CITATION: LI *v.* CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), 2010 FCA 75, [2010] 3 F.C.R. 347 A-251-09

A-251-09

2010 FCA 75

The Minister of Citizenship and Immigration (*Appellant*) (*Respondent in the Federal Court*)

v.

Dong Zhe Li and **Dong Hu Li** (*Respondents*) (*Applicants in the Federal Court*)

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

Federal Court of Appeal, Noël, Pelletier and Layden-Stevenson, JJ.A.—Vancouver, December 14, 2009; Ottawa, March 17, 2010.

Citizenship and Immigration — Exclusion and Removal — Removal of visitors — Appeal from Federal Court decision allowing judicial review of pre-removal risk assessment (PRRA) officer's decision respondents persons described in Immigration and Refugee Protection Act (IRPA), s. 112(3) — Respondents, Chinese nationals, entering Canada on temporary resident visas but issued exclusion orders thereafter — Since respondents found ineligible to make refugee claims, submitting PRRA applications — While respondents found to be excluded from refugee protection under IRPA, s. 98, United Nations Convention Relating to the Status of Refugees, Art. 1F(b), nonetheless found to be at risk of torture if returned to China pursuant to IRPA, ss. 97, 113(d) — Federal Court finding PRRA officer erring when proceeding under IRPA, s. 113(d) rather than s. 113(c) to assess applications — Exclusion in Convention, Art. 1(F) applying to respondents even if respondents not claiming refugee status prior to admission to Canada — By incorporating Convention exclusions into IRPA refugee protection scheme, exclusions intended to extend to all claims for refugee protection, not only Convention refugee status — Application under IRPA, s. 112 to Minister constituting application for refugee protection, even where applicant precluded from applying for refugee protection by reason of exclusion order — PRRA officer having jurisdiction to determine whether person excluded under IRPA, s. 98 given clear wording in s. 112 that application made to Minister — PRRA officer considering PRRA application under IRPA, s. 113(c) and determining applicant excluded from protection under IRPA, s. 98 entitled to consider application under s. 113(d), determine whether stay of removal order warranted — Federal Court thus erring when finding otherwise — Appeal allowed.

This was an appeal from a Federal Court decision allowing the application for judicial review of a pre-removal risk assessment (PRRA) officer's decision that the respondents were persons described in paragraph 112(3)(*c*) of the *Immigration and Refugee Protection Act* (IRPA). Paragraph 112(3)(*c*) provides that refugee protection may not result from an application for protection if the person made a claim to refugee protection that was rejected on the basis of section F of Article 1 of the *United Nations Convention Relating to the Status of Refugees*.

The respondents were Chinese nationals who entered Canada on temporary resident visas but who were excluded after failing to leave Canada when those visas expired. In the interim, Chinese warrants were issued

against them for their arrest for fraud. The respondents sought to claim refugee protection but were found ineligible to make those claims because of the exclusion orders in force against them. Therefore, they submitted PRRA applications pursuant to section 112 of the IRPA. While they were found to be excluded from refugee protection under section 98 of the IRPA as they were persons referred to in section F(b) of Article 1 of the Convention, they were also found, by operation of paragraph 113(*d*) and section 97 of the IRPA, to be at risk of torture if returned to China. Paragraph 113(*d*) provides that in the case of an applicant described in subsection 112(3), consideration of an application for protection shall be on the basis of the factors set out in section 97. ◇

On judicial review, the Federal Court found that the PRRA officer had erred by proceeding under paragraph 113(*d*) when the IRPA required the officer to proceed under paragraph 113(*c*) (dealing with applicants not described in subsection 112(3)) and consider the application on the basis of sections 96 to 98 of the IRPA. The Federal Court certified two questions. The principal issues raised in these questions were framed as follows in the present instance: (1) whether it was reasonable for the PRRA officer to conclude that the respondents were persons with respect to whom there were serious reasons for considering that they had committed a serious non-political crime outside the country of refuge before their admission to that country as a refugee contrary to section F(b) of Article 1 of the Convention and section 98 of the IRPA; (2) whether an application under section 112 is an application for refugee protection; (3) whether a PRRA officer has jurisdiction to determine whether a person is excluded from refugee protection under section 98 of the IRPA and; (4) if such a determination is made, whether the officer may consider the person's application under paragraph 113(*d*) of the IRPA.

Held, the appeal should be allowed.

The intent of the Convention is to prevent certain persons, who are deemed to be undeserving of international protection from invoking the Convention to claim Convention refugee status. The achievement of that objective does not depend on the timing of the claim but rather on the fact of claiming that status. Therefore, the application of the exclusion (section F of Article 1 of the Convention and section 98 of the IRPA) requires that there must be serious reasons for believing that the person has committed one or more of the acts described in sections E and F of Article 1 of the Convention, and that person must make a claim for Convention refugee status. It is not necessary that the refugee claim be made before or upon entry to Canada.

