Federal Court  Cour fédérale

Date: 20120203

Docket: IMM-3383-11

Citation: 2012 FC 144

Toronto, Ontario, February 3, 2012

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

RODERIC LAIDLOW

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant Roderic Laidlow is an adult male citizen of Saint Vincent and the Grenadines (St. Vincent). He entered Canada on June 17, 2007 on a visitor visa; he overstayed his visa and has remained in Canada, without status, since that time.

[2] In May 2009, during the time when he was without status, he was hospitalized after losing his eyesight and memory while riding on the Toronto transit system. He was diagnosed with a benign tumor affecting his brain and pituitary gland. The tumor was surgically removed at a

Toronto hospital and the Applicant remained in hospital until July 29, 2009. The evidence is that he will require daily doses of certain medicines for the rest of his life and will require occasional testing, for instance by MRI, to determine if the tumor has recurred.

[3] The Applicant apparently commenced the paperwork for a claim for refugee protection in Canada while in hospital, but that claim was not filed until September 2, 2009. The basis of the claim was that he faced a risk to his life were he to return to St. Vincent, in that he would be unable to access adequate medical treatment there. A year later, on September 3, 2010, the Applicant filed an application for permanent residence based on humanitarian and compassionate grounds (H & C) on the basis that he would be unable to afford life sustaining medication were he to be returned to St. Vincent. That H & C application remains outstanding. There is nothing in the record to indicate when a decision may be given in respect of that application.

[4] The Applicant's claim for refugee protection was scheduled for a hearing to commence on September 17, 2010. At the request of his Counsel, this hearing was adjourned. The hearing was re-scheduled to commence in March 2011. In February 2011, Applicant's Counsel again requested an adjournment on the basis that the Board should wait until the Applicant's H & C application was determined. The Board refused. The hearing was held on March 22, 2011. The Board's decision, dated April 21, 2011, rejected the Applicant's claim for refugee protection. This is a judicial review of that decision.

[5] For the reasons that follow, I have determined that the application for judicial review is dismissed without costs but a question is to be certified.

[6] Applicant's Counsel has raised the following issues:

> 1. *Whether the Board erred in law by failing to adjourn the refugee hearing, in light of the constitutional issue raised by the Applicant and the fact that the Applicant's H & C application remained undetermined;* (Adjournment Issue)
>
> 2. *Whether the Board erred in law by ignoring evidence, misconstruing specific evidence and failing to have regard to the totality of the evidence;* (Evidence Issue) *and*
>
> 3. *Whether section 97(1)(b)(iv) is unconstitutional in that it violates the Applicant's rights to life and security of the person under section 7 of the Charter and his right to equality under section 15(1) of the Charter, and whether these violations can be justified under section 1 of the Charter*. (Charter Issue)

Issue #1: **Adjournment Issue**

[7] Applicant's Counsel requested for a second time that the Board adjourn the hearing. The basis, at least for this second request, was that the H & C application was outstanding and that if the decision were favourable to the Applicant, the refugee claim decision would be unnecessary.

[8] The Board, at paragraphs 8 to 14 of its reasons, gave full consideration to this request and found that there were no exceptional circumstances to warrant a delay and that denying the adjournment would not cause any prejudice to the refugee protection claim. The request for an adjournment was denied.

[9] Applicant's Counsel relies on the decision of the Federal Court of Appeal in *Covarrubias v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 365, and in particular, paragraph 61

of that decision, to argue that the Court of Appeal has directed that it is inappropriate to consider *Charter* arguments until all other remedies have been exhausted. The Court wrote:

> *61 In addition, and as the Applications Judge noted, there is an adequate alternative remedy in this case for the appellants, namely, the pending H&C application, judicial review of that decision should the appellants be unsuccessful, and an appeal to the discretion of the Minister. In keeping with the reasons of Martineau J. in Adviento v. Canada (Minister of Citizenship and Immigration) (2003), 242 F.T.R. 295 at para. 54, I find that it is inappropriate for the appellants to turn to the Court for relief under the Charter before exhausting their other remedies.*

[10] Thus, Applicant's Counsel argues, since the Board was aware that the Applicant wished to raise a *Charter* argument and the Board was aware that there was a pending H & C application, the Court of Appeal has directed that the Board should postpone a hearing in circumstances such as this until the H & C determination is made, including exhaustion of any judicial review proceedings arising from that determination.

