means. A finding of proportionality requires: (a) means rationally connected to the objective; (b) minimal impairment of rights; and (c) proportionality between the effects of the infringement and the importance of the objective,\textsuperscript{750} that is, “proportionality between the deleterious effects of the measures which are responsible for limiting the rights or freedoms in question and the objective,

\begin{itemize}
  \item [\textsuperscript{745}] See \textit{ibid.} at para. 118
  \item [\textsuperscript{746}] See \textit{ibid.}
  \item [\textsuperscript{747}] [1994] 3 S.C.R. 761
  \item [\textsuperscript{749}] Oakes, \textit{supra} note 503 at paras. 69-71; Charkaoui, \textit{supra} note 545 at para. 67
  \item [\textsuperscript{750}] Oakes, \textit{ibid.} at paras. 70-71; Charkaoui, \textit{ibid.}
\end{itemize}
and there must be a proportionality between the deleterious and the salutary effects of the measures”.\(^{751}\)

### 7.4.1 Pressing and substantial objective

The objective of section 167 of the *IRPR*\(^{752}\) is to establish the prescribed factors to determine whether an oral hearing is required under subsection 113(b) of the *IRPA*.\(^{753}\) This objective is in line with the objective of subsection 113(b) of the *IRPA*, which is to provide oral hearing for PRRA applicants if the Minister is of opinion that the hearing is required on the basis of the prescribed factors. The objective of section 167 of the *IRPR* is also in line with the objective of the *IRPA*, with respect to refugees in section 3(2)(c) of the *IRPA*\(^{754}\), which is to grant, as a fundamental expression of Canada’s humanitarian ideals, fair consideration to those who come to Canada claiming persecution. The objective of section 167 of the *IRPR* is also in line with section 3(2)(e) of the *IRPA*\(^{755}\), which is to establish fair and efficient procedures that will maintain the integrity of the Canadian refugee protection system, while upholding Canada’s respect for the human rights and fundamental freedoms of all human beings. Therefore, the objective of section 167 of the *IRPR* is pressing and substantial. Hence, the first criterion of the Oakes test has been satisfied.

By the way, the argument of administrative efficiency is often advanced by the government. The government could argue that the objective of section 167 of the *IRPR* is administrative efficiency. It could claim that adding oral hearings could unduly delay the PRRA process, considering the voluminous amount of PRRA claims. However, the government’s arguments cannot stand. In *Singh*, the Supreme Court rejected the Minister’s argument that refugee determination process was already subjected to a

---

\(^{751}\) See *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 ("[T]here must be a proportionality between the deleterious effects of the measures which are responsible for limiting the rights or freedoms in question and the objective, and there must be a proportionality between the deleterious and the salutary effects of the measures" at para. 95).

\(^{752}\) *IRPR*, supra note 31, s. 167

\(^{753}\) *IRPA*, supra note 12, s. 113(b)

\(^{754}\) *Ibid.*, s. 3(2)(c)

\(^{755}\) *Ibid.*, s. 3(2)(e)
considerable strain in terms of the volume of cases which it was required to hear and that a requirement of an oral hearing in every case where an application for redetermination of a refugee claim would constitute an unreasonable burden on the available resources.\textsuperscript{756}

Wilson J. reasoned that

the guarantees of the Charter would be illusory if they could be ignored because it was administratively convenient to do so. No doubt considerable time and money can be saved by adopting administrative procedures which ignore the principles of fundamental justice but such an argument, in my view, misses the point of the exercise under s. 1.\textsuperscript{757}

Likewise, in respect to administrative efficiency, Peter Hogg argues that

[i]t should not be possible to take away a right just because, on balance, the benefits to others will outweigh the cost to the right-holder....Section 1 of the Charter would undermine everything that follows if it were interpreted as permitting the Court to uphold a limit on a guaranteed right whenever the benefits of the law imposing the limit outweighed the costs.\textsuperscript{758}

Although, in Morgentaler,\textsuperscript{759} the Supreme Court accepted that administrative efficiency is relevant in the evaluation of a legislation for the purpose of section 7 of the Charter, it cautioned that it is wrong to assume that violation caused by administrative measures do not amount to an “infringement of security of the person because the injury is caused by practical difficulties and is not intended by the legislator.”\textsuperscript{760} According to the Court, there are two reasons behind its assertion. First, as a practical matter, it is difficult to distinguish between the purpose of the legislation and the administrative procedures established to carry that purpose to effect. Second, the Court cited its previous ruling in \textit{R. v. Big M Drug Mart Ltd.} that “both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation.”\textsuperscript{761}

\textsuperscript{756} See Singh, supra note 136 at para. 68

\textsuperscript{757} Ibid. at para. 70

\textsuperscript{758} P.W. Hogg, \textit{Constitutional Law of Canada, 3}\textsuperscript{rd} ed. (Toronto: Carswell, 1992) at 854, cited in Hathaway & Neve, supra note 641 at para. 110