By incorporating the exclusions found at sections E and F of Article 1 of the Convention into the refugee protection scheme found in the IRPA, Parliament clearly intended those exclusions to extend to all claims for refugee protection, not simply to claims for Convention refugee status. Therefore, the fact that the respondents entered Canada on temporary resident visas and not as refugees did not preclude the application of sections E and F of Article 1 of the Convention to their claim for refugee protection. While neither the respondents' wealth nor the issuance of the warrants would by itself satisfy the test set out in section F of Article 1 of the Convention, the combination of the two was capable of reasonably supporting the PRRA officer's conclusion herein.

Refugee protection may result from an application to the Minister for protection as provided in the opening words of section 112. Therefore, applications for protection made under section 112 may result in applicants being accorded refugee protection or may result in a stay of the removal orders made against them. An application for protection under section 112 is thus an application for refugee protection. This is true even where the applicant is precluded, as was the case here, from applying for refugee protection pursuant to section 99 as a result of an exclusion order. Section 99 does not preclude making an application for protection under section 112. It only precludes making an application to an officer and then to the Refugee Protection Division. Therefore, notwithstanding their ineligibility to make applications to the Refugee Protection Division, the respondents were competent to make their applications to the Minister under section 112 and to receive refugee protection as a result of those applications.

A PRRA officer has jurisdiction to decide whether a person is excluded under section 98 of the IRPA. Sections 95 and 112 make it clear that an application under section 112 is made to the Minister who, where the

applicant has not been excluded under section 98, is directed by paragraph 113(*c*) to consider the application according to sections 96, 97 and 98. Therefore, the Minister must have jurisdiction to consider section 98 and to exclude an applicant thereunder if the facts warrant the exclusion.

A PRRA officer having commenced consideration of an applicant's PRRA under paragraph 113(*c*) is entitled, after determining that the person is excluded from protection under section 98 of the IRPA, to then consider the person's application under paragraph 113(*d*). While section 113 provides a road map for the treatment of section 112 applications, the PRRA officer must first determine if the applicant has thus far been refused refugee protection as a result of having been excluded under section E or F of Article 1 of the Convention. If no exclusion exists, the PRRA officer must consider the applicant's application under paragraph 113(*c*). However, if grounds for exclusion are found, the applicant becomes a person described in paragraph 112(3)(*c*) and the officer must therefore return to section 113 and proceed under paragraph 113(*d*). Under that paragraph, the officer must determine whether the deportation order in force against the applicant ought to be stayed.

Consequently, the Federal Court erred in law when it found that the PRRA officer could not consider the respondents' applications under paragraph 113(*d*) of the IRPA after determining, by means of her analysis pursuant to paragraph 113(*c*), that they were excluded from refugee protection pursuant to section 98.

STATUTES AND REGULATIONS CITED

Federal Courts Act, R.S.C., 1985, c. F-7, ss. 1 (as am. by S.C. 2002, c. 8, s. 14), 52 (as am. by S.C. 1990, c. 8, s. 17; 2002, c. 8, s. 50).

Immigration and Refugee Protection Act, S.C. 2001, c. 27, ss. 29(2), 41(*a*), 95, 96, 97, 98, 99, 112, 113, 114, 115(1).

Immigration and Refugee Protection Regulations, SOR/2002-227, s. 223.

TREATIES AND OTHER INSTRUMENTS CITED

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

CASES CITED

DISTINGUISHED:

Xie v. Canada (Minister of Citizenship and Immigration), 2004 FCA 250, [2005] 1 F.C.R. 304, 245 D.L.R. (4th) 385, 37 Imm. L.R. (3d) 163.

CONSIDERED:

Jalal v. Canada (Minister of Citizenship and Immigration), 2009 FC 877, 353 F.T.R. 132, 83 Imm. L.R. (3d) 218.

REFERRED TO:

Li v. Canada (Minister of Citizenship and Immigration), 2007 FC 941, 319 F.T.R. 14, 65 Imm. L.R. (3d) 234; *Canada (Minister of Citizenship and Immigration) v. Li*, 2009 FCA 85, [2010] 2 F.C.R. 433, 308 D.L.R. (4th) 314, 188 C.R.R. (2d) 71; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226, 223 D.L.R. (4th) 599, [2003] 5 W.W.R. 1; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, (1998), 160 D.L.R. (4th) 193, 11 Admin. L.R. (3d) 1, amended reasons, [1998] 1 S.C.R. 1222, (1998), 11 Admin. L.R. (3d) 130; *Saeed v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1016, 298 F.T.R. 307; *Saleem v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 389; *Soares v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 190, 308 F.T.R. 280; *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 198, [2008] 1 F.C.R. 385, 60 Admin. L.R. (4th) 247, 64 Imm. L.R. (3d) 226; *Cui v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 945, 65 Imm. L.R. (3d) 228; *Deng v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 943, 64 Imm. L.R. (3d) 133; *Zeng v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 956, 333 F.T.R. 84.

APPEAL from a Federal Court decision (2009 FC 623, [2010] 2 F.C.R. 407, 350 F.T.R. 28, 80 Imm. L.R. (3d) 293) allowing the application for judicial review of a pre-removal risk assessment officer's decision that the respondents were persons described in subsection 112(3) of the *Immigration and Refugee Protection Act.* Appeal allowed.