[11] There is no doubt that the Refugee Protection Board has the power to change the date of a proceeding before it. The *Refugee Protection Division Rules*, SOR/2002-228, section 48(4) sets out a number of criteria to be considered:

48. *(4) In deciding the application, the Division must consider any relevant factors, including*	***48***. *(4) Pour statuer sur la demande, la Section prend en considération tout élément pertinent. Elle examine notamment :*
(a) in the case of a date and time that was fixed after the Division consulted or tried to consult the party, any	*a) dans le cas où elle a fixé la date et l'heure de la procédure après avoir consulté ou tenté de*

exceptional circumstances for allowing the application;

(b) when the party made the application;

(c) the time the party has had to prepare for the proceeding;

(d) the efforts made by the party to be ready to start or continue the proceeding;

(e) in the case of a party who wants more time to obtain information in support of the party's arguments, the ability of the Division to proceed in the absence of that information without causing an injustice;

(f) whether the party has counsel;

(g) the knowledge and experience of any counsel who represents the party;

(h) any previous delays and the reasons for them;

(i) whether the date and time fixed were peremptory;

(j) whether allowing the application would unreasonably delay the proceedings or likely cause an injustice; and

(k) the nature and complexity of the matter to be heard.

consulter la partie, toute circonstance exceptionnelle qui justifie le changement;

b) le moment auquel la demande a été faite;

c) le temps dont la partie a disposé pour se préparer;

d) les efforts qu'elle a faits pour être prête à commencer ou à poursuivre la procédure;

e) dans le cas où la partie a besoin d'un délai supplémentaire pour obtenir des renseignements appuyant ses arguments, la possibilité d'aller de l'avant en l'absence de ces renseignements sans causer une injustice;

f) si la partie est représentée;

g) dans le cas où la partie est représentée, les connaissances et l'expérience de son conseil;

h) tout report antérieur et sa justification;

i) si la date et l'heure qui avaient été fixées étaient péremptoires;

j) si le fait d'accueillir la demande ralentirait l'affaire de manière déraisonnable ou causerait vraisemblablement une injustice;

k) la nature et la complexité de l'affaire.

[12] Applicant's Counsel emphasizes subparagraph 48(4)(j), which requires consideration as to whether the allowance would be likely to cause an injunction. Counsel argues that a refusal could result in the refugee claim being rejected and in the Applicant's removal from Canada without an H & C determination. Counsel argues that a removal to St. Vincent even for a brief time would endanger the Applicant's life due to the lack of accessible medical supplies and services.

[13] Respondent's Counsel argues that the Board acted reasonably, that there was insufficient evidence to support the argument that there was a risk to life if the Applicant was to be removed to St. Vincent, and that there was no immediate risk of removal in any event.

[14] As to this last point, risk of immediate removal, Respondent's Counsel did not undertake, on behalf of the Minister, not to attempt to remove the Applicant. However, I appreciate that there are several avenues open to the Applicant to delay removal, such as a first request for a pre-removal risk assessment. In other words, the risk of removal, at least for the next several months, is remote.

[15] As to whether the Applicant's life is at risk if he were removed to St. Vincent is a matter addressed by the Board, and is discussed in respect of Issue #2 following. In brief, the Board found no such risk and I find that such a finding was reasonable.

