

PART III: CANADA

Complementary Refugee Protection in Canada: The History and Application of Section 97 of the Immigration and Refugee Protection Act (IRPA)¹

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On June 28 2002, Canada's *Immigration and Refugee Protection Act (IRPA)*² came into force and introduced an "expanded and consolidated" mandate for the country's refugee determination system.³ Under the former *Immigration Act*,⁴ refugee claimants appeared before a panel of the Convention Refugee Determination Division (CRDD) of the Immigration and Refugee Board (IRB), where their claims for refugee status were assessed based on the five enumerated grounds in the *Refugee Convention*.⁵ The *IRPA* expanded the IRB's jurisdiction and enabled the CRDD's successor – the Refugee Protection Division (RPD) – to confer refugee protection on both "Convention refugees" and the newly created class of "persons in need of protection."⁶ The new class encompasses claimants whose

¹ This paper addresses Canada's refugee law and policy for in-land refugee claims and does not address Canada's overseas refugee program (i.e. refugee resettlement). Other immigration programs and policies which have "complementary protection aspects" to them, but do not form part of the Canadian in-land refugee protection system (i.e. matters strictly within the mandate of the Immigration and Refugee Board), are also beyond the scope of this paper. These Citizenship and Immigration Canada (CIC) programs include applications assessed on "Humanitarian and Compassionate" grounds and Pre-Removal Risk Assessments (PRRAs).

² S.C. 2001, c. 27. The tabling of the *Immigration and Refugee Protection Act* (originally Bill C-31) occurred in April of 2000. In February of 2001, *IRPA* was reintroduced as Bill C-11. The new bill introduced changes addressing concerns over the initial Bill C-31. This bill received royal assent in November of 2001.

³ In a presentation to the Canadian Bar Association in May of 2001, Peter Showler (then Chairperson of the Immigration and Refugee Board) explained the upcoming changes to the refugee determination system under the new *IRPA*. He used the term "expanded and consolidated grounds" to refer to the Board's newly revised authority to grant protection. A copy of his speech can be found online at: http://www.irb-cisr.gc.ca/en/media/speeches/2001/cba_e.htm

⁴ R.S.C. 1985 c. I-2.

⁵ *Convention Relating to the Status of Refugees*, (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137, Can. T.S. 1969 No. 6. The five enumerated grounds in the *Refugee Convention* are: race, religion, nationality, membership of a particular social group and political opinion.

⁶ This jurisdiction is found in para. 95(1)(b) of the *IRPA*. Section 96 of the *IRPA* encapsulates Canada's international obligations under the *Refugee Convention*, while s. 97 articulates the criteria for finding a "person in need of protection":

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves 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.

return to their home country would subject them personally to torture, or would constitute a risk to life, or a risk of cruel and unusual treatment or punishment. Successful refugee claimants in either class (Convention refugee under section 96, or “person in need of protection” under section 97 of the *IRPA*) become “protected persons”⁷ under Canadian law and may apply for permanent residence status in Canada.

While the *IRPA* extended the IRB’s mandate and allowed its members⁸ to consider grounds other than those historically applied through the *Refugee Convention*, the notion that the Canadian refugee definition was expanded in 2002 is misleading. The mechanisms to grant protection to claimants who faced torture or a risk to life or a risk of cruel and unusual punishment existed under the previous *Immigration Act*. However, these risk assessments were conducted through a process unaffiliated with the IRB.⁹ Previously, ministerial delegates or immigration officials evaluated the risk to life or risk of cruel and unusual punishment faced by failed refugee claimants as part of an assessment under the Post-Refugee Determination in Canada Class (PRDCC). Thus, in reality, the change in *IRPA* constituted an effort to consolidate and streamline a process, which under the predecessor Act, was fragmented into different levels of decision-making.

Although parliamentary committee debate in the period leading up to the enactment of *IRPA* confirms that changes to the refugee determination process under the new Act were aimed at consolidation rather than expansion of refugee protection in Canada,¹⁰ the

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.

⁷ *IRPA*, ss. 95(2).

⁸ In Canada, those who adjudicate the refugee claims of persons seeking protection are referred to as RPD “members.” Part 4 of the *IRPA* outlines the administrative structure of the IRB. An organizational chart of the IRB can be found online at: http://www.irb-cisr.gc.ca/en/about/orgchart/index_e.htm. A brief overview of the RPD (including its mandate and process) can also be found online at: http://www.irb-cisr.gc.ca/en/about/publications/overview/index_e.htm#rpd.

⁹ In a Legislative Summary on Bill C-11, the Parliamentary Research Branch highlighted this fact, explaining that the proposed new act *consolidated* rather than expanded Canada’s refugee protection process. (Parliamentary Research Branch, *Bill C-11: The Immigration and Refugee Protection Act* (Legislative Summary) by Jay Sinha and Margaret Young, Law and Government Division (Ottawa: Library of Parliament, 26 March 2001, revised 31 January 2002) at 29.) A copy of this Legislative Summary can be found online at: <http://www.parl.gc.ca/37/1/parlbus/chambus/house/bills/summaries/c11-e.pdf>.