APPEARANCES

Cheryl D. E. Mitchell and *Jennifer Dagsvik* for appellant.

Christopher Elgin for respondents.

SOLICITORS OF RECORD

Deputy Attorney General of Canada for appellant.

Elgin, Cannon & Associates, Vancouver, for respondents.

The following are the reasons for judgment rendered in English by

PELLETIER J.A.:

INTRODUCTION

[1] The appellants, Dong Zhe Li and Dong Hu Li (the Li brothers or simply the brothers) entered Canada on temporary resident visas. They failed to leave the country when their visas expired. They were eventually apprehended and exclusion orders were made against them, which had the effect of precluding them from making applications to the Refugee Protection Division for Convention refugee status. In the course of their pre-removal risk assessments, their last chance to claim refugee protection, the pre-removal risk assessment (PRRA) officer determined the brothers were excluded

from refugee protection because they were persons referred to in section E or F of Article 1 of the *United Nations Convention Relating to the Status of Refugees* [July 28, 1951, [1969] Can. T.S. No. 6] (the Convention).

[2] The issue in this appeal [Federal Court reasons for judgment reported at 2009 FC 623, [2010] 2 F.C.R. 467] is whether the PRRA officer had the jurisdiction to make that determination. The Li brothers say that only the Refugee Protection Division can determine whether a person is excluded from refugee protection. In any event, they say, the PRRA officer had no factual basis upon which to make the determination that they were excluded.

FACTS

[3] The Li brothers, citizens of the People's Republic of China, were admitted to Canada on December 31, 2004, pursuant to temporary resident visas. When their visas expired on June 30, 2005, they did not leave the country as required. In February 2007, the immigration authorities located them and issued exclusion orders against them on the basis of their failure to leave Canada at the expiry of their visas, contrary to subsection 29(2) and paragraph 41(*a*) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act). The brothers' challenge to the validity of the exclusion orders was dismissed by the Federal Court in reasons reported as *Li v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 941, 319 F.T.R. 14, a decision from which no appeal was taken.

[4] In the interim, public officials in China issued warrants for the arrest of the Li brothers, alleging that they and others had committed theft of more than 170 million yuan, which amounts to approximately 24 million Canadian dollars, by negotiable instruments fraud. It was only after their apprehension by immigration authorities that the brothers sought to claim refugee protection but they were found to be ineligible to make those claims because of the existence of the exclusion orders in force against them: see subsection 99(3) of the Act and section 223 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations):

99. (1) . . .

(3) A claim for refugee protection made by a person inside Canada must be made to an officer, may not be made by a person who is subject to a removal order, and is governed by this Part.

223. There are three types of removal orders, namely, departure orders, exclusion orders and deportation orders.

[5] The brothers launched numerous unsuccessful legal proceedings in an attempt to stave off their removal from Canada. These proceedings are described in *Canada (Minister of Citizenship and Immigration) v. Li*, 2009 FCA 85, [2010] 2 F.C.R. 433, at paragraph 28. Their last hope of remaining in Canada was their applications for protection under section 112 of the Act, a proceeding known as a pre-removal risk assessment. Their applications met with mixed success. While they were found to be excluded from refugee protection by virtue of section 98 of the Act, they were also found to be at risk of torture if returned to China. The result is that while they are denied the status of persons in need of protection, the enforcement of the removal orders against them will be stayed for an indeterminate period, unless it is determined that they are subject to removal pursuant to paragraph

113(*d*) of the Act.

THE PRRA OFFICER'S DECISION

[6] Section 113 of the Act indicates how an application for protection is to be considered:

> **112.** (1) A person in Canada, other than a person referred to in subsection 115(1), may, in accordance with the regulations, apply to the Minister for protection if they are subject to a removal order that is in force or are named in a certificate described in subsection 77(1).
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> . . .
>
> **113.** Consideration of an application for protection shall be as follows:
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> . . .
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> (*c*) in the case of an applicant not described in subsection 112(3), consideration shall be on the basis of sections 96 to 98;
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> (*d*) in the case of an applicant described in subsection 112(3), consideration shall be on the basis of the factors set out in section 97 and
>
> (i) in the case of an applicant for protection who is inadmissible on grounds of serious criminality, whether they are a danger to the public in Canada, or
>
> (ii) in the case of any other applicant, whether the application should be refused because of the nature and severity of acts committed by the applicant or because of the danger that the applicant constitutes to the security of Canada.

[7] After having reviewed the Li brothers' personal circumstances, including the charges pending against them, the PRRA officer began her analysis by inquiring whether the Li brothers were persons described in subsection 112(3) of the Act because the answer to that question dictates whether the officer proceeds under paragraph 113(*c*) or (*d*). The material portions of subsection 112(3) are:

> **112.** (1) . . .
>
> (3) Refugee protection may not result from an application for protection if the person
>
> . . .
>
> (*c*) made a claim to refugee protection that was rejected on the basis of section F of Article 1 of the Refugee Convention;

[8] The PRRA officer concluded that the Li brothers were persons described in paragraph 112(3)(*c*) as she considered that they were persons with respect to whom there were serious reasons for considering that they had committed a serious non-political crime outside the country of refuge prior to their admission to that country as refugees contrary to section F(b) of Article 1 of the Convention and section 98 of the Act.