\textsuperscript{759} Morgentaler, supra note 643

\textsuperscript{760} Ibid. at para. 32

\textsuperscript{761} Big M Drug Mart, supra note 290 at para. 80. The Court reminded that “[a]ll legislation is animated by an object the legislature intends to achieve. This object is realized through the impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation’s object and its ultimate impact, are clearly linked, if not indivisible. Intended and actual effects have often been looked to for guidance in assessing the legislation’s object and thus, its validity.”
Similarly, as a practical matter, it is difficult to distinguish between the purposes of section 167 of the IRPR and the administrative procedures established to carry those purposes into effect. Pursuant to subsection 113(b) of the IRPA and section 167 of the IRPR, the purpose of conducting oral hearing is to deal with the issue credibility, which would determine the result of the PRRA decision. Specifically, in Selliah, Demirovic and in Sarria, the Federal Court ruled that in order to qualify for oral hearings, section 167 of the IRPR required all factors to be present because they are cumulative in nature. Consequently, oral hearings are constrained by the operational requirements of section 167 of the IRPR itself. So then, it is not possible to say that the difficulty or near impossibility in obtaining oral hearings is the result of budgetary constraints or caused by the lack of resources resulting from the voluminous PRRA claims.

Although the mandate given to the courts under the Charter does not, generally speaking, enable the judiciary to provide remedies for administrative inefficiencies, when denial of a right as basic as security of the person is infringed by the procedure and administrative structures created by the law itself, the courts are empowered to act.

Second, even if the purpose of section 167 of the IRPR is constitutional, “the administrative procedures to bring that purpose into operation may produce unconstitutional effects, and the legislation [or regulation] should then be struck down.” The Court added that invalidation would be effected through section 52 of the Constitution Act, 1982 and not under section 24(1) of the Charter, which is meant to cure individual effects that lead the courts to provide personal remedy.

### 7.4.2 Proportional means

---

762 See Zokai, supra note 256 at para. 7
763 See Selliah, supra note 38 at para. 25
764 See Demirovic, supra note 38 at paras. 9 and 10
765 See Sarria, supra note 270 at para. 17
766 Morgentaler, supra note 643 at para. 33
767 Ibid. at para. 34
768 Constitution Act, 1982, supra note 661, s. 52.
769 See Morgentaler, supra note 643 at para. 34
The Oakes test\textsuperscript{770} also requires the second criteria of proportional means. A finding of proportionality requires: (a) means rationally connected to the objective; (b) minimal impairment of rights; and (c) proportionality between the effects of the infringement and the importance of the objective,\textsuperscript{771} that is, "proportionality between the deleterious effects of the measures which are responsible for limiting the rights or freedoms in question and the objective, and there must be a proportionality between the deleterious and the salutary effects of the measures".\textsuperscript{772}

7.4.2.1 Means rationally connected to the objective

The objective of section 167 of the \textit{IRPR}\textsuperscript{773} is to establish the prescribed factors to determine whether an oral hearing is required under subsection 113(b) of the \textit{IRPA}.\textsuperscript{774} To achieve the objective of section 167 of the \textit{IRPR}, the means employed is the enumeration of the three factors namely: 1) whether there is evidence that raises a serious issue of the applicant's credibility; 2) whether the evidence is central to the decision with respect to the application for protection; and 3) whether the evidence, if accepted, would justify allowing the application for protection.

Subsection 113(b) of the \textit{IRPA} provides that an oral hearing may be held in the context of a PRRA application.\textsuperscript{775} Section 167 of the \textit{IRPR} gives the PRRA Officer direction as to when such a hearing should be held. All factors must be present to allow for an oral hearing. The Federal Court has already pronounced in several instances that

\textsuperscript{770} Oakes, supra note 503 at paras. 69-71; Charkaoui, supra note 545 at para. 67.

\textsuperscript{771} Oakes, ibid. at paras. 70-71; Charkaoui, ibid.

\textsuperscript{772} See Dagenais, supra note 751 ("[T]here must be a proportionality between the deleterious effects of the measures which are responsible for limiting the rights or freedoms in question and the objective, and there must be a proportionality between the deleterious and the salutary effects of the measures" at para. 95).

\textsuperscript{773} IRPR, supra note 31, s. 167.

\textsuperscript{774} IRPA, supra note 12, s. 113(b).

\textsuperscript{775} Ibid.
the factors are cumulative. Therefore, the means employed is rationally connected to the objective of section 167 of the IRPR.

7.4.2.2 Minimal impairment of rights

The Supreme Court has shown that a variable approach could be applied to minimal impairment. In R. v. Sharpe ("Sharpe"), the Court used variable approach to deal with minimal impairment in section 1 analysis. Variable approach is the manner in which courts deal with minimal impairment under section 1 of the Charter. The courts could either take a more stringent approach or a less stringent approach to minimal impairment. For example in Sharpe, under the variable approach, it was easier for the government to justify limiting a right protected by the Charter. In Sharpe, Supreme Court reiterated that "[t]his Court will not, in the name of minimal impairment, take a restrictive approach to social science evidence and require legislatures to choose the least ambitious means to protect vulnerable groups." In Thomson Newspapers Co. (c.o.b. Globe and Mail) v. Canada (Attorney General), the Court made it known that "the type of proof required to discharge the burden of justification [in minimal impairment] on the government may vary from case to case depending on the context." Therefore, under variable approach if courts take a restrictive approach to minimal impairment, the government cannot easily justify limiting a right protected by the Charter. Instead, if the courts choose a liberal approach, then the government would find it easier to justify the limitation of the Charter.