[16] What we are left with is a consideration as to whether the Board acted reasonably in refusing a further adjournment given that the Applicant wished to raise a *Charter* argument, and given that there was a pending H & C application; and given that, at best, the Applicant asserted that there was

a risk to his life due to inadequate medical treatment. I find that the Board's refusal to adjourn was reasonable for the following reasons:

1. In general, the granting or not of an adjournment is a procedural matter within the Board's discretion and should not lightly be set aside upon a judicial review;

2. A careful reading of section 48(4)(j) shows that it is directed to whether *allowing* the application for adjournment would be likely to cause an injustice, not to whether *refusing* the application for adjournment would cause an injustice;

3. The Applicant has failed to show on the evidence that a return to St. Vincent would be likely to expose him to a risk of irreparable harm or death;

4. We do not know when the H & C decision will be made. If the Board had some assurance that it would be delivered within a short period after the Board was scheduled to hear the matter, this may well have influenced its decision. Even now, nearly a year later, we still don't know when the H & C decision will be made; and

5. The Applicant has the procedural means, such as a PRRA application, at its disposal that should delay the matter for several months, at least.

Issue#2: **Evidence Issue**

[17] Applicant's Counsel argues that the Board made an unreasonable decision in determining that there was no persuasive evidence that St. Vincent has an unjustified unwillingness to provide medical care to the Applicant, and no persuasive evidence that St. Vincent would deliberately attempt to persecute or discriminate against the Applicant by allocating insufficient resources for his treatment and care. The Board concluded, on the evidence that St. Vincent provides a fulsome, if not perfect, health care system for its nationals and does not discriminate based on wealth or individual circumstances.

[18] I find that the Board, in its reasons, did take into account all relevant evidence; in particular, an affidavit of a law student in Applicant's Counsel's office, who had spoken with a doctor in St. Vincent by telephone, and set out the substance of that conversation in the affidavit. Applicant's Counsel argues that the Board seemingly overlooked evidence to the effect that the Applicant apparently had difficulty for a few days in Toronto obtaining the necessary medication. I find that this apparent omission in the reasons is not particularly relevant as to whether medication is available in St. Vincent. In any event, the Supreme Court of Canada has recently reminded us in its decision in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, that a board does not need to include all details in its reasons. Abella J, for the Court, wrote at paragraphs 15 and 16:

> *15 In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show "respect for the decision-making process of adjudicative bodies with regard to both the facts and the law" (Dunsmuir, at para. 48). This means that courts should not substitute their own reasons, but they may, if they find it*

> *necessary, look to the record for the purpose of assessing the reasonableness of the outcome.*
>
> *16 Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn., [1975] 1 S.C.R. 382, at p. 391). In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the Dunsmuir criteria are met.*

[19] I find that the Board's finding on the evidence as to medical care in St. Vincent was reasonable.

Issue#3: **Charter Issues**

[20] Applicant's Counsel argues that section 97(1)(b)(iv) of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 (IRPA) is unconstitutional having regard to sections 7 and 15(1), in view of section 1 of the *Charter of Rights and Freedoms*. Section 97(1)(b)(iv) states:

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	*97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :*
…	…

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if	*(b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :*
…	…
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	*(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.*

[21] In brief, it states that a person cannot be considered to be in need of protection from risk of life or cruel and unusual treatment or punishment if that risk is caused by the inability of that person's home country to provide adequate health or medical care.

[22] Applicant's Counsel argues that the only people to whom section 97(1)(b)(iv) applies are those who have a medical condition that is treatable in Canada but not in their country of origin; in other words, they would die for lack of adequate medical treatment if returned to their country of origin. The adequacy of medical treatment, obviously, would vary from one country of origin to another. Thus, Counsel argues, section 97(1)(b)(iv) imposes a differential treatment solely on the basis of a person's individual disability and individual country of origin. Thus, it is argued, the provision is discriminatory.

[23] Respondent's Counsel argues that this argument must fail at the outset because the Board found that on the evidence, the Applicant would not be denied medical treatment or be discriminated against in respect of medical treatment in St. Vincent. I have found this determination to be reasonable.