ARTICLE 1

. . .

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

. . .

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee.

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

[9] Having made this determination, the PRRA officer dealt with the Li brothers' applications pursuant to paragraph 113(*d*), which meant that she directed her mind to the question of whether the Li brothers were at risk of torture or inhumane treatment if they were returned to China, as provided in section 97 of the Act:

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

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

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

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

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

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

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

[10] The PRRA officer concluded that there was a real risk that the Li brothers would be tortured, given the nature of the charges pending against them. She then sent the file on to the Minister's delegate for consideration of the factors militating against allowing the Li brothers to stay in Canada, that is, the nature and severity of the crimes alleged against them. This weighing exercise has yet to be completed. But, given the PRRA officer's determination that the brothers are persons described in subsection 112(3), the best they can hope for is a stay of the removal orders which are in force against them, a result dictated by paragraph 114(1)(*b*) of the Act:

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

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

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

THE FEDERAL COURT DECISION

[11] The Li brothers challenged the PRRA officer's decision by way of an application for judicial review. They argued that since they were precluded from making an application for refugee protection because of the exclusion orders in force against them, they could not be persons whose claim to refugee protection had been refused. In their view, only the Refugee Protection Division has jurisdiction to make such a determination; the PRRA officer does not.

[12] Accordingly, if, at the time of making a demand under section 112, a person has not been denied refugee protection, then paragraph 113(*c*) of the Act must be read to exclude the reference to section 98. In their memorandum of fact and law, filed in response to the Minister's appeal, the Li brothers contend that the reference to section 98 in paragraph 113(*c*) is a drafting error: see paragraph 67.

[13] The brothers' applications for judicial review were heard by Madam Justice Heneghan. She set aside the PRRA officer's decision and sent the matter back for redetermination.

[14] The Judge concluded that the PRRA officer was required, as a preliminary step, to make a determination as to whether there was a restriction on the availability of protection by reason of the application of subsection 112(3). She analysed each of the circumstances described in that subsection and concluded that they all referred to an action or determination which had already occurred by the time the application for protection was made. In particular, she found that paragraph 112(3)(*c*) described the situation where a claim for refugee protection had been rejected after a hearing before the Refugee Protection Division. In her view, paragraph 112(3)(*c*) did not deal with persons who were ineligible to make a claim for refugee protection as a result of subsection 99(3) of the Act.

[15] The Judge noted that applications under section 112 are to be considered following the "road map" provided by section 113. In the Judge's view, the PRRA officer must first determine whether a claim must be considered pursuant to paragraph 113(*c*) or 113(*d*). If the person is not, at the time of making the application under section 112, a person described in subsection 112(3), then the application must be considered as provided in paragraph 113(*c*). If the person is a person described in subsection 112(3), then consideration of the application is governed by paragraph 113(*d*).

[16] The Judge rejected the Li brothers' argument that the PRRA officer did not have jurisdiction to consider section 98. She found that, on a plain reading of the language of paragraph 113(*c*), the PRRA officer was entitled to consider section 98. But she found that the PRRA officer erred in this case because the PRRA officer limited her consideration of the Li brothers' applications to section 97 of the Act, that is, she proceeded under paragraph 113(*d*) when the Act required her to proceed under paragraph 113(*c*). As a result, the Judge set aside the PRRA officer's decision and sent the matter back for redetermination.

[17] The application Judge certified two questions:

(1) Do pre-removal risk assessment officers have the jurisdiction to exclude persons from refugee protection under section 98 of the IRPA (the Act) and find them described in section 112(3)(*c*) of the IRPA?

(2) Does section 112(3)(*c*) of the IRPA only apply to rejections by the Refugee Protection Division on the basis of Section F of Article 1 of the Refugee Convention or does it also apply to rejections by pre-removal risk assessment officers on the basis of Section F of Article 1 of the Refugee Convention?

ISSUES

[18] In my view, the issues raised in the certified questions can best be answered by considering a series of more fundamental questions:

i. What is the appropriate standard of review?

ii. Was it reasonable for the PRRA officer to conclude that the Li brothers are persons with respect to whom there were serious reasons for considering that they had committed a serious non-political crime outside the country of refuge prior to their admission to that country as a refugee contrary to section F(b) of Article 1 of the Convention and section 98 of the Act?

iii. Is an application under section 112 of the Act an application for refugee protection?

iv. Does a PRRA officer have jurisdiction to determine that a person is excluded from refugee protection under section 98 of the Act?

v. If the PRRA officer determines that a person is excluded from protection under section 98 of the Act, is the PRRA officer entitled to consider the person's application pursuant to paragraph 113(*d*) of the Act?