That being said, in the PRRA process, the means chosen are three cumulative factors from section 167 of the IRPR for determining whether an oral hearing is

---

776 See Selliah, supra note 38 at para. 25; See Demirovic, supra note 38 at paras. 9 and 10; See also Sarria, supra note 270 at para. 17.


779 Thomson Newspapers, ibid. at para. 111

780 IRPR, supra note 31, s. 167
required under subsection 113(b) of the IRPA. The question at this point concerns the approach the courts should take in analysing the limitation of a right protected by the Charter? In other words, based on the variable approach, should courts take a restrictive or liberal approach?

My thesis argues for a restrictive approach. This is because oral hearing enables a PRRA applicant appearing at the hearing to persuade the decision-maker by reasoned arguments to accept his or her point of view, by answering questions posed and by clarifying any doubts raised by the decision-maker. PRRA decision-makers are conferred with a quasi-judicial authority and their decisions affect the applicants in a fundamental manner touching their rights to life, liberty and security of the person. Therefore, in a quest for a fair hearing, it becomes all the more necessary to give an oral hearing to PRRA applicants, especially when the decision has no appeal and entails an immediate removal or deportation from Canada. Once removed, Canada has no control over ascertaining if the applicant was persecuted or tortured and it would be too late to provide any form of refugee protection. Thus, it could be argued that the requirement of oral hearing is implicit with the concept of fairness in quasi-judicial hearings, such as the PRRA process. Furthermore, the importance of oral hearing is accentuated by the fact that the Federal Court has rejected the possibility of disclosing a draft risk assessment report so that the applicants could deal with perceived errors or omissions made by PRRA decision-makers. The Federal Court of Canada rejected the request for preliminary risk assessment on grounds of administrative efficiency. Thus, there are ample grounds for the courts to take a restrictive approach under the variable approach to minimal impairment.

781 IRPA, supra note 12, s. 113(b)

782 See Rasiah, supra note 309 at para. 21. "[O]verwhelming and clear jurisprudence of this Court is that there is no obligation on the PRRA officer to provide the applicant with draft reasons."; See also Selliah, supra note 38 at para. 78 (F.C.) where the court ruled that "there was no duty on the Officer to disclose the results of the PRRA prior to rendering a decision on the H&C application. The Officer did not breach the duty of fairness."; See also Navaratnam, supra note 309 at paras. 11-15; See also Vasquez, supra note 309 at paras. 16-28 (F.C.); See also Akpataku, supra note 309 at para. 19.
According to the Oakes test, the means should impair "as little as possible" the right or freedom in question, even if rationally connected to the objective\(^783\). The three prescribed factors cumulatively prevent PRRA applicants from having a "meaningful opportunity to state their case and to know the case they have to meet."\(^784\) Particularly, the PRRA scheme is created to uphold the principle of *non-refoulement*, which is proven to be a principle of fundamental justice in this thesis. However, the PRRA scheme, which contains the prescribed factors, eliminates having a hearing solely to deal with the credibility of the claim. Thus, the PRRA scheme with the prescribed factors, preventing an oral hearing for credibility relating to the claim, cannot adequately uphold the principle of *non-refoulement*. Specifically, the prescribed factors prevent an oral hearing with regard to the assessment of the well-foundedness of the fear of persecution or degree of risk of torture or other forms of cruel and inhuman treatment. The prescribed factors remove the discretion of the PRRA decision-maker to hold a hearing to assess the credibility of the application with respect to the submissions and documentary evidences provided.

In addition, the cumulative prescribed factors remove the ability of the PRRA Officer to hold an oral hearing at his or her discretion to determine a serious issue of credibility relating to the application and the applicant, taking into consideration the unique, specific and particular circumstances in each case. This goes against the position adopted by the Supreme Court of Canada in *Singh* that where there is a serious issue of credibility for applicant or application, credibility should be determined on the basis of an oral hearing.\(^785\)

In such circumstances, there would be enormous difficulty in making an argument that fundamental justice is rendered in PRRA and that the assessment is examined on the merits in an unbiased hearing, in which there is a reasonable opportunity to make one's case.\(^786\) Indeed, this was highlighted in *Singh*, where

\(^783\) See *Oakes*, *supra* note 503 at para. 70

\(^784\) *Singh*, *supra* note 136 at para. 57

\(^785\) See *ibid.* at para. 59

\(^786\) Hathaway & Neve, *supra* note 641 at para. 84

156
Wilson J. stated that protection from the risk of persecution is a matter of such fundamental importance that procedural fairness would invariably require that refugees be afforded an oral hearing. She noted that it would be difficult to conceive of a situation in which fundamental justice could be achieved by a tribunal making significant findings of credibility solely on the basis of written submissions. While Wilson J. concluded that fundamental justice might not require an oral hearing in every case, she was clear that refugee claimants must be provided with an adequate opportunity to state their case and know the case that has to be met. As succinctly observed in the concurring opinion of Beetz J. based on the Bill of Rights, "nothing will pass muster short of at least one full oral hearing before adjudication on the merits."  