[24] I must, therefore, look at the Applicant's argument in a somewhat different way. I look at it on the basis that the Applicant *asserts* that he would be at risk of inadequate medical treatment, which *could* result in his death if he were to be returned to St. Vincent. The assessment of that *assertion* in a refugee claim hearing is determined on the basis of section 97(1)(b)(iv); namely, is there a *risk* to life, etc. *However*, in the H & C application, the test is different, where the Minister is *not* to consider subsection 97(1) factors, but must consider elements related to hardship. Subsections 25(1) and (1.3) of the IRPA provide:

25. (1) The Minister must, on request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, 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 obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.	*25. (1) Le ministre doit, sur demande d'un étranger se trouvant au Canada qui est interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.*
…	…
(1.3) In examining the request of a foreign national in Canada, the Minister may not consider the factors that are taken into account in the	*(1.3) Le ministre, dans l'étude de la demande d'un étranger se trouvant au Canada, ne tient compte d'aucun des facteurs servant à établir la qualité de réfugié — au sens de la Convention — aux termes de l'article 96 ou de personne à protéger au titre du paragraphe*

determination of whether a person is a Convention refugee under section 96 or a person in need of protection under subsection 97(1) but must consider elements related to the hardships that affect the foreign national.	*97(1); il tient compte, toutefois, des difficultés auxquelles l'étranger fait face.*

[25] Thus, the *assertion* of hardship may be considered differently in an H & C application from considerations given in a refugee claim matter.

[26] The question becomes whether section 97(1)(b)(iv) is discriminatory, in that different criteria from those under section 25(1) or (1.3) in respect of the same assertion of risk to life are provided, and that the hearing of the refugee claim first may frustrate or render moot the H & C application since the Applicant may *possibly* be removed to his country of origin before the H & C result is known and, arguably, may *possibly* be dead by that time.

[27] Respondent's Counsel argues that a proper judicial basis has not been established whereupon a proper *Charter* argument can be made. The factual finding, which I have found to be reasonable, is that there is no risk to life in respect of the medical treatment situation in St. Vincent. Possibilities and assertions are, it is argued, insufficient. Second, Respondent's Counsel argues, the Applicant's arguments rest on choices made by the government of St. Vincent as to how to allocate its resources, and not in respect of any choice made by the government of Canada.

[28] The Federal Court of Appeal has dealt with *Charter* arguments respecting section 97(1)(b)(iv) of IRPA in *Covarrubias v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 365. Linden JA, for the Court, wrote at paragraphs 34 to 36 and 39 and 40:

> *34 The legislative history furnishes some guidance. In the clause-by-clause Analysis of Bill C-11 (later enacted as the IRPA) it provides as an explanatory note to section 97:*
>
> > *[...] Cases where a person faces a risk due to lack of adequate health or medical care can be more appropriately assessed through other means in the Act and are excluded from this definition. Lack of appropriate health or medical care are not grounds for granting refugee protection under the Act.*
>
> *35 A country's political decision not to provide a certain level of health care does not necessarily mean that the country is "unwilling" to provide that health care to its nationals. To interpret the exclusion as the appellants suggest would oblige a PRRA officer to engage in an unseemly analysis of another state's medical system in relation to its fiscal capacity and current political priorities. It would effectively require a finding that another country's public policy decision not to provide a certain level of health care is inadequate by Canadian standards. As the Board stated in the decision under review in Travers, supra, "it is not for the panel to judge the health care delivery system in the context of Canada or to attach blame for its shortcomings when the contributing forces are many and complex."*
>
> *36 The appellants are, in essence, seeking to expand the law in section 97 so as to create a new human right to a minimum level of health care. While their efforts are noble, the law in Canada has not extended that far. McLachlin C.J. and Major J., in concurring reasons in the decision of Chaoulli v. Québec (Attorney General), [2005] 1 S.C.R. 791 at para. 104, stated that the Canadian Charter of Rights and Freedoms (the "Charter") does not confer on Canadians a freestanding constitutional right to health care. If that is so, then a freestanding right to health care for all of the people of the world who happen to be subject to a removal order in Canada would not likely be contemplated by the Supreme Court.*
>
> …