ANALYSIS

1. What is the appropriate standard of review?

[19] The role of an appellate court on appeal from the decision of a reviewing court is to determine if the reviewing court has properly identified the standard of review which it must apply, and then to confirm that the reviewing court has properly applied that standard of review: *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226, at paragraph 43. In this case, the Judge found that the determination as to whether the Li brothers were caught by subsection 112(3) was a question of fact and was therefore reviewable only on a standard of reasonableness. Questions of statutory interpretation and jurisdiction were to be reviewed on the standard of correctness.

[20] In my view, it is more correct to say that the question of whether the Li brothers were persons with respect to whom there were serious reasons for considering that they had "committed a serious non-political crime outside the country of refuge" contrary to section F of Article 1 of the Convention is a question of mixed fact and law, since it requires the application of a legal test to a

given set of facts, and it is therefore reviewable on a standard of reasonableness. Once that issue was decided, the question as to whether they were persons described in subsection 112(3) was a question of law since it required the Court to decide if the determination made under section 99 satisfied the test set out in paragraph 112(3)(*c*). Similarly, the consequences of the determination made under section 112 on the processing of the brothers' application under section 113 is a question of law. These questions are reviewable on a standard of correctness.

> 2. Was it reasonable for the PRRA officer to conclude that the Li brothers are persons with respect to whom there were serious reasons for considering that they had committed a serious non-political crime outside the country of refuge prior to their admission to that country as a refugee contrary to section F(b) of Article 1 of the Convention and section 98 of the Act?

[21] The Li brothers, as respondents in the appeal, did not frame the issues under appeal. They are, however, entitled to defend the decision on any basis which was raised before the Judge. Thus, if the Minister's arguments are successful, the Li brothers argue that the appeal should nevertheless be dismissed because the PRRA officer's determination that there were serious reasons to believe that they had committed serious non-political crimes in China was unreasonable. Since this question, if answered in favour of the Li brothers, is dispositive of the appeal, I propose to treat it first.

[22] This requires me to deal with a preliminary question which was not raised by the parties but is nonetheless a question which must be answered in order to dispose of the appeal. As to the Court's power to decide a question not fully canvassed before it, see *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, at paragraph 25.

[23] The question is whether section 98 and section F of Article 1 of the Convention apply to the Li brothers at all since they did not enter Canada as refugees, but on a temporary resident visa. Section F of Article 1, it will be recalled, deals with persons with respect to whom there were serious reasons for considering that they have committed a serious non-political crime outside the country of refuge *prior to their admission to that country as refugees*. If these words are to be taken at face value, the exclusions found at sections E and F of Article 1 of the Convention would only apply to persons who either entered Canada after having their claim to refugee status recognized by a visa officer overseas, or who made their claim for refugee status at a port of entry and were admitted to Canada pending the determination of their claim for refugee protection.

[24] The case law contains many examples of persons who entered Canada without claiming refugee status and who subsequently made an application to the Refugee Protection Division: for recent examples, see *Saeed v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1016, 298 F.T.R. 307; *Saleem v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 389; *Soares v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 190, 308 F.T.R. 280; *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 198, [2008] 1 F.C.R. 385. It seems unlikely that Parliament intended that such persons would be immune from exclusion on the basis that they did not enter Canada as refugees. Such a result would simply provide a significant incentive for those persons most likely to face exclusion to enter Canada under cover of some other legal authority (i.e. visitor, student visa, temporary resident visa) as opposed to asking for refugee protection prior to, or upon entry to, Canada.

[25] In addition, restricting the application of the exclusion to persons claiming refugee status upon entry would lead to the kind of forum shopping described in *Liu v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 877, 353 F.T.R. 132, where an applicant who attempted unsuccessfully to enter Canada with false documents, made a claim for refugee status which he later withdrew in favour of an application under section 112, in which he claimed that the exclusions found in the Convention could not be invoked against his application for refugee protection.

[26] The requirement that the acts giving rise to the exclusion must have occurred prior to the claimant's entry to Canada do not give rise to any particular difficulty. The issue is whether persons who would otherwise fall within the exclusion can only be excluded if they enter Canada as refugees. The intent of the Convention is to prevent certain persons who are deemed to be undeserving of international protection from invoking the Convention to claim Convention refugee status. The achievement of that objective does not depend upon the timing of the claim for Convention refugee status but rather on the fact of claiming that status. As a result, it seems to me that application of the exclusion requires two conditions to be met. There must be serious reasons for believing that the person has committed one or more of the acts described in sections E and F of Article 1, and that person must make a claim for Convention refugee status. In my view, it is not necessary that the claim for Convention refugee status be made prior to or upon entry to Canada. The objective of the Convention is furthered by the application of the exclusion at the time of making an application for Convention refugee status, whenever that application is made.

[27] By incorporating the exclusions found at sections E and F of Article 1 of the Convention into the refugee protection scheme found in the Act, it seems clear that Parliament intended those exclusions to extend to all claims for refugee protection, not simply to claims for Convention refugee status. Thus, the requirements for the application of the exclusions are that there must be serious reasons to consider that the person has committed the acts described in sections E and F of Article 1 of the Convention, and that, either before or after entry to Canada, the person makes an application for refugee protection. Thus, the making of an application for refugee protection, at any time, triggers the inquiry into whether or not the person has committed acts which would disentitle him or her from international protection. I would therefore conclude that the fact that the Li brothers did not enter Canada as refugees does not preclude the application of sections E and F of Article 1 of the Convention to their claim for refugee protection.