Therefore, based on the variable approach, it is evident that courts should take a restrictive approach to minimal impairment in respect to the three cumulative factors in section 167 of the **IRPR** for determining whether oral hearing is required in PRRA.

Indeed, there are other possible means to minimally impair the right to security of the person for PRRA applicants so that they have a "meaningful opportunity to state their case and to know the case they have to meet." The prescribed factors should be reformulated to minimally impair the right protected by the Charter.

In this regard, the reformulated factors in section 167 of the **IRPR** should be as follows: 1) whether there is evidence that raises a serious issue of the applicant's credibility or the credible basis of the application and the evidence is related to the factors set out in sections 96 and 97 of the **IRPA**; 2) whether the evidence is relevant to the decision with respect to the application for protection; 3) whether the evidence raises serious ambiguities; or 4) whether the evidence, if accepted, would justify allowing the application for protection.

Most importantly, the prescribed factors need not be taken cumulatively. Therefore, it is not required to follow the factors cumulatively contrary to the decisions.

---

787 *Ibid.*: "Two sets of reasons were delivered by the Court in Singh. Each had the support of three justices. Wilson J. based her judgment on the Charter. Beetz J. chose to rely on s. 2(e) of the Canadian Bill of Rights, S.C. 1960, c. 44, reprinted in R.S.C. 1985, App. III [hereinafter Bill of Rights], and expressly refrained from ruling on the applicability of the Charter to the case. Both judgments concluded that refugee claimants had the right to state adequately their case and respond, which would normally require an oral hearing."

788 **IRPR**, supra note 31, s. 167

789 *Singh*, supra note 136 at para. 57

790 **IRPR**, supra note 31, s. 167

791 See **IRPA**, supra note 12, ss. 96-97
of the Federal Court in *Demirovic*, where the Federal Court accepted that the prescribed factors are cumulative due to the use of the conjunctive ‘and’ in section 167 of *IRPR*. 792

Therefore, the means chosen by requiring three cumulative factors to be satisfied from section 167 of the *IRPR*793 for determining whether an oral hearing is required under subsection 113(b) of the *IRPA*794 for PRRA applicants, do not minimally impair the right to security of the person under section 7 of the *Charter*.

7.4.2.3 Proportionality

A finding of proportionality requires proportionality between the effects of the infringement and the importance of the objective.795 In other words, there must be proportionality between the effects of the measures which are responsible to limit the *Charter* right or freedom, and the objective that has been identified as sufficiently important. 796 As stated in *Oakes*, "[e]ven if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve".797 As a result, in *Dagenais v. Canadian Broadcasting Corp.* ("Dagenais"), the Supreme Court modified the test for proportionality by stating that “there must be a proportionality between the deleterious effects of the measures which are responsible for limiting the rights or freedoms in question and the objective, and there must be a proportionality between the deleterious and the salutary effects of the measures."798 In other words, even if an objective is of sufficient importance, the first two elements of the proportionality test are satisfied, and the deleterious effects are proportional to the objectives, it is still possible that, because of a lack of proportionality between the

792 See *Demirovic*, supra note 38 at paras. 9 and 10
793 *IRPR*, supra note 31, s. 167
794 *IRPA*, supra note 12, s. 113(b)
795 *Oakes*, supra note 503 at paras. 70-71; *Charkaoui*, supra note 545 at para. 67
796 *Oakes*, ibid. at para. 70
797 ibid. at para. 71
798 *Dagenais*, supra note 751 at para. 95
deleterious effects and the salutary effects, a measure will not be reasonable and
demonstrably justified in a free and democratic society.\textsuperscript{799}

Courts must, therefore, look not only at the objective of the impugned law but also at its
salutary effects.

Section 167 of the \textit{IRPR}\textsuperscript{800} requires all three factors to be satisfied cumulatively
for determining whether an oral hearing is required under subsection 113(b) of the
\textit{IRPA}.\textsuperscript{801} Perhaps, the only salutary effect is administrative efficiency. For the most part,
restrictions imposed by section 167 of the \textit{IRPR} reduce the number of oral hearings.
These restrictions in turn accelerate the PRRA process and manage the lack of resources
resulting from voluminous number of PRRA claims.