> *39 This is not to say that the exclusion in subparagraph 97(1)(b)(iv) should be interpreted so broadly as to exclude any claim in respect of health care. The wording of the provision clearly leaves open the possibility for protection where an applicant can show that he faces a personalized risk to life on account of his country's unjustified unwillingness to provide him with adequate medical care, where the financial ability is present. For example, where a country makes a deliberate attempt to persecute or discriminate against a person by deliberately allocating insufficient resources for the treatment and care of that person's illness or disability, as has happened in some countries with patients suffering from HIV/AIDS, that person may qualify under the section, for this would be refusal to provide the care and not inability to do so. However, the applicant would bear the onus of proving this fact.*
>
> *40 This interpretation of subparagraph 97(1)(b)(iv) is consistent with the jurisprudence and it is consistent with the description in the publication by Legal Services, Immigration and Refugee Board, "Consolidated Grounds in the Immigration and Refugee Protection Act", section 3.1.9, wherein it states:*
>
> > *[...] The inability of a country to provide adequate health or medical care generally can be distinguished from those situations where adequate health or medical care is provided to some individuals but not to others. The individuals who are denied treatment may be able to establish a claim under s. 97(1)(b) because in their case, their risk arises from the country's unwillingness to provide them with adequate care. These types of situations may also succeed under the refugee ground if the risk is associated with one of the Convention reasons. [Emphasis added]*

[29] More recently, in *Toussaint v Canada (Attorney General)*, 2011 FCA 213, the Federal Court of Appeal dealt with *Charter* issues in the context of a person who was in Canada without status, and without having made a refugee claim sought health care in Canada under an interim federal program. Stratas JA, for the Court, wrote at paragraphs 72 and 108:

> *72 Further, and most fundamentally, the appellant by her own conduct - not the federal government by its Order in Council - has endangered her life and health. The appellant entered Canada as a*

> *visitor. She remained in Canada for many years, illegally. Had she acted legally and obtained legal immigration status in Canada, she would have been entitled to coverage under the Ontario Health Insurance Plan: see section 1.4 of Regulation 552, supra.*
>
> …
>
> *108 The exclusion of the appellant from the coverage provided by the Order in Council does not undercut its overall purpose. On the other hand, the exclusion of the appellant from the coverage provided by the Order in Council is consistent with its purpose. The Order in Council is designed to provide emergency care to legal entrants into Canada who are under immigration jurisdiction or for whom immigration authorities feel responsible. Extending these benefits to all foreign nationals in Canada, even those in Canada illegally, stretches the program well beyond its intended purpose. Excluding persons such as the appellant keeps the program within its purpose. In the words of Auton (at paragraph 43), the appellant's exclusion from the Order in Council "cannot, without more, be viewed as an adverse distinction based on an enumerated ground"; rather, "it is an anticipated feature" of the Order in Council.*

[30] That situation is similar to the one here in that the Applicant was diagnosed with a tumor and received surgical treatment while he was in Canada without status; it was only several weeks after he was released from hospital did he file a claim for refugee protection.

[31] Section 97(1)(b)(iv), in light of *Covarubbias* and, in particular, in the circumstances of the present case, does not discriminate against the Applicant individually or as a member of a particular class. While in Canada he suffers no discrimination, if removed to St. Vincent, on the evidence, he will not suffer risk to life. There is no violation of section 15 of the *Charter*.

[32] Turning to section 7 of the *Charter*, has the Applicant been deprived of the right to life because his refugee claim was determined without postponement until the H & C application was determined?

[33] Again, on the facts, the matter fails. A return to St. Vincent will not endanger his life.

[34] The question is whether the *possibility* of risk to life and *possible* salvation if an H & C decision favourable to the Applicant is made means that section 7 of the *Charter* has been violated because the Board did not adjourn its hearing?