¹⁰ Canada, Parliament, Standing Committee on Citizenship and Immigration, Minutes of Proceedings (14 June 2000) at 1655 and 1720 (Ms. Joan Atkinson, then Acting Deputy Minister, Policy and Program Development, Department of Citizenship and Immigration); Canada, Parliament, Standing Committee on Citizenship and Immigration, Minutes of Proceedings (28 September 2000) at 940 (Mr. Peter Showler, then Chairperson, Immigration and Refugee Board).

efforts to streamline the refugee determination process have contributed to a greater entrenchment and prominence of non-Convention refugee protection in Canada. Under the former PRDCC, determinations, unless judicially reviewed by the Federal Court, were virtually invisible while those of the IRB were reported and constituted a body of significant jurisprudence. The consolidation of the refugee protection grounds in *IRPA*, in essence, has elevated complementary protection by according it a status similar to that of Convention refugee protection. Although the jurisprudence on section 97 is still in its infancy, an analysis of over 300 reported RPD decisions since *IRPA*'s enactment indicates that complementary protection in Canada is serving to provide protection for refugee claimants outside the scope of the *Refugee Convention*. This paper will examine some of the trends which have developed in the last four years and highlight, in particular, two recent developments in the section 97 jurisprudence from the Federal Court and the Federal Court of Appeal.

Background

As a decision-making body, the now defunct CRDD was not created until 1989. Although Canada became a signatory to the 1951 *Refugee Convention* and its 1967 Protocol in 1969, until the IRB's creation in 1989, refugee determinations did not include an oral hearing. In 1985, the Supreme Court of Canada held that the requirements of fundamental justice necessitated the provision of an oral hearing for the determination of refugee claims.¹¹ Writing for the majority of the Court, Madam Justice Bertha Wilson stated:

[E]ven 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

[T]he absence of an oral hearing need not be inconsistent with fundamental justice in every case. My greatest concern about the procedural scheme envisaged by ss. 45 to 48 and 70 and 71 of the Immigration Act, 1976 is not, therefore, with the absence of an oral hearing in and of itself, but with the inadequacy of the opportunity the scheme provides for a refugee claimant to state his case and know the case he has to meet.¹²

In response to this decision, a quasi-judicial body (the CRDD of the IRB) was created and tasked with the responsibility of providing oral hearings for people seeking protection under the *Refugee Convention*. Failed refugee claimants received an automatic review to determine if they would be subject to "unduly harsh or inhumane treatment in the country to which they were to be removed."¹³ Although this review did not encompass an oral hearing, it responded to concerns for claimants who did not conform to *Refugee*

¹¹ *Singh v. Canada (Minister of Employment and Immigration)*, [1985] S.C.J. No. 11; [1985] 1 S.C.R. 177.

¹² *Ibid.* at paras. 59-60.

¹³ Regulatory Impact Analysis Statement, SOR/DORS/93-44, Canada Gazette Part II, Vol. 127, No. 3, at pp. 653-661.

Convention criteria, but who would nevertheless face a personal risk of serious harm if removed from Canada. In 1993, the former Act was amended to create the Post-Refugee Determination in Canada Class (PRDCC).¹⁴ In 2002, *IRPA* expanded the IRB's jurisdiction to include the areas previously assessed by immigration officials under the PRDCC. Canada's refugee protection system now has three grounds of protection available to claimants fleeing persecution, torture, risk to life, or risk of cruel and unusual treatment/punishment.

The Application of section 97 in Canadian Refugee Protection Jurisprudence

Section 97 of the *IRPA* provides for two distinct branches of complementary refugee protection. Under paragraph 97(1)(a), claimants may succeed in their refugee claims if they establish that removal from Canada would subject them personally to a danger of torture (within the meaning of article 1 of the *Convention Against Torture (CAT)*).¹⁵ They may also succeed under paragraph 97(1)(b), if removal from Canada would subject them personally to a risk to life, or a risk of cruel and unusual treatment or punishment. For both branches of section 97, the burden of proof is on the claimant and the legal test applied by the RPD member when assessing the claim, is "balance of probabilities."¹⁶

With respect to claims involving torture, both domestic and international jurisprudence has informed the determinations of the RPD.¹⁷ The definition of torture mirrors that of the *CAT*, and it encompasses severe physical or mental pain or suffering intentionally inflicted upon the claimant for such purposes as: obtaining information or a confession; punishment for an act committed; intimidation or coercion. Additionally, the purpose of the torture could be for any reason based on discrimination of any kind. State involvement (or complicity) is required to sustain a claim although an exception exists in relation to punishment arising from lawful sanctions. Claimants must demonstrate that the feared torture is prospective and that they would be subjected personally to this danger of torture. It is insufficient to allege broadly, without more, that torture is practiced (in general) in the country to which the claimants would be removed.¹⁸ The "country of reference" element to a paragraph 97(1)(a) claim is no different than that required under section 96: claimants must establish a danger of torture in their country or countries of nationality. For stateless claimants, the danger of torture must be in reference to his or her "country(ies) of former habitual residence."¹⁹

There is no general requirement to seek state protection in claims of alleged torture because the definition of torture itself specifies that the state is either directly or indirectly involved in the abuse. However, the issue of state protection may arise when the torture is

¹⁴ *Ibid.*

¹⁵ *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85, Can. T.S. 1987 No. 36.

¹⁶ This issue will be covered in more detail in another section of this paper.

¹⁷ The Legal Services of the IRB provides a very helpful legal guide to the interpretation of para. 97(1)(a) claims. An electronic copy of this legal guide can be found online at: http://www.irb-cisr.gc.ca/en/references/legal/rpd/cgrounds/torture/cgtorture_e.pdf.

¹⁸ *Ibid.* at pp. 17-18.

¹⁹ *Ibid.* at p. 17.

not so widespread that it involves “all of the state apparatus.”²⁰ With respect to the availability of an internal flight alternative (IFA), paragraph 97(1)(a) “implicitly requires proof of the absence of an IFA for protection to be granted... a danger of torture must be shown to exist throughout the territory of the country of reference.”²¹

For refugee claims arising from a risk to life or risk of cruel and unusual treatment or punishment under paragraph 97(1)(b), the lengthy wording of the legislation enumerates the conditions upon which protection is conferred.²² Interpretation of this section draws upon both domestic and international jurisprudence, and includes Federal Court judicial reviews of PRDCC decisions. The “country of reference” requirement that is common to both Convention refugee claimants and those who claim a danger of torture, is identical to that under paragraph 97(1)(b).