On the other hand, the deleterious effects created by the cumulative prescribed
factors are the following: 1) the cumulative prescribed factors eliminate the need for oral
hearings to deal with the credibility of the claim, even if a serious issue of credibility is
involved; 2) oral hearings cannot be called to assess the well-foundedness of the fear of
persecution or the substantial risk of torture or other forms of cruel and inhuman
treatment; 3) the cumulative prescribed factors remove the ability of the PRRA Officer
to hold an oral hearing at his or her discretion to determine a serious issue of credibility
relating to the application and/or the applicant; 4) PRRA applicants do not have a
meaningful opportunity to state their case and to know the case they have to meet; 5)
denial of oral hearing in the PRRA process could lead to a negative determination and
removal of PRRA applicants to face the risk of persecution, torture or other forms of
cruel and inhuman treatment; and 6) removals without a fair hearing contravene the
principle of \textit{non-refoulement}.

Therefore, there is no proportionality between the effects of the infringement and
the importance of the objective of section 167 of the \textit{IRPR}.\textsuperscript{802} The deleterious effects
outweigh the salutary effect of administrative efficiency. Consequently, section 167 of
the \textit{IRPR} violates the right to security of the person under section 7 of the \textit{Charter}, by

\textsuperscript{799} \textit{Ibid.}

\textsuperscript{800} \textit{IRPR}, \textit{supra} note 31, s. 167

\textsuperscript{801} \textit{IRPA}, \textit{supra} note 12, s. 113(b)

\textsuperscript{802} \textit{IRPR}, \textit{supra} note 31, s. 167
requiring the three cumulative factors to be satisfied for determining whether an oral hearing is required under subsection 113(b) of the IRPA.\textsuperscript{803} This limitation does not conform to the principles of fundamental justice. Furthermore, this violation cannot be saved under section 1 of the Charter. Therefore, this violation is not reasonable and not demonstrably justified in a free and democratic society. For this reason, section 167 of the IRPR is unconstitutional and invalid.

CONCLUSION

The principle of \textit{non-refoulement} has emerged as a non-derogable principle, applicable in all circumstances, regardless of the nature of the activities asylum seekers may have engaged in, or their immigration status. Jurisprudence from the Supreme Court of Canada affirmed that "everyone, including serious criminals and persons who pose a threat to national security, are entitled to a risk assessment."\textsuperscript{804} As well, the principle of \textit{non-refoulement} relates not only to the country to which a person faces immediate return but extends to any other country where he or she runs a risk of persecution or torture after being removed, expelled or returned from Canada.

On the other hand, there is a long-standing persuasive and unquestioned authority that removals or deportations can be used against non-citizens, who are deemed inadmissible to live within a country. For example, in \textit{Kindler}, La Forest J. stated that the government has the right and the duty to keep out and to expel aliens from Canada.\textsuperscript{805} In the same token, "[o]ne of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State [...] and to expel or deport from the State, at pleasure, even a friendly alien [...]."\textsuperscript{806}

\textsuperscript{803} IRPA, supra note 12, s. 113(b)
\textsuperscript{804} PRRA Manual, supra note 14 at para. 2
\textsuperscript{805} See \textit{Kindler}, supra note 572 at para. 133

160
Sopinka J. in *Chiarelli*, added that based on the most fundamental principle of immigration law, non-citizens do not have "an unqualified right to enter or remain in the country. At common law an alien has no right to enter or remain in the country."\(^8\) This is based on the notion of sovereignty, which arose in the nineteenth century and has continued to remain unchallenged, keeping its grip on immigration law.\(^9\)

The biggest challenge for the principle of *non-refoulement* comes from state sovereignty. This is because of the difference in immigration law and refugee law. Immigration law is rooted in the principle of sovereignty, where sovereign states are free to create and implement immigration policies of their choice, based on their domestic laws.\(^9\) Instead, refugee law has developed through various international obligations under international law. At the same time, under international law, the notion of sovereignty permits a state to decide that it wishes to permit no immigration. However, this sovereign discretion to exclude or restrict immigration cannot apply to refugee law. This creates a tension between a state’s restrictive immigration policy and its refugee law.

The notion of sovereignty in which states have an absolute right to deny territorial access to all non-citizens is built on historical or jurisprudential foundation.\(^10\) Furthermore, the questionable origin of state’s unfettered right to expel, exclude and remove non-citizens "is rooted in imprecise legal doctrine, fears of threatened state security, and, in some cases, overt racism."\(^11\)

Sovereignty is, indeed, a difficult concept to explain. The sixteenth century French jurist, Jean Bodin, concluded that "la souveraineté est la puissance absolue et

\(^8\) *Chiarelli, supra* note 394 at para. 24; See also *Medovarski v. Canada (Minister of Citizenship and Immigration)*; *Esteban v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 539 at para. 46: "The most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in Canada...Thus the deportation of a non-citizen in itself cannot implicate the liberty and security interests protected by s. 7 of the *Canadian Charter of Rights and Freedoms.*"

\(^9\) Cohen, *supra* note 806 at para. 15


\(^11\) Ibid. at para. 16
perpétuelle d'une République." Following Bodin, other natural law theorists of the seventeenth century, particularly Hobbes and Pufendorf, engaged in defining sovereignty. They concluded that sovereignty could be reduced to a question about who makes the decision in extreme cases. However, this conception was reversed by Jean-Jacques Rousseau, the eighteenth century French philosopher and author of the Social Contract. Rousseau conceptualized sovereignty as the identification of the will of the sovereign with the general will.