[28] The Refugee Protection Division and the Federal Court have recently dealt with cases in which the exclusion was applied to persons who did not claim refugee status prior to or upon entry to Canada. No issue appears to have been raised as to the applicability of the exclusion to those persons: see *Cui v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 945, 65 Imm. L.R. (3d) 228; *Deng v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 943, 64 Imm. L.R. (3d) 133; *Zeng v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 956, 333 F.T.R. 84. At the very least, these cases are illustrative of the prevailing view of the applicability of the exclusion to persons who did not enter Canada as refugees.

[29] The Li brothers challenge the PRRA officer's conclusion that there are serious grounds for believing that they had committed serious non-political crimes in China prior to their arrival in Canada. They say that the evidence shows that the property and assets which the Li brothers acquired in Canada were acquired between 2000 and 2002 while the warrants which were issued

against them were for crimes allegedly committed in 2003 and 2004. As a result, the possession of unexplained wealth cannot be tied to the warrants alleging serious criminal behaviour.

[30] It is true that the information provided by the Chinese officials only alleges crimes committed in the period between 2003 and 2004. The Armstrong report, which was relied upon by the PRRA officer, alleges four series of frauds beginning in 2002. It also shows various transactions, some of which precede 2003–2004, and others which fall within or after that period, though it must be said that very few details are provided.

[31] The Armstrong report also shows a pattern of liquidation of assets and divestment of property in the name of the Li brothers following their arrival in Canada. None of the proceeds of the property can be traced back to the Li brothers. The Armstrong report notes that "[n]one of the targets listed above have any bank accounts, vehicles, utilities or properties in their name" (appeal book, page 871). Several incidents demonstrate the use of nominees to conceal the Li brothers' identities or ownership of assets.

[32] The affidavits filed by the Li brothers are, as the PRRA officer noted, the equivalent of pleading innocent. They provide no explanation for their wealth, other than the assertion of having operated successful businesses, an assertion which is not borne out by the information provided to the author of the Armstrong report.

[33] The question of whether there are serious grounds to believe that the Li brothers have committed serious non-political crimes in China is a question of mixed fact and law and is reviewable on a standard of reasonableness. The combination of the Li brothers' wealth, their unsupported assertions as to the source of their wealth (even if made under oath), the liquidation of their Canadian assets upon their arrival in Canada and the disappearance of the proceeds of those dispositions, taken together with the warrants issued for their arrest and the particulars of the crimes alleged, is sufficient to support a reasonable conclusion that there are grounds to believe that the Li brothers committed serious non-political crimes in China.

[34] It is important to remember that the Li brothers are the ones who know the most about their business dealings. When circumstances reasonably call for an explanation of their wealth, they are in the best position to provide it. The PRRA officer is entitled to take into account the quality of the explanation provided by persons in the position of the brothers when assessing whether there are serious grounds for believing that they have obtained their assets by the commission of offences.

[35] Neither the Li brothers' wealth, nor the issuance of the warrants would, by itself, satisfy the test set out in section F of Article 1 of the Convention. However, the combination of the two, when considered in the light of an indifferent explanation for their wealth and a pattern of liquidating property and concealing the proceeds of such dispositions, is capable of reasonably supporting the PRRA officer's conclusion.

3. Is an application under section 112 of the Act an application for refugee protection?

[36] The Li brothers argued before us that the PRRA officer did not reject a claim for refugee protection since she considered the brothers' application in light of section 97 only. Since claims for

refugee protection are dealt with under section 96, the failure to make a determination under that section means that the PRRA officer did not refuse an application for refugee protection. Furthermore, they took the position that only the Refugee Protection Division had the jurisdiction to decide a claim for refugee protection. Because they were precluded from making an application for refugee protection by virtue of the exclusion orders in force against them, there could have been no rejection of an application for refugee protection at the time they made their section 112 application.

[37] Section 95 of the Act sets out the circumstances in which refugee protection may be granted:

> **95.** (1) Refugee protection is conferred on a person when
>
> (*a*) the person has been determined to be a Convention refugee or a person in similar circumstances under a visa application and becomes a permanent resident under the visa or a temporary resident under a temporary resident permit for protection reasons;
>
> (*b*) the Board determines the person to be a Convention refugee or a person in need of protection; or
>
> (*c*) except in the case of a person described in subsection 112(3), the Minister allows an application for protection.

[38] The three circumstances described in section 95 are an application made from abroad to a visa officer, an inland application made to the Refugee Protection Division, or an application made to the Minister pursuant to section 112. The point to note here is that *refugee protection* (as set out in the opening words of section 95) may result from an application to the Minister for *protection* (as provided in the opening words of section 112).

[39] This is confirmed by section 114 of the Act (reproduced below, again, for ease of reference) which describes the possible outcomes of a successful application under section 112:

> **114.** (1) A decision to allow the application for protection has
>
> (*a*) in the case of an applicant not described in subsection 112(3), the effect of conferring refugee protection; and
>
> (*b*) in the case of an applicant described in subsection 112(3), the effect of staying the removal order with respect to a country or place in respect of which the applicant was determined to be in need of protection.

[40] As a result, applications for protection made under section 112 may result in applicants being accorded refugee protection (as contemplated by section 95 and paragraph 114(1)(*a*)) or may result in a stay of the removal orders made against them. In the latter case, applicants are afforded a form of protection, a stay of removal, even though, by virtue of section 98, they are not granted refugee protection nor are they considered to be persons in need of protection.

[41] As a result, I believe that it is clear that an application for protection under section 112 is an application for refugee protection.

[42] Is this still true where the applicant, as is the case here, is precluded from applying for refugee protection pursuant to section 99 by reason of the exclusion order in force against him? The answer

is that section 99 precludes the making of an application for refugee protection to an officer, and then to the Refugee Protection Division. It does not preclude making an application for protection under section 112. Any person in Canada who is subject to a deportation order (other than a person described in subsections 115(1) and 112(2)) may apply for protection under that section. Such an application may result in refugee protection and, but for section 98, could have resulted in refugee protection for the Li brothers. Consequently, notwithstanding their ineligibility to make applications to the Refugee Protection Division, the Li brothers were competent to make their applications to the Minister under section 112 and to receive refugee protection as a result of those applications. Their applications to the Minister were, in fact and law, applications for refugee protection.

[43] This conclusion is entirely consistent with the decision of this Court in *Xie v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 250, [2005] 1 F.C.R. 304 (*Xie*). The issue in that case was whether the exclusion found at section F of Article 1 of the Convention could be invoked in the case of purely economic crimes. The appellant's argument was that such a finding put her at risk of deportation to torture. In order to dispose of this argument, the Court reviewed the dispositions relating to claims for refugee protection. At paragraph 28 of its reasons, this Court said:

> The third avenue by which a person can be extended refugee protection is by means of an application for protection pursuant to section 112. Persons facing deportation may apply to the Minister for protection on the basis that they face a risk of harm if returned to their country of origin. If the application for protection is granted, such persons acquire refugee protection pursuant to paragraph 95(1)(*c*).

[44] The Court went on to examine the consequences of a successful application under section 112 and concluded as follows (at paragraph 32):

> For all except those described in subsection 112(3), a successful application for protection results in the grant of refugee protection and the status of protected person. For persons described in subsection 112(3), the result is a stay of the deportation order in force against them.

[45] In *Xie*, this Court was not called upon to decide the effect of exclusion under section 99. The argument that an application under section 112, in the circumstances in which the Li brothers find themselves, does not amount to an application for refugee protection is an argument about the effect of section 99, not an argument about the effect of section 98. Consequently, nothing in *Xie* is of assistance to the Li brothers.

> 4. Does a PRRA officer have jurisdiction to determine that a person is excluded from refugee protection under section 98 of the Act?

[46] The conclusion that an application under section 112 is an application for refugee protection disposes of the second issue, namely, whether a PRRA officer has jurisdiction to decide whether a person is excluded under section 98.

[47] Section 95 quoted above, as well as section 112 itself, make it clear that an application under section 112 is made to the Minister. In the course of considering an application under section 112, where the applicant has not been excluded under section 98, the Minister is directed by paragraph 113(*c*) to consider the application according to sections 96, 97, and 98. The Minister must therefore have jurisdiction to consider section 98 and to exclude an applicant under that section if the

facts warrant the exclusion. Otherwise, the legislation imposes an obligation on the Minister without giving him or her the authority to discharge that duty. Such a result cannot have been intended.

5. If the PRRA officer determines that a person is excluded from protection under section 98 of the Act, is the PRRA officer entitled to consider the person's application pursuant to paragraph 113(*d*) of the Act?

[48] The issue here is whether the PRRA officer, having commenced consideration of an applicant's pre-removal risk assessment under paragraph 113(*c*) of the Act, is entitled, upon making a finding of exclusion under section 98, to then consider the application under paragraph 113(*d*). The application Judge seems to have concluded that the PRRA officer could not do so when she found that, although the PRRA officer had the jurisdiction to consider section 98, she erred when she purported to treat the Li brothers' application under paragraph 113(*d*) when she was bound to consider it under 113(*c*): see paragraph 56. This flows from the application Judge's conclusion that the factors set out in subsection 112(3) were all matters which would be determined prior to the making of an application under section 112. Consequently, the Judge concluded that while the PRRA officer had the jurisdiction to consider section 98, it was jurisdictional error for her to recast her consideration of the Li brothers' section 112 application under paragraph 113(*d*) when she had commenced it under paragraph 113(*c*).

[49] The argument that the PRRA officer erred in applying section 98 to section 96, which deals with refugee protection, but in not applying it to section 97, which deals with persons in need of protection, is of a similar nature. Since section 98 denies a person excluded under section F of Article 1 of the Convention the status of a Convention refugee, as well as the status of a person in need of protection, the Li brothers argue that a PRRA officer cannot deny them Convention refugee status as a result of their exclusion under section 98 but yet consider whether they are persons in need of protection under section 97. They say that such a result is excluded by the terms of section 98 itself.