The risk faced by a claimant under paragraph 97(1)(b) must be personal and not one faced generally by others in the country, i.e., “there must be some particularization of the risk to the person claiming protection as opposed to an indiscriminate or random risk faced by the claimant and others.”²³ As with Convention refugee claims, the requirement that a claimant rebut a presumption of state protection applies in s. 97(1)(b) claims.

A distinction exists with respect to IFA in that paragraph 97(1)(b) claims will fail if an IFA exists anywhere in the country. Under section 96, the possibility of an IFA is subject to a “reasonableness element.” The language of paragraph 97(1)(b) mandates that the risk must be faced by the claimant in every part of that country. Thus, both grounds under section 97 incorporate a more demanding IFA test than that applied in section 96 claims. Finally, under paragraph 97(1)(b), the legislation stipulates that the risk cannot be inherent or incidental to lawful sanctions, and it cannot arise from inadequate health or medical care.

The most notable distinction with respect to paragraph 97(1)(b) claims relates to the inapplicability of nexus and state involvement in claims involving risk to life or risk of cruel/unusual treatment or punishment. Unlike Convention refugee claims, paragraph 97(1)(b) claims do not require a “nexus” between the fear of persecution and an enumerated *Refugee Convention* ground. Additionally, the requirement of state involvement or complicity under claims pursuant to a danger of torture, does not apply in paragraph 97(1)(b) claims. Despite the absence of these two requirements, early predictions as to the scope of paragraph 97(1)(b) suggested that it would not provide the broad ground of protection that refugee advocates had hoped for:

The scope of s. 97(1)(b) appears to be very narrow. Who exactly will benefit from a determination under s. 97(1)(b) remains to be determined but it seems that the provision will benefit mainly those claimants who are unable to establish a nexus to the Convention refugee definition and who face a risk which is not generalized or due to inadequate health or medical care. Section 97(1)(b) does not appear to broaden the scope of coverage of claims arising out of civil war situations.

²⁰ *Ibid.* at p. 23.

²¹ *Ibid.* at pp. 23-24.

²² This ground of refugee protection, as outlined in the *IRPA*, has much in common with the regulations governing the PRDCC under the former *Immigration Act*. As is the case for claims based on danger of torture, the Legal Services of the IRB provides a legal guide to the interpretation of para. 97(1)(b) claims. An electronic copy of this legal guide can be found online at: http://www.irb-cisr.gc.ca/en/references/legal/rpd/cgrounds/life/cglife_e.pdf.

²³ *Ibid.* at p. 9.

Likewise, persons who may have an IFA available to them do not appear to benefit from a more liberal interpretation of that concept under s. 97(1)(b) than exists under Canadian jurisprudence for Convention refugees. Lastly, s. 97(1)(b) is not intended to grant protection on the basis of humanitarian and compassionate grounds.²⁴

Positive section 97 Claims

Regrettably, an informed analysis of positive refugee claims is limited because many positive decisions by members of the Refugee Protection Division (RPD) are brief, delivered orally, and are not reported. Negative determinations are often lengthier decisions and yield more detailed analysis of refugee claims. In circumstances where claimants seek protection under both sections 96 and 97, but a positive determination can be made under section 96, the presiding member will decline to assess the section 97 claim, it being superfluous to do so.²⁵ Subject to these limitations, a survey of reported positive decisions, which include a section 97 analysis, indicates that these claims are most often successful when nexus cannot be established with respect to an enumerated *Refugee Convention* ground.²⁶

In *Re E.Y.L.*,²⁷ the RPD member granted refugee protection to a claimant, when his return to Cambodia would possibly subject him to being falsely accused of a high-profile crime, tortured into confession by government authorities and victimized by mob violence. The decision described the claimant as “a member of a group who is falsely accused of a crime and does not have political connections or financial resources in Cambodia.” The RPD member concluded that this particular group did not constitute a “social group” within the meaning of *Refugee Convention* jurisprudence. Thus, nexus was not established. Rather, the claimant was found to be a person in need of protection on the basis of both paragraph 97(1)(a) and paragraph 97(1)(b), because the criteria for these grounds were satisfied on the facts of the case.

In *Re M.Q.F.*,²⁸ the nine-year-old claimant was found to be a person in need of protection on the basis of risk to life (paragraph 97(1)(b)) after the RPD member determined that the child’s claim fell beyond the scope of the *Refugee Convention*. Born in Haiti and brought to Canada at the age of four (by a woman who turned out not to be his biological mother and who later abandoned him in Canada), the child’s counsel claimed Convention refugee protection on the basis of membership in a social group. The RPD member determined that there was no nexus. Protection was granted under paragraph 97(1)(b) because the child’s life would be at risk, if removed from Canada, in that the

²⁴ *Ibid.* at p. 11.

²⁵ For example, in *Re I.V.H.*, [2004] R.P.D.D. No. 57, the Colombian claimant sought protection pursuant to s. 96 and s. 97. The RPD member determined that there was a “reasonable chance that the principle claimant [would] be persecuted by the ELN by reason of his pro-government/anti-ELN political opinion” if he were to return to Colombia. She concluded, “having found that the claimants are Convention refugees, I did not assess their claims to be persons in need of protection due to a risk to their lives or of cruel and unusual treatment or punishment or torture.”

²⁶ Of the 13 positive decisions where the RPD member granted protection pursuant to s. 97, 11 (84.6%) were based on lack of nexus under s. 96.

²⁷ [2002] R.P.D.D. No. 187.

²⁸ [2004] R.P.D.D. No. 87.

identity of the child's parents/family was unknown and the documentary evidence indicated that upon return to Haiti, he would become a street child, prey to prostitution and homelessness.