According to Carl Schmitt, the definition of sovereignty and its connection to the state could be summed up as the state having "the monopoly of the ultimate decision." Schmitt concludes that sovereignty is "the highest underived power of domination". Moreover, Schmitt argues that "the sovereign is whoever has the faculty to violate, and thus relativize, the legal order as a whole. An absolute form of government, monarchical or democratic, implies a sovereign prince or a sovereign people who stand legibus solutus, above the law."

For example, in the context of absolute sovereignty, Australia argues that the process of refugee determination is not connected to civil rights or obligations. Moreover, the "decision to allow entry into its territory is a matter for the State concerned, and not a determination of a civil right. A right of entry into a State of which one is not a national does not exist under either Australian national law or under international law." Even in Canada, the federal government concerned with sovereignty, initially "refused to sign the Refugee Convention in 1951 based on a fear..."

---

813 Ibid. at para. 7
814 Ibid. at para. 9
815 Ibid. at para. 2
816 Ibid. at para. 6
817 Ibid. at para. 33
818 See Alexander, supra note 146 at n. 19
819 Ibid.
that the treaty would impede the deportation of refugees on security grounds."\textsuperscript{820} This was apart from the fact that Canada was "an important financial supporter of the United Nations High Commissioner for Refugees (UNHCR) from its inception and became a member of its governing Executive Committee [...]"\textsuperscript{821}

That being said, the problem with the international refugee system is that refugees often arrive into asylum countries illegally using criminal networks or smugglers, "thus nourishing criminal networks, endangering their own lives, and creating anxiety with nation-states about the inability to protect their borders - an insult to states sovereignty and fuel for far-right rhetoric."\textsuperscript{822} Moreover, following the attacks of September 11, 2001, in the United States, the plight of refugees has become even more difficult because of stricter border controls and refugee law worldwide.\textsuperscript{823} There is a perception that criminals and terrorists may disguise as refugees to gain entry into certain countries.\textsuperscript{824} Furthermore, the growing effort to combat international terrorism has created an environment in which states are searching for ways to prevent certain refugees from residing in their territories. Counter-terrorism legislations have been adopted to greatly enhance investigative powers of various government agencies.\textsuperscript{825}

On the other hand, the state parties to the Refugee Convention frequently suspect refugee claimants as 'back-door' economic migrants, abusing their refugee process and welfare benefits.\textsuperscript{826} According to the UNHCR \textit{Handbook}:

\begin{quote}
A migrant is a person who, for reasons other than those contained in the definition, voluntarily leaves his country in order to take up residence elsewhere. He may be moved by the desire for change or adventure, or by family or other reasons of a personal nature. If he is motivated exclusively by economic considerations, he is an economic migrant and not a refugee. The distinction between an economic migrant and a refugee is, however, sometimes blurred in the same way as the distinction
\end{quote}

\textsuperscript{820} \textit{Ibid.}

\textsuperscript{821} Aiken, supra note 9 at n. 31

\textsuperscript{822} Jones & Baglay, supra note 195 at 28.

\textsuperscript{823} Mary A. Young, "The Smuggling and Trafficking Of Refugees and Asylum Seekers: Is the International Community Neglecting the Duty to Protect the Persecuted In the Pursuit of Combating Transnational Organized Crime?" (2003) 27 Suffolk Transnat'l L. Rev. at 101

\textsuperscript{824} Taylor, supra note 142 at 396

\textsuperscript{825} Young, supra note 823 at 101

\textsuperscript{826} Jones & Baglay, supra note 195 at 28.
between economic and political measures in an applicant's country of origin is not always clear.827

To some extent, the stringent avenues for legitimate immigration from the South to the North have led to the exploitation of the international refugee system, by ‘back-door’ economic migrants, as the only way to immigrate to their preferred country.828 Indeed, while such migrants cannot qualify for refugee status, their ‘bogus’ claims have forced governments to take measures to separate bogus claimants, who are not at risk in their country of origin, from genuine refugees, who are at risk of serious human rights abuses in their home country.829

The UNHCR believes that economic migrants can be distinguished from genuine refugees if state parties use “fair and effective asylum procedures, supported by accurate and timely country of origin information.”830 Such practices would aid in differentiating between individuals who are in need of international protection and those who do not. That being said, the UNHCR Handbook emphasizes the importance of according refugee claimants the ‘benefit of the doubt’ so as to ensure that state parties do not reject refugee claims that fall between economic migration and refugee protection.831 This is to ensure that all are protected from the danger of refoulement.