[35] In this respect, the decision of the Federal Court of Appeal in *Poshteh v Canada (Minister of Citizenship and Immigration)*, [2005] 3 FCR 487, is instructive. Rothstein JA (as he then was) wrote for the Court at paragraphs 62 and 63:

> *62 The principles of fundamental justice in section 7 of the Charter are not independent self-standing notions. They are to be considered only when it is first demonstrated that an individual is being deprived of the right to life, liberty or security of the person. It is the deprivation that must be in accordance with the principles of fundamental justice. (See, for example, Blencoe v. British Columbia (Human Rights Commission), [2000] 2 S.C.R. 307, at paragraph 47.)*
>
> *63 Here, all that is being determined is whether Mr. Poshteh is inadmissible to Canada on the grounds of his membership in a terrorist organization. The authorities are to the effect that a finding of inadmissibility does not engage an individual's section 7 Charter rights. (See, for example, Barrera v. Canada (Minister of Employment and Immigration), [1993] 2 F.C. 3 (C.A.).) A number of proceedings may yet take place before he reaches the stage at which his deportation from Canada may occur. For example, Mr. Poshteh may invoke subsection 34(2) to try to satisfy the Minister that his presence in Canada is not detrimental to the national interest.*

> *Therefore, [page510] fundamental justice in section 7 of the Charter is not of application in the determination to be made under paragraph 34(1)(f) of the Act.*

[36] Also, the decision of the Supreme Court of Canada in *Gosselin v Quebec (Attorney General),* [2005] 4 SCR 429 is instructive. The Chief Justice McLachlin, for the majority, wrote at paragraphs 81 and 82:

> *81 Even if s. 7 could be read to encompass economic rights, a further hurdle emerges. Section 7 speaks of the right not to be deprived of life, liberty and security of the person, except in accordance with the principles of fundamental justice. Nothing in the jurisprudence thus far suggests that s. 7 places a positive obligation on the state to ensure that each person enjoys life, liberty or security of the person. Rather, s. 7 has been interpreted as restricting the state's ability to deprive people of these. Such a deprivation does not exist in the case at bar.*
>
> *82 One day s. 7 may be interpreted to include positive obligations. To evoke Lord Sankey's celebrated phrase in Edwards v. Attorney-General for Canada, [1930] A.C. 124 (P.C.), at p. 136, the Canadian Charter must be viewed as "a living tree capable of growth and expansion within its natural limits": see Reference re Provincial Electoral [page492] Boundaries (Sask.), [1991] 2 S.C.R. 158, at p. 180, per McLachlin J. It would be a mistake to regard s. 7 as frozen, or its content as having been exhaustively defined in previous cases. In this connection, LeBel J.'s words in Blencoe, supra, at para. 188 are apposite:*
>
> > *We must remember though that s. 7 expresses some of the basic values of the Charter. It is certainly true that we must avoid collapsing the contents of the Charter and perhaps of Canadian law into a flexible and complex provision like s. 7. But its importance is such for the definition of substantive and procedural guarantees in Canadian law that it would be dangerous to freeze the development of this part of the law. The full impact of s. 7 will remain difficult to foresee and assess for a long while yet. Our Court should be alive to the need to safeguard a degree of flexibility in the interpretation and evolution of s. 7 of the Charter.*

> *The question therefore is not whether s. 7 has ever been -- or will ever be -- recognized as creating positive rights. Rather, the question is whether the present circumstances warrant a novel application of s. 7 as the basis for a positive state obligation to guarantee adequate living standards.*

[37] Viewing the matter "in the present circumstances", as McLachlin CJ did in *Gosselin*, I find that section 7 does not impose a positive obligation on the Board to adjourn its hearing until the determination of the H & C application.

Conclusion

[38] I conclude, therefore, that this application for judicial review must be dismissed. There are no special circumstances to justify an award of costs.

[39] Counsel for the Applicant has proposed several questions for certification. I have considered these proposals. Counsel for the Respondent has not proposed any questions.

[40] I will certify a question as follows:

> *Does the Immigration and Refugee Protection Board violate the provisions of section 7 of the Charter if it declines to postpone its hearing based on risk to life where there is a pending humanitarian and compassionate application also based on risk to life?*

JUDGMENT

FOR THE REASONS PROVIDED:

THIS COURT'S JUDGMENT is that:

1. The application is dismissed;

2. The following question is certified:

   Does the Immigration and Refugee Protection Board violate the provisions of section 7 of the Charter if it declines to postpone its hearing based on risk to life where there is a pending humanitarian and compassionate application also based on risk to life?

3. No order as to costs.

"Roger T. Hughes"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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