Other positive section 97 decisions – where lack of nexus was noted – included those where the claimant was a target of a blood feud in Albania²⁹ and where a claimant was convicted *in absentia* (in Myanmar) for an assault, which occurred while defending his sister from an attempted rape by two soldiers.³⁰

Within this category of decisions – where lack of nexus is recognized and section 97 is invoked to grant protection to those falling outside the parameters of the *Refugee Convention* – a small group of refugee claimants, sometimes referred to as “victims of crime,” appears to be developing within the RPD jurisprudence.

In *Re I.D.Q.*,³¹ the claimant alleged persecution on the basis of perceived political opinion. The RPD member determined that the agents of persecution in Colombia were not members of paramilitary units, but “common criminals” who made several attempts to kidnap the claimant's children for purposes of extortion. Since the kidnappers were not motivated by the claimant's political opinions, nexus did not exist and the claimant was not a Convention refugee. Refugee protection was nevertheless granted under paragraph 97(1)(b) as the RPD member found that neither adequate state protection nor the possibility of an IFA existed.

In a similar case, the RPD member found the refugee claimant's fear of persecution to be credible, but maintained that her persecutors in Guatemala were not concerned with her perceived political opinion because they were likely common criminals who wanted to “know the details of her late husband's transactions.” Accordingly, the member determined that although nexus was not established, the application of paragraph 97(1)(b) could be used to grant the female claimant protected status as a person in need of protection.³²

In another claim arising from Colombia, paragraph 97(1)(b) protection was conferred on a claimant due to his position as a well-to-do businessman who was subjected to a series of extortions by criminals. The RPD member noted that the documentary evidence indicated that “extortion in the Colombian context, [had] the potential for serious harm, including a possible risk to life.” State protection was not available because the evidence on record indicated that Colombia's security forces were currently overwhelmed and did not have the ability to deal with the crimes experienced by the claimant.³³

Three similarly successful “victim of crimes” claims under section 97, originate from Jamaica,³⁴ Haiti,³⁵ and Bangladesh.³⁶ In the Jamaican case, the claimant's status as a “victim of crime” and an “informant/witness to a crime” justified the need for protection. The claimant was in Canada with no legal status when he, by chance, witnessed a shooting. Threatened by the “criminals” (also of Jamaican origin) who were aware of him having witnessed the crime, the claimant reported the threats to the police. The police assured him these “criminals” could not harm him while they were detained. Satisfied that they could

²⁹ *Re E.A.N.*, [2004] R.P.D.D. No. 11.

³⁰ *Re I.O.S.*, [2003] R.P.D.D. No. 108.

³¹ [2002] R.P.D.D. No. 189.

³² *Re X.H.N.*, [2002] R.P.D.D. No. 168.

³³ *Re Z.Z.E.*, [2003] R.P.D.D. No. 14.

³⁴ *Re W.C.Z.*, [2003] R.P.D.D. No. 425.

³⁵ *Re Y.A.T.*, [2004] R.P.D.D. No. 10.

³⁶ *Re V.S.I.*, [2004] R.P.D.D. No. 284.

not carry out their threats, the claimant was persuaded to testify at the murder trial. The accused persons were convicted and given 25-year sentences. The claimant was subsequently deported to Jamaica where he faced threats and physical attacks from friends of the men against whom he had testified in Canada. Unable to obtain protection from the police in Jamaica, the claimant fled to Canada and claimed refugee status. The RPD member found a lack of nexus, but determined that the claimant's life was at risk in Jamaica "because he [had] been labelled a 'rat' and that should he return there, the promised death sentence [would] be eventually meted out." The claimant was then granted refugee protection pursuant to paragraph 97(1)(b).

Negative section 97 Claims

The reported cases for negative section 97 claims are far more extensive. In general, claims involving risk to life or risk of cruel and unusual treatment or punishment often fail due to a finding of adequate state protection in the country of reference.³⁷ For example, in *Re K.F.F.*,³⁸ a Guyanese claimant sought protection based on both section 96 and section 97 grounds. He alleged that he was a victim of multiple random robberies and threats from criminals who perceived him to be a wealthy businessman. The RPD member dismissed the section 96 claim for lack of nexus, and then assessed the possibility of protection under section 97. Ultimately refugee protection was refused because the RPD member concluded that state protection was available.

In another alleged "victim of crime" case where nexus could not be found, the RPD member rejected the claim under section 97 because the claimant did not make any "diligent or *bona fide* attempt to seek protection in his country of origin before travelling abroad for asylum." The Mexican claimant had approached the police on one occasion, but had left the country before the authorities could address the complaint. In dismissing the claim (for reasons of adequate state protection), the RPD member noted that the absence of evidence that the police had ever refused to help. Rather, they had demonstrated a willingness to assist by taking the report and assuring the claimant that they would investigate. Although the documentary evidence indicated that police corruption existed in Mexico, the RPD member recognized that the evidence also referred to the government's recent, substantial efforts to combat and prevent corruption.³⁹

The availability of an internal flight alternative (IFA), especially given its more stringent test under both danger of torture (paragraph 97(1)(a)) and risk to life/risk of cruel and unusual treatment or punishment (paragraph 97(1)(b)), is another reason why section 97 claims do not succeed.⁴⁰ In *Re R.C.C.*,⁴¹ the Ukrainian claimant testified that he feared a criminal group which had extorted money from him, assaulted him, and threatened both him and his family. After finding no nexus, the RPD member assessed his claim under paragraph 97(1)(b), but ultimately denied it on the basis of an available IFA in Kiev. The

³⁷ Of the total 279 negative decisions which encompass a s. 97 claim, 62 (22.2%) mention adequate state protection when giving reasons for the denial of protection.