Unfortunately, at times, government measures, aimed at curbing ‘back-door’ economic migration and enhancing national security, tend to implement schemes that fail to consider the wide spectrum of fundamental rights that are incorporated in the refugee protection system.832 Examples of fundamental rights are the right to life, liberty and security of the person, the principle of non-refoulement prohibiting return to face

---

827 UNHCR Handbook, supra note 98 at 4
828 Jones & Baglay, supra note 195 at 28.
829 Hathaway & Neve, supra note 641 at para. 6
830 UNHCR, "UNHCR, refugee protection and international migration" UNHCR Online (17 January 2007), online: UNHCR: The UN Refugee Agency <unhcr.org/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=RSDLEGAL&id=44ca0f874> at 4
831 See ibid.
832 Jones & Baglay, supra note 195 at 29.
persecution or torture and grave violations against freedom of expression, freedom from arbitrary detention, and many other basic human rights.\textsuperscript{833}

In any case, the theory of reciprocity of obligations and rights should be respected. Canadian law relating to removal or deportation should not be imposed without granting those affected the necessary procedural protections. The right to be heard is a fundamental component of procedural fairness. As mentioned in \textit{Singh}, the Supreme Court claimed that a minimum concept of fundamental justice includes the notion of procedural fairness in section 7 of the \textit{Charter}. Indeed, a minimum concept of fundamental justice may require an oral hearing, particularly where fundamental interests are at stake.

In respect to PRRA, the status determination criteria and the procedural scheme chosen make it extremely difficult to receive a positive assessment for PRRA applicants. In fact, 97\% of PRRA applicants do not succeed the assessment. Fundamental interests are at stake and the consequences of an incorrect decision are severe. The harm done is irreparable. There is no pressing national interest that prevents providing an oral hearing for PRRA applicants for their credibility assessment. Moreover, the \textit{Singh} decision outlines the importance of oral hearings in dealing with issues concerning serious credibility.\textsuperscript{834}

The problems arising from credibility determination through documentary evidence can be eased effectively by using oral hearings. The PRRA process should not separate the credibility of the applicant and the credibility of the claim into two distinct elements in credibility assessment. For example, in gender-related PRRA claims, oral hearings serve to bring out all the relevant facts and provide the PRRA decision-maker an avenue to share the responsibility of drawing out the evidences required to establish the claim. Therefore, the PRRA decision-maker must be given the choice to conduct oral hearings at his or her discretion to determine the genuine risk of persecution to bring about a more gender-inclusive PRRA regime.

\textsuperscript{833} \textit{Ibid.}

\textsuperscript{834} See \textit{Singh}, supra note 136 at para. 59
Indeed, the PRRA process was created to uphold the principle of *non-refoulement*. For this reason, the PRRA applicant must have the opportunity to present all relevant information to the decision-maker. Thus, the PRRA should not become an efficient mechanism for removing non-citizens from Canada. Human rights should have primacy over administrative efficiency and not the other way round.
BIBLIOGRAPHY

STATUTES AND REGULATIONS


Constitution Act, 1982, s. 52(1) being Schedule B to the Canada Act 1982 (U.K.), 1982, c.11.

Criminal Code, R.S. C. 1985, c. C-46

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

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

Immigration and Refugee Protection Regulations, S.O.R./2002-227

JURISPRUDENCE


Ahani v. Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 72


Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817

Bowen v. Canada (Minister of Citizenship and Immigration), [2008] F.C.J. No. 125


Canada (Director of Investigation and Research) v. Southam Inc., [1997] 1 S.C.R. 748

Canada (Minister of Employment and Immigration) v. Chiarelli, [1992] 1 S.C.R. 711

Canada (Minister of National Revenue - M.N.R.) v. Coopers and Lybrand Ltd., [1979] 1 S.C.R. 495


Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour), [2003] 1 S.C.R. 539


Chan v. Canada (Minister of Employment and Immigration), [1995] 3 S.C.R. 593

Chaoulli v. Quebec (Attorney General), [2005] 1 S.C.R. 791


Chieu v. Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 84


Dehghani v. Canada (Minister of Employment and Immigration), [1993] 1 S.C.R. 1053


Dharamraj v. Canada (Minister of Citizenship and Immigration), [2006] F.C.J. No. 853


Harkat (Re), [2003] F.C.J. No. 973 (F.C.)


Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927


Kaybaki v. Canada (Solicitor General of Canada), [2004] F.C.J. No. 27 (F.C.)


Kindler v. Canada (Minister of Justice), [1991] 2 S.C.R. 779


Knight v. Indian Head School Division No. 19, [1990] 1 S.C.R. 653


Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities), [1992] 1 S.C.R. 623


Pushpanathan v. Canada (Minister of Citizenship and Immigration), [1998] 1 S.C.R. 982


Reference re Motor Vehicle Act (British Columbia) s 94(2), [1985] 2 S.C.R. 486

Reference re Section 94(2) of the Motor Vehicle Act (British Columbia), [1985] 2 S.C.R. 486

Reference re: Seabed and subsoil of the continental shelf offshore Newfoundland, [1984] 1 S.C.R. 86


Singh v. Canada (Minister of Citizenship and Immigration), [2007] F.C.J. No. 1756

Singh v. Canada (Minister of Employment and Immigration), [1985] 1 S.C.R. 177


Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038

Suresh v. Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3
Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79, [2003] 3 S.C.R. 77

INTERNATIONAL TREATIES AND CONVENTIONS

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 U.N.T.S. 85.