[50] In my view, both of these arguments are based on the false premise that once the PRRA officer starts down the road of paragraph 113(*c*), he or she is precluded from reassessing the application once he or she finds that section 98 applies to the applicant. I agree with the application Judge that section 113 provides a road map for the treatment of section 112 applications. I also agree that the PRRA officer must first determine if the applicant has, to that point, been refused refugee protection as a result of having been excluded under section E or F of Article 1 of the Convention. If the applicant has not been so excluded, I agree that the PRRA officer must consider the applicant's application under paragraph 113(*c*).

[51] That said, I consider that the PRRA officer's analysis under paragraph 113(*c*) must begin by addressing section 98. Where an applicant has not made a claim to the Refugee Protection Division, the question of exclusion will not have been canvassed. If there are no grounds for exclusion under section 98, the PRRA officer's analysis then proceeds through sections 96 and 97. If, however, the PRRA officer finds that there are grounds for exclusion, the applicant becomes a person described in paragraph 112(3)(*c*), and the PRRA officer must therefore return to section 113 and proceed under paragraph 113(*d*). At that point, the best possible outcome for the applicant is a limited form of protection, namely an indefinite stay of the deportation order in force against him or her.

[52] In proceeding under paragraph 113(*d*), the PRRA officer is not considering the applicant as a candidate for the status of a person in need of protection, as suggested by the Li brothers. Section 98 is conclusive against this argument. The PRRA officer is engaged in a process of determining whether execution of the deportation order in force against the applicant ought to be stayed.

[53] The Li brothers rely on the following comments, made at paragraph 40 of this Court's reasons in *Xie*:

> Specifically, I would say that a claimant can be excluded from refugee protection by the Refugee Protection Division for a purely economic offence. I stress refugee protection because the certified question appears to suggest that the exclusion applies to claims for protection, which is not the case. It applies only to claims for refugee protection.

[54] This is a comment about the effect of a finding of exclusion under section 98. It is not a comment about the nature of an application under section 112, nor is it inconsistent with the conclusion to which I have come. Notwithstanding the PRRA officer's conclusion that section 98 applied to the Li brothers, she went on to find that they were at risk of torture if returned to China and forwarded the file to the Minister's delegate for a weighing of the factors relevant to their removal to China in the face of that risk. Thus, while the Li brothers are excluded from refugee protection, they may yet benefit from protection in the form of a stay of the deportation orders in force against them.

[55] I note that in *Liu v. Canada (Minister of Citizenship and Immigration)*, Mr. Justice Russell came to the same conclusion as I have, expressing himself succinctly, as follows (at paragraph 131):

> In other words, I do not think that the direction in 113(c) that "consideration shall be on the basis of sections 96 to 98" means that a PRRA officer who makes a 1F(b) exclusion decision cannot then go on to consider section 97 risk under subsection 113(d). It is also my view that the PRRA Officer's approach to these statutory provisions and his way of dealing with section 96 to 98 of the Act was in accordance with the guidance provided by the Federal Court of Appeal in *Xie*. The Officer kept the two streams separate and ensured that exclusion was only applied to refugee protection.

[56] In the result, I conclude that the application Judge erred in law when she found that the PRRA officer could not consider the Li brothers' applications under paragraph 113(*d*). When the PRRA officer's analysis under paragraph 113(*c*) led her to the conclusion that the Li brothers were excluded from refugee protection by virtue of section 98, and were therefore persons described in paragraph 112(3)(*c*), she was then entitled to pursue her analysis of the Li brothers' application under paragraph 113(*d*).

CONCLUSION

[57] I would answer the certified questions as follows:

(1) Do pre-removal risk assessment officers have the jurisdiction to exclude persons from refugee protection under section 98 of the IRPA and find them described in paragraph 112(3)(*c*) of the IRPA?

Answer: Yes.

(2) Does paragraph 112(3)(*c*) of the IRPA only apply to rejections by the Refugee Protection Division on the basis of section F of Article 1 of the Refugee Convention or does it also apply to rejections by pre-removal risk assessment officers on the basis of section F of Article 1 of the Refugee Convention?

Answer: Paragraph 112(3)(*c*) applies to findings of exclusion on the basis of section F of Article 1 of the Convention by pre-removal risk assessment officers, as well as to findings of exclusion by the Refugee Protection Division.

[58] For these reasons, I would allow the appeal and set aside the decision of the application Judge. Rather than return the matter for reconsideration, I would invoke the jurisdiction conferred on this Court by section 52 [as am. by S.C. 1990, c. 8, s. 17; 2002, c. 8, s. 50] of the *Federal Courts Act*, R.S.C., 1985, c. F-7 [s. 1 (as am. *idem*, s. 14)], and, rendering the judgment which the Federal Court should have rendered, I would dismiss the application for judicial review.

NOËL J.A.: I agree.

LAYDEN-STEVENSON J.A.: I agree.