³⁸ [2002] R.P.D.D. No. 184.

³⁹ *Barro v. Canada (Minister of Citizenship and Immigration)*, [2005] R.P.D.D. No. 101.

⁴⁰ Of the total 279 negative decisions which encompass a s. 97 claim, 16 (5.7%) mention the availability of an IFA when giving reasons for the denial of protection.

⁴¹ [2002] R.P.D.D. No. 462.

claimant's hometown of Dolyna was hundreds of kilometres from Kiev where his sister resided. He testified that his sister had not experienced any problems with criminals and extortion. Additionally, before coming to Canada, the claimant had lived in Kiev for a month without any difficulties. The RPD member concluded:

The claimant [will] not face a serious possibility of a risk to life or cruel and unusual treatment or punishment in Kiev, and therefore he is not in need of protection... Kiev is easily accessible for the claimant.

[I] cannot go on to consider the reasonableness of the potential IFA under section 97(1)(b) of the [IRPA] for the following reasons. This provision speaks only of a risk faced by the person in every part of the country. It does not add a reasonableness element to the availability of a safe area in the country, an element that has been extensively interpreted by the Federal Court in the context of Convention refugee cases. In order to find, therefore, that the claimant has an internal flight alternative, the panel must be satisfied that the IFA is an area of the country (i) which is reasonably accessible to the claimant, and (ii) where the claimant would not face a serious possibility of a risk to life or a risk to cruel and unusual treatment or punishment.

Refugee claimants who cannot demonstrate a personal risk, but who face “generalized risk” in their country of reference have not been successful in their claims.⁴² In *Re Y.F.J.*,⁴³ the claimant did not want to return home due to his fear of crime and violence in Guyana. He testified that “crime and violence affect[ed] everyone’s life” and had “increased dramatically” in the three years since he had left the country. In dismissing his claim under section 97, the RPD member reasoned that any risk the claimant would face was similar to that of any other Guyanese citizen, as he feared “a risk of random indiscriminate violence” which was a “generalized risk... faced by all citizens of Guyana.”

Notably, the most cited reason for failure of refugee claims under section 97 hinges upon an RPD member’s negative credibility finding.⁴⁴ As section 96 claims also commonly fail on this ground, these statistics for negative section 97 claims, based on lack of credible evidence or testimony, is not surprising. In rendering a negative decision based primarily, or solely, on a negative credibility finding, many RPD members will cite various implausibilities in the claimant’s narrative, point to the claimant’s evasive or suspicious behaviour during the hearing, or highlight the inconsistencies between the claimant’s testimony at the hearing and previous explanations from his personal information form (PIF) or port-of-entry (POE) interview notes. Taken cumulatively, this evidence will often cause an RPD member to conclude that “the claimant has not presented sufficient credible or trustworthy evidence” that he/she faces a serious possibility of persecution (or danger of torture, or risk to life, etc.) in his/her country of reference.

⁴² Of the total 279 negative decisions which encompass a s. 97 claim, 14 (5%) mention the presence of generalized risk (or lack of personalized risk) when giving reasons for the denial of protection.

⁴³ [2002] R.P.D.D. No. 180.

⁴⁴ Of the total 279 negative decisions which encompass a s. 97 claim, 207 (74.2%) mention the claimant’s lack of credibility when giving reasons for the denial of protection.

Recent Developments in the Federal Court and the Federal Court of Appeal Jurisprudence on section 97

Like the RPD reported decisions on section 97 claims, the Federal Court and Federal Court of Appeal jurisprudence arising from judicial review of refugee claims based on danger of torture or risk to life/risk of cruel and unusual treatment or punishment is limited. Notwithstanding, two significant issues have received judicial attention. The first issue concerns the desirability and, in some cases, the requirement for a separate and distinct analysis of a section 97 claim in circumstances where a claimant requests protection pursuant to both sections 96 and 97. The second issue is the Federal Court of Appeal's determination that the legal test to be applied when assessing the evidence in a section 97 claim is "more likely than not," also known as the "balance of probabilities" test. Thus, claims based on a danger of torture or risk to life or risk of cruel/unusual punishment must meet a higher threshold than claims based on *Refugee Convention* grounds.

The Desirability of a Separate Analysis of section 97

A survey of some of the earliest negative decisions rendered by the RPD (where protection was claimed under both sections 96 and 97) reveals a weak or superficial analysis of section 97. In some cases, the RPD member found the claimant to be "not credible," denied the claim for Convention refugee protection and determined that an assessment of s. 97 was "not required." In other cases, where protection under both sections was claimed, RPD members denied the claimants protection, but provided reasons which exhibited an analysis only of section 96. In October of 2003, Mr. Justice Edmond Blanchard's decision in *Bouaouni*⁴⁵ provided clarification regarding the assessment of a claim for protection under section 97 and he stressed the importance of separately considering the claims under section 96 and section 97:

A claim under section 97 must be evaluated with respect to all the relevant considerations and with a view to the country's human rights record. While the [RPD member] must assess the applicant's claim objectively, the analysis must still be individualized... There may well be instances where a refugee claimant, whose identity is not disputed, is found to be not credible with respect to his subjective fear of persecution, but the country conditions are such that the claimant's particular circumstances, make him/her a person in need of protection. It follows that a negative credibility determination, which may be determinative of a refugee claim under s. 96 of the Act, is not necessarily determinative of a claim under subsection 97(1) of the Act. The elements required to establish a claim under section 97 differ from those required under section 96 of the Act where a well-founded fear of persecution to a convention ground must be established. Although the evidentiary basis may well be the same for both claims, it is essential that both claims be considered as separate. A claim under section 97 of the Act requires that the [RPD member] apply a different test, namely whether a claimant's removal would subject him personally to the dangers and risks stipulated in paragraphs 97 (1) (a) and (b) of the Act... Whether the [RPD member] properly considered both claims is a matter

⁴⁵ *Bouaouni v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 1540; 2003 FC 1211.

to be determined in the circumstances of each individual case bearing in mind the different elements required to establish each claim.⁴⁶

Although the failure to specifically analyse the section 97 claim in *Bouaouni* was noted by Justice Blanchard, he went on to conclude that the RPD member “found important omissions, contradictions and implausibilities in the applicant’s evidence, which led it to conclude that the applicant’s story was not credible... [T]hese findings were open to the [RPD member].”⁴⁷ Thus, in cases where negative credibility findings negate the basis for a claim, the lack of a separate section 97 analysis will constitute a legal error which is “not material to the result.”⁴⁸ In other circumstances, this legal error may well be material to the result in which case the RPD member’s negative decision will not withstand judicial review.

The requirement of separate consideration was again reinforced by the Federal Court in January of 2004. Mr. Justice Richard Mosley’s decision in *Kilic*⁴⁹ cited the *Bouaouni* decision and ordered that the RPD member’s decision be quashed and remitted to another member for reconsideration:

In my opinion, the [RPD member] in this case did not address the country documentation and other evidence related to prison conditions in Turkey and failed to consider whether the applicant could be a "person in need of protection" if returned to that country, in light of the possibility that he may face a "serious prison sentence" for evading Turkish military service. Despite the [member’s] negative credibility findings, a separate analysis, along the lines described in *Bouaouni*, *supra*, and having regard to the legislative wording of section 97, may have produced a finding that Mr. Kilic was a person in need of protection. Therefore, the result of the [member’s] error is unknown, and accordingly, this application should be sent back for redetermination on this ground.

I do not agree with the [Minister’s] submission that the lack of analysis in the [member’s] reasons in relation to section 97 can be explained by a lack of sufficient evidence of risk to the applicant on the section 97 grounds. As outlined above, there was evidence on the record before the [RPD], such as human rights reports describing the abusive conditions in Turkish prisons and correspondence the applicant had received from the Turkish Ministry of National Defence, that went to the applicant’s alleged risk pursuant to section 97.⁵⁰

However, in an April 2004 Federal Court decision, Madam Justice Carolyn Layden-Stevenson, before rendering her decision to dismiss the application for judicial review, expressed reservation with respect to whether a separate analysis is required in every case. After summarizing the *Bouaouni* and *Kilic* decisions, she continued:

In *Yorulmaz v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 193, 2004 FC 128, Mr. Justice von Finckenstein found that the board’s negative

⁴⁶ *Ibid.* at para. 41.

⁴⁷ *Ibid.* at para. 42.

⁴⁸ *Ibid.* at para 42.

⁴⁹ *Kilic v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 84; 2004 FC 84.

⁵⁰ *Ibid.* at paras.27-28.

credibility finding was substantiated by the facts and that the failure to perform a section 97 analysis was not relevant to the result because of a lack of evidence.

Mr. Justice Gibson, in *Kulendrarajah v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 94, 2004 FC 79, determined that the board did not err in arriving at its negative credibility finding. Since the sole bases for the claim were Convention grounds (ethnicity and membership in a particular social group), the board's credibility and risk analyses were sufficient to support a denial of refugee status. Justice Gibson further determined that the claimant was not a person in need of protection because no ground to support a need of protection other than a Convention ground had been advanced. While a more extensive explanation for the board's determination regarding section 97 might have been desirable, its absence did not constitute reviewable error.

These authorities, in my view, do not demand that a section 97 analysis be performed in every case. Rather, it will be required in some cases. It is a question that must be reviewed on a case by case basis. If there is evidence before the board to support a section 97 analysis, the analysis must be conducted.

Thus, while a separate section 97 analysis is desirable, the failure to conduct such an analysis will not be fatal in circumstances where there is no evidence that would require it. Here, there were no other grounds to support a finding of person in need of protection and the risk analysis was performed for Mrs. Brovina in the context of refugee protection. Moreover, the board did conduct a brief analysis related to a section 97 risk when it found that there was "no reason to believe" that Mrs. Brovina would face any risk in returning to Albania. There was no objective evidence before the board that might have led to any other conclusion.⁵¹

The Legal Test for section 97 Claims: "More Likely than Not" (Balance of Probabilities)

As is the situation with section 96 claims, the *IRPA* is silent with respect to the standard of proof to be applied by RPD members in assessing claims for protection under section 97. Federal Court of Appeal jurisprudence on the "well-foundedness of the claimant's subjective fear" – also known as the "objective element" in Convention refugee claims (section 96) – is well established. The objective test applied by RPD members should not be so stringent as to require a probability of persecution. Instead, a more accurate way of describing the requisite legal test is whether a "reasonable chance" of persecution would take place if the claimant returned home. "Reasonable chance" means that "there need not be more than a 50% chance (i.e. probability) [yet] there must be more than a minimal possibility."⁵²

In accordance with the jurisprudence indicating that Convention refugee claims benefit from a legal test lower than the standard of "balance of probabilities," the IRB legal

⁵¹ *Brovina v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 771; 2004 FC 635, at paras. 15-18.

⁵² *Adjei v. Canada (Minister of Employment and Immigration)*, [1989] 2 F.C. 680; [1989] F.C.J. No. 67 (FCA).

services, upon the coming into force of *IRPA* in June of 2002, issued an opinion that claims assessed under paragraphs 97(1)(a) and 97(1)(b) should likewise benefit from the same legal test as that applied in section 96 claims:

The *IRPA* is silent on the standard of proof to be applied to claims for Convention refugee status. Accordingly, these claims will continue to be decided based on the *Adjei* test of reasonable chance or serious possibility of persecution. Claims to be a "person in need of protection" because of a danger of torture (s. 97(1)(a)) are to be decided based on a standard of proof that the danger is "believed on substantial grounds to exist". Claims to be a "person in need of protection" because of a risk to life or of cruel and unusual punishment or treatment (s. 97(1)(b)) do not have a proscribed standard of proof set out in the *IRPA*.

The preferred position of IRB Legal Services is that all three grounds for protection should be decided using the same standard of proof, namely the *Adjei* test, "reasonable chance or serious possibility". The test is premised on the prospective nature of the risk and that same prospective element is present in all three protection grounds.⁵³

Several RPD decisions involving section 97 claims applied the "less than a balance of probabilities, but more than a minimal possibility" legal test in assessing claims for refugee protection.

However, in a 2003 Federal Court decision (judicial review of an RPD determination involving both a section 96 and a paragraph 97(1)(a) claim for protection), the application of this test was questioned and ultimately rejected for claims relating to a danger of torture.⁵⁴ After an extensive review of both domestic and international jurisprudence on the interpretation of the *Convention Against Torture*, Madam Justice Johanne Gauthier arrived at the conclusion that the correct legal test for section 97 claims was more rigorous than the one applied in section 96 claims. Thus, claims pursuant to paragraphs 97(1)(a) and 97(1)(b) should be assessed on a balance of probabilities.

RPD decisions rendered after Justice Gauthier's ruling indicate that some RPD members preferred to follow previous Federal Court jurisprudence confirming the IRB's initial opinion as to a uniform application of a "less than balance of probabilities" legal test in all refugee protection claims.⁵⁵ In rendering a positive determination of a claim based on paragraph 97(1)(b), RPD member Ian Kagedan engaged in a lengthy analysis of the purpose of the *IRPA* and in particular sections 96 and 97, the nature of prospective risk assessment, and the type of evidence submitted in support of such claims. Member Kagedan stated that a consideration of the tribunal's process and the need to provide "fair results" all indicated that the RPD should not apply multiple standards of proof in assessing claims under sections 96 and 97. The issue was not simply a matter of "decision-makers being confused and potentially issuing inconsistent decisions." Rather, the application of different legal tests had the potential for rendering unjust outcomes and impinged upon the integrity of the refugee protection system:

...[T]he reputation of the justice system is at stake where two people from the same country, fearing the same harm, and equally having no state protection, get different

⁵³ A legal guide to the interpretation of s. 97(1)(b) claims, *supra* note 22, at pp. 37-38.

⁵⁴ *Li v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 1934; 2003 FC 1514.

⁵⁵ *Tameh v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 1859; 2003 FC 1468.

decisions on protection, just because the harm feared by one is on account of his political opinion and the harm faced by the other is on account of having helped convict a prominent mobster.⁵⁶

This RPD decision precisely identified the dilemma confronting members when meritorious claims fall outside the parameters of the *Refugee Convention*. In cases where nexus cannot be established, section 97 provides an avenue to grant protection to claimants who would otherwise be determined Convention refugees if their status could have been subsumed within one of the five enumerated grounds. The “victims of crimes” cases, canvassed earlier, are illustrative of such claimants. The application of two different legal tests means that the threshold they must meet in order to sustain their claims for protection is higher than that for claimants who “oppose or denounce crime and corruption.” The latter group of claimants have been found to fall within the scope of the *Convention* ground of “political opinion.”⁵⁷ Victims of crimes and victims “who oppose crime and corruption” have considerable common characteristics in the RPD jurisprudence. The reported RPD decisions reveal that the application of two different legal tests for these two groups of claimants was disconcerting for some RPD members.

However, the issue has been authoritatively resolved in accordance with Justice Gauthier’s reasoning in *Li*. The Federal Court of Appeal, in affirming her decision, justified the use of separate legal tests for a number of reasons. Mr. Justice Rothstein (now a Justice of the Supreme Court of Canada), noted that the words in article 3 of the *CAT* are almost identical to those used in paragraph 97(1)(a). Thus a consideration of the jurisprudence which interprets article 3 is essential to the analysis. Case law and UN commentary regarding its interpretation suggested that the test was neither one of “theory or suspicion” nor “highly probable”; instead, it fell somewhere in the middle. Justice Rothstein concluded that, “the use of the word ‘would’ requires a showing of probability.” Thus, had the *CAT* used the words “could,” “might,” or “may,” a lower-level test might have applied. Furthermore, in *Suresh*,⁵⁸ the Federal Court of Appeal had interpreted the legal test in article 3 of the *CAT* as meaning “on the balance of probabilities.” Given that Parliament enacted paragraph 97(1)(a) after *Suresh*, the Court’s interpretation of the applicable standard was presumed to have been known when the *IRPA* was drafted. In the face of *Suresh*, Parliament had the opportunity to enact a lower-level test in paragraph 97(1)(a), but declined to do so.⁵⁹

While the Federal Court of Appeal acknowledged the merits of the argument that it “made no rational sense” to adopt a higher legal standard for claims under paragraph 97(1)(a) than for those under section 96, the Court determined that the differences between claims under section 96 and those under paragraph 97(1)(a) support the conclusion that the use of identical tests is not necessary. For instance, although nexus is a requirement under section 96, it is not necessary for a successful section 97 claim. Additionally, a section 96 claim requires both a subjective and an objective fear of persecution. There is no “subjective component” to a paragraph 97(1)(a) claim.

⁵⁶ *Re Y.A.T.*, [2004] R.P.D.D. No. 10.

⁵⁷ *Klinko v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 228 (FCA).

⁵⁸ *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 5 (FCA)

⁵⁹ *Li v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 1; 2005 FCA 1, at paras.18-28.

The Federal Court of Appeal also concluded that the use of the same “more likely than not” or “balance of probabilities” test is appropriate for paragraph 97(1)(b) claims. In its concluding paragraphs, the Court stated:

In the absence of some compelling reason suggesting a particularly low or a particularly high level test, I do not see why the degree of risk for purposes of paragraph 97(1)(b) should not be that it is more likely than not that the individual would be subjected, personally, to a risk to his life or to a risk of cruel and unusual punishment if the person was returned to his country of nationality.⁶⁰

Queries whether the Court’s reasoning – that differences between the applicable criteria of section 96 and paragraph 97(1)(a) justify (in part) the application of two legal tests – could be applied to the differences between paragraphs 97(1)(a) and 97(1)(b), were rendered moot when leave to appeal the Federal Court of Appeal decision was denied by the Supreme Court of Canada.⁶¹ While refugee advocates and perhaps some RPD members may not favour the application of two different legal tests, the positive aspect is that a clearer distinction has been drawn between the analyses of section 96 and section 97 claims. The application of two legal tests should encourage independent and separate analyses of the three different types of claims contained in the consolidated grounds of protection.

Conclusion

The RPD and Federal Court jurisprudence on section 97 is growing. Recent statistics from the IRB indicate that the number of section 97 and mixed sections 97 and 96 claims appears to be on the rise. One year ago, the national average of section 96 claims represented 92% of all refugee claims made in Canada. IRB records for the past three months indicate that the national average for section 96 claims has dropped to 86%. Section 97 and mixed sections 96 and 97 claims have risen, such that 6% of all claims are section 97 claims and 7% of all claims are mixed sections 96 and 97 claims.⁶²

It should be noted that the *IRPA* provides other means for granting permanent resident status, outside the jurisdiction of the IRB. Although these mechanisms, strictly speaking, are not part of Canada’s in-land refugee protection system, they represent other ways in which Canada can bestow complementary protection to people outside the definition of a Convention refugee. For example, any foreign national in Canada may apply for permanent resident status on “Humanitarian and Compassionate” (H&C) grounds.⁶³ This potential vehicle to remain in Canada (with the same rights and duties as any other permanent resident, including the ability to apply for citizenship), is open to failed refugee claimants and non-refugee claimants alike.

⁶⁰ *Ibid.* at para 38.

⁶¹ *Li v. Canada (Minister of Citizenship and Immigration)*, [2005] S.C.C.A. No. 119

⁶² The results from these IRB records were obtained in a telephone conversation with the current Deputy Chairperson of the IRB on October 16, 2006.

⁶³ The authority for this ability arises in s. 25(1) of the *IRPA*. For more information on the criteria considered in an H&C assessment, please consult CIC’s Policy and Program Manual: “IP5: Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds,” available online at: <http://www.cic.gc.ca/manuals-guides/english/ip/ip05e.pdf>.

Pre-Removal Risk Assessments (PRRAs) constitute another potential avenue of complementary protection, outside the IRB's mandate. PRRAs are available as mechanisms against removal from Canada and are assessed on the same criteria used in section 96 and section 97 analyses. However, when accessed by failed refugee claimants, the basis for granting protection from removal must arise from new evidence indicating a change in circumstances (e.g. country conditions) or from evidence that was previously unavailable at the time of the refugee protection hearing.

Although commonly accessed by applicants, the H&C and PRRA determinations do not result in reported decisions. Thus, unless judicially reviewed by the Federal Court, they lack the visibility of RPD decisions regarding complementary protection.

Appendix A: Chart summarizing a sample of 300 reported RPD Decisions⁶⁴

Positive Decisions	21 of the 300 total decisions
Positive s. 97 decisions (includes 1 decision where the claimant succeeded on both s. 96 & s. 97)	13 of the 21 positive decisions
• Lack of nexus mentioned	• 11 of the 13
• “Victim of Crime” decisions	• 9 of the 13
Positive s. 96 decisions (where both s. 96 and s. 97 were claimed, but member decided on basis of s. 96)	8 of the 21 positive decisions
Negative Decisions	279 of the 300 total decisions
Negative decisions where s. 97 is assessed independently of s. 96	77 of the 279 negative decisions
• Lack of credibility mentioned ⁶⁵	• 32 of the 77
• IFA possibility mentioned	• 5 of the 77
• Adequate state protection mentioned	• 28 of the 77
• Generalized risk mentioned	• 14 of the 77
• Lack of nexus mentioned	• 8 of the 77
• “Victim of Crime” decisions	• 7 of the 77
Negative decisions where s. 97 is not assessed independently of s. 96	202 of the 300 total decisions
• Lack of credibility mentioned	• 175 of 202
• IFA possibility mentioned	• 11 of 202
• Adequate state protection mentioned	• 34 of 202
• Exclusion based on war crimes, crimes against humanity; serious criminality, etc. is the reason for claim failure	• 12 of the 202
Decisions involving both s. 96 and s. 97 claims	294 of the 300 total decisions
Decisions involving only a s. 97 claim (NOTE: all of these claims were unsuccessful)	6 of the 300 total decisions

⁶⁴ These cases were randomly selected from the Quicklaw database for RPD decisions. The search generating these decisions stemmed from a query for RPD decisions which mentioned s. 97 anywhere within the text of the decision. It is important to note that many positive determinations by members of the Refugee Protection Division (RPD) are not reported as they are brief decisions, delivered orally at the end of a Refugee Protection hearing.

⁶⁵ In some cases, no one issue (e.g. state protection, lack of nexus, generalized risk, etc.) was dispositive of the claim. In other cases, where negative credibility findings led the RPD member to determine that risk of torture or risk to life was not established on a balance of probabilities, “lack of credibility” alone could result in a negative decision.