INTERNATIONAL CASES, ARBITRAL DECISIONS AND OTHER CASES
Altun v. Germany (1983), 5 E.H.R.R. 611

Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America), [2003] I.C.J. Rep. 1

Chahal v. United Kingdom, No. 70/1995/576/662 (European Court of Human Rights)

Chalal v United Kingdom (1997) 108 ILR 385

Cornejo-Barreto v. Seifert, 218 F.3d 1004 (9th Cir., 2000)


Jones v. Great Western Railway Co., (1930), 47 T.L.R. 39 (H.L.)


Prosecutor v. Furundzija, (1998), Case No. IT-95-17/1-T (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber)

Selvarajan v. Race Relations Board, [1976] 1 All E.R. 13

Sepet v. Secretary of State for the Home Department, [2003] H.L.J. No. 15

Soering v United Kingdom (1989) 98 ILR 270

Vilvarajah v United Kingdom (1991) 108 ILR 321

INTERNATIONAL MATERIALS

European Court of Human Rights, "Extradition, Capital Punishment and Article 3 Convention for the Protection of Human Rights and Fundamental Freedoms (Treaty of Rome)" European Court of Human Rights, July 7 1989: The Soering Case (7 July 1989), online:

<www1.umn.edu/humanrts/instree/johannesburg.html>

Lauterpacht, Sir Elihu & Daniel Bethlehem, "The scope and content of the principle of non-refoulement." United Nations High Commissioner for Refugees (20 June 2001), online: UNHCR

Office of the High Commissioner for Human Rights (OHCHR), "Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New


Statute of International Court of Justice, 26 June 1945, Can T.S. 1945 No. 7 (entered into force 24 October 1045), online: United Nations www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm


UNHCR, "UNHCR, refugee protection and international migration" UNHCR Online (17 January 2007), online: UNHCR: The UN Refugee Agency <unhchr.org/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=RSDLEGAL&id=44ca0f874>.


173
MONOGRAPHS


Bryant, Michael & Lorne Sossin, Public Law: An Overview of Aboriginal, Administrative, Constitutional and International Law in Canada (Toronto: Carswell, 2002).


Fox-Decent, Evan, "The Charter and Administrative Law: Cross-Fertilisation in Public Law" in Audrey Macklin, Coursepack: Administrative Law (Faculty of Law, University of Toronto, Winter 2008)


174
Huscroft, Grant & Michael Taggart, eds. *Inside and Outside Canadian Administrative Law* (Toronto: University of Toronto Press, 2006).

Huscroft, Grant, "The Duty of Fairness - From Nicholson to Baker and Beyond" in Audrey Macklin, *Coursepack: Administrative Law* (Faculty of Law, University of Toronto, Winter 2008)


---, *The Definition of Convention Refugee* (Markham: Butterworths, 2001).


**ESSAYS, JOURNALS & ARTICLES**


Cameron, Jamie, "From the MVR to Chaoulli v. Quebec: The Road Not Taken and the Future of Section 7" (2006) 34 S.C.L.R. (2d) 105.

Clark, Tom, "Rights Based Refuge, The Potential of the 1951 Convention and the need for Authoritative Interpretation" (2004) 16 Int'l J. Refugee L. 584


Forcete, Craig, "Torture and the New Normal: Modern Legal Thinking on an Ancient Scourge" (2005 - 2006) 37 Ottawa L. Rev. 149


Fox-Decent, Evan, "The Charter and Administrative Law: Cross-Fertilisation in Public Law" in Audrey Macklin, Coursepack: Administrative Law (Faculty of Law, University of Toronto, Winter 2008)


Mullan, David, "Section 7 and Administrative Law Deference - No Room at the Inn?" (2006) 34 S.C.L.R. (2d) 227


Saufert, Stacey A., "Closing the Door to Refugees: The denial of due process for refugee claimants in Canada" (2007) 70 Sask. L. Rev. 27


---, "Protection Elsewhere/Nowhere" (2006) 18 Int'l J. Refugee L. 283


UNHCR, "Cases and Comments" (2000) 12 Int'l J. Refugee L. 268


Yeo, Colin, "Agents of the State: When is an official of the State an Agent of the State?" (2002) 14 Int'l J. Refugee L. 509


GOVERNMENT DOCUMENTS


OTHER DOCUMENTS

Makin, Kirk, "Arbour's role in torture case under fire: UN rights chief calls for ban, but critics cite her part in 2002 Supreme Court ruling" The Globe and Mail (27 June 2006), online: The University of Western Ontario <http://communications.uwo.ca/making_headlines/coverage/060627-1.htm>.

Case (7 July 1989), online: