



Legal Services

**CONSOLIDATED GROUNDS
IN THE *IMMIGRATION AND REFUGEE
PROTECTION ACT***

PERSONS IN NEED OF PROTECTION

RISK TO LIFE

OR

***RISK OF CRUEL AND UNUSUAL TREATMENT OR
PUNISHMENT***

Legal Services
Immigration and Refugee Board
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1. INTRODUCTION

- The jurisdiction of the IRB has been expanded under the *IRPA* to allow the RPD and the RAD to deal with consolidated risk factors.
- The consolidated protection grounds are:
 - persecution for a Convention refugee ground;
 - danger of torture;
 - risk to life or risk of cruel and unusual treatment or punishment.
- A person in need of protection is granted the same rights under the *IRPA* as a Convention refugee under the *Immigration Act*.

The *Immigration and Refugee Protection Act*¹ ("*IRPA*") vests the responsibility to assess claims for protection on the Immigration and Refugee Board ("*IRB*"), at first instance on the Refugee Protection Division ("*RPD*") and on appeal, on the Refugee Appeal Division ("*RAD*"). It is the RPD (or the RAD on appeal) who will, in one proceeding, determine whether a claimant is a Convention refugee or a person in need of protection.

The jurisdiction of the IRB has been expanded to allow the RPD and the RAD to grant protection on three different basis: (1) a Convention refugee ground, (2) danger of torture, and (3) a risk to life or a risk of cruel and unusual treatment or punishment. The second and third grounds are the basis for finding a claimant to be a person in need of protection. Only the Convention refugee ground need to relate to the person's political opinion, race, religion, nationality or membership in a particular social group.

The expanded jurisdiction is an effort to rationalize and streamline a process which under the *Immigration Act, 1978*² ("*Immigration Act*") was fragmented into different proceedings and layers of decision making by the IRB and Citizenship and Immigration Canada ("*CIC*"). Under the *Immigration Act*, the IRB had jurisdiction only with respect to the *1951 Convention Relating to the Status of Refugees and the 1967 Protocol* (the "*Refugee Convention*") and could not assess other risks of harm not related to the grounds set out in the definition of Convention refugee. It fell on the Minister to assess those risks under the PDRCC regulatory program (Post-claim determination class risk review) and under the Minister's discretion on humanitarian and

¹ S.C. 2001, c.27.

² R.S. 1985, c. I-21.

compassionate grounds under s. 114. This multi-layered approach resulted in delays and inconsistencies.

The rights granted to Convention refugees in the *Immigration Act* are now granted in the *IRPA* to Convention refugees and to those who are determined to be persons in need of protection. Those rights include, among others, the right of non-refoulement and the right to apply for permanent residence.

This paper will deal with the risk to life and the risk of cruel and unusual treatment or punishment (s. 97(1)(b) of the *IRPA*).

2. THE LEGISLATION

As noted above, the *IRPA* confers refugee protection on a person on three different bases: Convention refugee grounds (section 96),³ danger of torture⁴ grounds (section 97(1)(a)), and risk to life and of cruel and unusual treatment or punishment grounds (section 97(1)(b)).

Section 97 provides as follows:

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. [Emphasis added]

³ For a discussion of this ground see *Interpretation of the Convention Refugee Definition in the Case Law*, IRB Legal Services, December 31, 1999 and addendum dated December 31, 2001.

⁴ As that term is defined in Article 1 of the *Convention Against Torture*.

3. CONDITIONS THAT MUST BE MET UNDER S. 97(1)(b)

3.1. Elements of the Definition of "Person In Need of Protection" Under s. 97(1)(b)

3.1.1. Generally

It should be pointed out that there are two elements that are not required, one is that the risk be connected to a refugee Convention ground, and the other is that the risk be at the hands of a state agent (as is the case for the danger of torture ground). Also, s. 97(1)(b) is not intended for granting protection on the basis of compassionate and humanitarian grounds.

As will be seen, the elements required to establish that a person is in need of protection are extensive and appear to be intended to restrict the benefit of this category of protection to a narrow class of individuals.

The elements of the definition of a person in need of protection under s. 97(1)(b) mirror to some extent the language in the PDRCC Regulations.⁵ Therefore it might be helpful in discussing the possible interpretations of these elements to refer to the PDRCC Guidelines and case law on the PDRCC Regulations.⁶ The PDRCC approach is by no means binding on the IRB but to the extent that the task is similar, the CIC guidelines for risk assessment which are contained in the PDRCC Manual may be of some assistance in interpreting the legislation. Federal Court jurisprudence interpreting terms found in both the PRDCC Regulations and s. 97(1)(b) is of course binding.⁷

3.1.2. Country of Reference (Nationality or Former Habitual Residence)

This element is common to all grounds for refugee protection. Section 97(1) makes it clear that the person claiming to be in need of protection will need to establish a risk in the person's country or countries of nationality. The requirement that the risk be present in all

⁵ One difference is that the wording in the *IRPA* tracks the wording in s. 12 of the *Charter* more closely ("cruel and unusual treatment or punishment" rather than "extreme sanctions"). Another difference is that s. 97 explicitly excludes those risks associated with lawful sanctions.

⁶ The *Immigration Regulations, 1978*, define the Post-determination refugee claimants class ("PDRCC") as those persons who will be subject to recognizable risks if forced to leave Canada. Paragraph (c) of the definition of the class in subs. 2(1) define the persons in the class as those:

Who if removed to a country to which the immigrant could be removed would be subjected to an objectively identifiable risk, which risk would apply in every part of that country and would not be faced generally by other individuals in or from that country,

(i) to the immigrant's life, other than a risk to the immigrant's life that is caused by the inability of that country to provide adequate health or medical care,

(ii) of extreme sanctions against the immigrant, or

(iii) of inhumane treatment of the immigrant.

⁷ See section 4.3. below.

countries of nationality is parallel to the requirement in the definition of Convention refugee (s. 96(a)). The provision goes on to establish that if there is no country or countries of nationality, the risk must be present in the country of former habitual reference. Like the definition of Convention refugee, the section does not speak of multiple countries of former habitual residence.

Notwithstanding this anomaly in drafting, it is suggested that it is logical to interpret the provision as requiring proof that the risk exists in all countries of former habitual residence to which the claimant can return. This interpretation is consistent with *Thabet*,⁸ a decision of the Federal court of Appeal interpreting a similar provision in the definition of Convention refugee:

In order to be found a Convention refugee, a stateless person must show that, on a balance of probabilities he or she would suffer persecution in any country of former habitual residence, and that he or she cannot return to any of his or her countries of former habitual residence.

Therefore, if a stateless person has multiple countries of former habitual residence, the claim for protection may be established by reference to any such country. However, if the claimant is able to return to any other country of former habitual residence, the claimant must, in order to establish the claim for protection, also demonstrate that he or she faces a risk there.⁹

3.1.3. The Risk Must Be to Life or of Cruel and Unusual Treatment or Punishment

The terms "risk to life" and "risk of cruel and unusual treatment or punishment" are not defined in the legislation. Their meaning will have to be determined by the RPD and the RAD based on Canadian and international law. This element is extensively explored later on in the paper, where reference is made to interpretations under the *Canadian Charter of Rights and Freedoms*¹⁰ (the *Charter*), PDRCC, and international law.

3.1.4. Personal Risk

This element is common to the claims for protection based on danger of torture and on risks to life, or of cruel and unusual treatment or punishment. Section 97 requires that the risk faced by a person if removed to his or her country of nationality or former habitual residence be a risk to which the person would be subjected personally. The phrase "would subject them personally" indicates that the risk is assessed prospectively.

⁸ *Thabet v. Canada (Minister of Citizenship and Immigration)*, [1998] 4 F.C. 21 (C.A.). See also the IRB Legal Services' paper *Interpretation of the Convention Refugee Definition in the Case Law*, December 31, 1999 and addendum dated December 31, 2001, section 2.2.2.

⁹ What makes a country a country of former habitual residence is discussed fully in chapter 2 of the IRB Legal Services' paper *Interpretation of the Convention Refugee Definition in the Case Law*, December 31, 1999 and addendum dated December 31, 2001.

¹⁰ Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

A person may be at risk without necessarily being personally targeted. The risk may be assessed by considering the risk faced by similarly situated persons. For instance, a risk will be personal if the claimant has a certain political profile, is of a particular ethnicity or belongs to a professional or social group if the evidence discloses that persons with those characteristics are at risk. In fact, the phrase "would subject them personally" requires no greater evidentiary burden of personal risk than establishing that a claimant faces a well-founded fear of persecution.

While interpreting different language in the PDRCC Regulations, the Federal Court has stated that the Post-determination Claims Officer ("PDCO") requires evidence that the particular applicants face an "objectively identifiable risk" and not simply evidence that some individuals, should they be returned to that country, face an objectively identifiable risk. It would exclude, however, those who face a risk which would apply to all residents of a country such as random violence or natural disaster.

In risk to life claims, the requirement of personal risk overlaps to some extent with the further requirement that the risk not be faced generally by other individuals in the country (see below, section 3.1.6.) but the concepts are not identical. An example may serve to clarify the distinction: a claimant facing a risk to life because of a natural disaster may face a personal risk but if the risk is faced by all citizens generally, the claimant will not benefit from protection even though his or her personal risk is serious and credible.

3.1.5. No State Protection Available

The requirement that there be no state protection appears to be parallel to the requirement under the Convention refugee definition. The interpretation given by the Supreme Court of Canada in *Ward*¹¹ should assist the RPD and the RAD in determining this question. The following principles from *Ward* apply:

- Nations should be presumed capable of protecting their citizens.
- To rebut this presumption, a claimant would have to present "clear and convincing" evidence that protection would not be reasonably forthcoming.¹²

3.1.6. Risk Faced in Every Part of Country (No IFA)

In order to be a person in need of protection the risk of harm (to life or of cruel and unusual treatment or punishment) must extend to every part of the country. In other words, if an IFA exists in that country, the claimant is not a person in need of protection. The issue of IFA has been extensively interpreted by the Federal Court in the context of refugee cases. However,

¹¹ *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, 103 D.L.R. (4th), 1, 20 Imm. L.R. (2d) 85; reversing [1990], 2 F.C. 667, 67 D.L.R. (4th) 1, 10 Imm. L.R. (2d) 189 (C.A.).

¹² For a full analysis of the issue of state protection see chapter 6 of the IRB Legal Services' paper *Interpretation of the Convention Refugee Definition in the Case Law*, December 31, 1999 and addendum dated December 31, 2001.

the two-pronged IFA test as developed by the courts would likely not be the same test applied by the RPD and the RAD to persons in need of protection. Section 97(1)(b)(ii) 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.

There are two possible interpretations one can give to the IFA test under s. 97(1)(b). The first and preferable one would exclude the reasonableness prong, except for the issue of accessibility to the IFA. Under this approach, the test would be formulated as follows:

- If the evidence discloses that the risk faced by the claimant is limited to part of the country, the RPD and the RAD will need to assess whether there are other parts of the country, reasonably accessible by the claimant, where the claimant would not face a serious possibility of a risk to life or of cruel and unusual treatment or punishment.¹³

The main reason why this approach is preferable is that it is consistent with the language in s. 97(1)(b) which does not import the reasonableness prong. It is also easy to apply in that each part of the country is assessed based on the same test of whether the claimant faces a risk to life or of cruel and unusual treatment or punishment there. The main difficulty with this approach is that the test is not consistent with the IFA test for the Convention refugee and danger of torture grounds and may lead to inconsistent results depending on which ground of protection is applied (particularly if the lack of medical care in the putative IFA is a factor or there is a natural disaster affecting the whole of the country).

The second approach would be to use the same two-prong IFA test as used in refugee claims, restated as follows:

- If the risk faced by the claimant is limited to part of the country, the RPD and the RAD will need to assess whether there are other parts of the country (i) where the claimant would not face a serious possibility of risk to life or of cruel and unusual treatment or punishment; and (ii) where it is not unreasonable, in all the circumstances, for the claimant to seek refugee.

This approach, while consistent with the IFA approach for Convention refugee and danger of torture grounds and with the PDRCC Manual¹⁴ is difficult to reconcile with the

¹³ The test could also be restated as: an 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 of cruel and unusual treatment or punishment.

¹⁴ It is interesting to note that the PDRCC Guidelines use the same language and principles as the CRDD jurisprudence in defining what constitutes an IFA. They speak of a realistic and attainable option, accessible without great physical danger or undue hardship. They note that while the choice of where to live in the country is not a matter of convenience for the person, it would be unreasonable to require an individual to move where, by virtue of traditions, background, lack of family, tribal or clan ties, she or he would be alienated or utterly marginalized. There is no Federal Court case dealing directly with the question of IFA under the PDRCC Regulations but in *Ahmed, Abdikarim Abdulle v. M.C.I* (F.C.T.D., no. IMM-850-99), Gibson, July 31, 2000, the Court remitted back the case to the PCDO in part because he had failed to consider the absence of family support and the claimant's particular vulnerability (schizophrenic illness) in the unstable conditions prevailing

explicit restrictions in s. 97(1)(b) (ii) and (iv), namely that the risk not be faced generally by others in that country, and that the risk not be caused by inadequate health or medical care. These two restrictions would have to be read out of the test in order for it to be consistent with the statutory language.

The risk that gives rise to the claimant's original need for protection need not be the same risk faced by the claimant in the IFA region. The IFA will be assessed for any risk to life or risk of cruel and unusual treatment or punishment as long as it is not a risk faced generally by others and is not related to inadequate health care.

There are two other issues that need consideration:

- (1) Notice. In the refugee context, the claimant has the burden of proving there is no IFA only if the issue is raised by the CRDD or the Minister. In the context of a claim for protection under s. 97(1)(b), the absence of an IFA is an explicit element of the definition and therefore, there is arguably a positive obligation on the claimant to satisfy the requirement without having to receive notice.
- (2) Standard of proof. In the refugee context, the standard of proof for the first prong has been stated as follows: "the Board must be satisfied on a balance of probabilities that there is no serious possibility of the claimant being persecuted in the IFA". We suggest that the same standard applies to s. 97(1)(b).

3.1.7. Risk Not Faced Generally

If the risk faced by a person stems from a general risk in that country, the person is not protected under section 97(1)(b). Protection is limited to those who face a specific risk not faced generally by others in the country. 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.

A claim based on natural catastrophes such as drought, famine, earthquakes, etc. will not satisfy the definition as the risk is generalized.¹⁵ However, claims based on personal threats, vendettas, etc. may be able to satisfy the definition (provided that all the elements of s. 97(1)(b) are met) as the risk is not indiscriminate or random.

in Somalia. [These factors are arguably relevant to the "unreasonableness" prong]. Also, in *Maximenko, Natalia v. M.C.I.* (F.C.T.D., no. IMM-5548-01), Lemieux, February 8, 2002, the Court granted a stay of removal on the basis that a serious issue existed as to whether the PCDO properly applied the IFA test set out in *Ranganathan v. Canada (Minister of Citizenship and Immigration)*, [2001] 2 F.C. 164 (F.C.A.).

¹⁵ *Sinnappu v. Canada (Minister of Citizenship and Immigration)*, [1997] 2 F.C. 791 (T.D.). In this case, a specialist on PDRCC from CIC testified before the Trial Division that the requirement that the risk be one that is not faced generally by other individuals would apply only in extreme situations such as a generalized disaster of some sort that would involve all the inhabitants of a given country.

In a civil war situation a claimant would be required to adduce some evidence that the risk faced is not an indiscriminate risk faced generally in that country, but linked to a particular characteristic or status. In a refugee claim, a claimant fleeing a situation of civil war may be able to establish a claim where the risk of persecution is not individualized but is group-based harm that is distinguishable from the general dangers of civil war. There is a requirement of some targeting although the targeted group can be large and there can be several opposing targeted groups. Similarly, the PDRCC Guidelines did not require individualized targeting, but would exclude victims of random violence in a civil war situation if all residents were subject to that random violence. This approach to risk arising from civil war is consistent with the IRB's Chairperson's *Civil War Guidelines*¹⁶ and appears to be consistent with the intent of s. 97(1)(b)(ii).

Therefore, individuals who face a serious and credible risk may not be able to benefit from protection under s.97(1)(b) as long as the risk is faced generally by citizens in that country irrespective of their personal characteristics or status.

3.1.8. Risk Not Inherent or Incidental to Lawful Sanctions

A claimant is not a person in need of protection if the risk faced is inherent or incidental to lawful sanctions. The lawful sanctions, however, cannot be imposed in disregard of accepted international standards. This will require RPD and RAD members to engage in an analysis of lawful punishments which may nonetheless offend international norms,¹⁷ having regard to s. 3(3)(f) which directs that the Act be construed and applied in a manner that complies with international human rights instruments to which Canada is a signatory.

Even though the PDRCC regulations do not exclude from its definition of risk to life risks that are inherent to lawful sanctions (as does s. 97(1)(b)(iii)), the Guidelines refer to persons who have violated the law or the social rules in their own society. It notes that those persons may face a possible risk of a legally sanctioned severe punishment or death penalty through the judicial system in the country of origin. The test used is whether the possible sanction would shock the conscience of Canadians. An example is given that if a death penalty has been imposed on a person, the penalty would have to be examined to see if, in the circumstances of the individual, it violates international treaties. An examination would be made of the gravity of the offence, the legal safeguards in that country and the proposed methods of execution. A similar approach would have to be taken under s. 97(1)(b), since the exception set out in s. 97(1)(b)(iii) directs that international standards be used in evaluating whether a sanction is lawful.

3.1.9. Risk Not Due to Inadequate Health or Medical Care

If the risk is caused by the inability of the country of reference to provide adequate health or medical care the claimant will not qualify for protection. A similar requirement in the PRDCC

¹⁶ *Civilian Non-Combatants Fearing Persecution in Civil War Situations*, March 7, 1996.

¹⁷ For a more complete discussion of this issue see section 4.4.5. and 4.4.6. below, and in particular the discussion of the Supreme Court decisions in *Kindler* and *Burns*.

Regulations was explained in the PDRCC Guidelines as reflecting the position that the Regulations were never intended to compensate for disparities between the health and medical care available in Canada and those available elsewhere in the world.¹⁸ The same could be said of s. 97(1)(b)(iv).

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.

Care must be taken in analyzing a claim where the risk arises, not because of the lack of health care, but because the person has a medical condition that will make him or her more vulnerable to the unstable conditions in his or her country. This was the situation in *Ahmed*,¹⁹ where the applicant under PDRCC suffered from schizophrenia. He had no family or support in his country and this made him, given his condition, very vulnerable due to the instability in Somalia. The PDCO was directed by the Federal Court to assess the risk to the applicant's life in light of his medical condition and not from the perspective of lack of availability of adequate medical care.

3.1.10. Conclusion

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. 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.

4. CONCEPTS OF "RISK TO LIFE" AND "CRUEL AND UNUSUAL TREATMENT OR PUNISHMENT" IN OTHER CANADIAN LEGISLATION AND INTERNATIONAL INSTRUMENTS

The wording in s. 97(1)(b) is not unique to the *IRPA*. Similar wording is found in other Canadian legislation and international instruments. The extent to which interpretations of these similar provisions is helpful to the RPD and RAD will be discussed below.

¹⁸ For a discussion of the health and medical exception in the PDRCC Regulations, see *Mazuryk, Antonina Ivanovna v. M.C.I.* (F.C.T.D., no. IMM-6116-00), Dawson, March 7, 2002.

¹⁹ *Ahmed, Ali v. Canada (Minister of Citizenship and Immigration)*, (F.C.T.D. no. IMM-5330-99), Tremblay-Lamer, August 31, 2000.

4.1. Canadian Legislation

The *Canadian Charter of Rights and Freedoms* (the *Charter*) contains two sections that are relevant:

Section 7: Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Section 12: Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

The *Canadian Bill of Rights*²⁰ contains similar provisions:

Section 1: It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

(a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;

Section 2: Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgement or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to

...

(b) impose or authorize the imposition of cruel and unusual treatment or punishment;

4.2. International Instruments

A number of human rights international instruments, including the following, contain similar or related provisions.²¹

1. *Universal Declaration of Human Rights*²²

Article 3: Everyone has the right to life, liberty and security of person.

Article 5: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

²⁰ 1960, c. 44.

²¹ We have tried to highlight the most important provisions. When referring to these instruments, the text of the entire instrument should be consulted as required.

²² G.A. res. 217A (III), U.N. Doc A/810 (1948).

2. *International Covenant on Civil and Political Rights*²³ ("ICCPR")

Article 6(1): Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

Article 7: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

3. *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*²⁴ ("CAT")

Article 16: Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10,11,12 and 13 shall apply with the substitution for references to torture or references to other forms of cruel, inhuman or degrading treatment or punishment.

Article 16(2): the provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion.

4. *American Declaration on the Rights and Duties of Man*²⁵

Article 1: Every human being has the right to life, liberty and security of his person

5. *Convention on the Rights of the Child*²⁶

Article 6: State Parties recognize that every child has the inherent right to life.

Article 37: State Parties shall ensure that

- (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below 18 years of age;

²³ G.A. res 2200A (XXI), 21 U.N. GAOR Supp. (No.16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976. Ratified by Canada in 1976.

²⁴ G.A. res 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 19, U.N. Doc. A/39-51 (1984), entered into force June 26, 1987. Ratified by Canada in 1987.

²⁵ O.A.S. res XXX, adopted by the Ninth International Conference of American States (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc 6 rev. 1 (1992).

²⁶ G.A. res 44/25, annex, 44 U.N. GAOR Supp. (No. 49), U.N. Doc. A/44/49 (1989), entered into force September 2, 1990. Ratified by Canada in 1991.

6. *The European Convention for the Protection of Human Rights and Fundamental Freedoms*²⁷ (the *European Convention*)

Article 3(1): No one shall be subjected to torture or to inhuman or degrading treatment or punishment.²⁸

7. *The American Convention on Human Rights*²⁹

Article 5(2) (1): No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.

4.2.1. Rules of Interpretation for International Law

Traditionally, Canadian courts tended to adjudicate cases on the basis of domestic law only. With the advent of the *Charter* in 1982, reference to international sources has become commonplace. This is a logical development since most of the rights and freedoms protected in the *Charter* are also contained in international human rights instruments.³⁰

The rules of interpretation relating to international law are complex but generally, there is a common law presumption that Canada's laws are enacted with the intention of giving force to Canada's international obligations.

The recognition of Canada's international obligations with respect to persons who need protection because of violations of their human rights is an important feature of the *IRPA*. As stated in the legislation,

3. (3) This Act is to be construed and applied in a manner that ...
- (f) complies with international human rights instruments to which Canada is a signatory.

The role of international instruments and jurisprudence in the interpretation of specific provisions is governed by the following general principles:

²⁷ (ETS) No. 5), 213 U.N.T.S. 222, entered into force September 3, 1953, as amended by Protocols Nos 3, 5, and 8 which entered into force on September 21, 1970, December 20, 1971 and January 1, 1990 respectively.

²⁸ The case law from the European Court of Human Rights (which applies the *European Convention*) must be read with caution, at least with respect to the application of the principle of non-derogation in respect of the prohibition against *refoulement* to a country which exposes a person to a risk of torture. However, the interpretation of the terms "inhuman or degrading treatment or punishment" may be of some assistance to the RPD and the RAD. In fact, the Supreme Court of Canada has equated Article 3 of the *European Convention* to s. 12 of the *Charter* in *United States v. Burns*, [2001] 1 S.C.R. 283.

²⁹ O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 entered into force July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc 6 rev 1 (1992).

³⁰ Bassan, Daniela, "*The Canadian Charter and Public International Law: Redefining the State's Power to Deport Aliens*", (1996) 34 Osgoode Hall L. J. 583-625.

- A provision in an international instrument does not have the force of law in Canada unless it is explicitly incorporated in domestic law.³¹
- Canadian law should be interpreted, as far as possible, consistently with international law.
- If the meaning of a provision in the domestic law is clear and unambiguous, the provision should be interpreted according to domestic law.
- If the meaning of a provision in the domestic law is ambiguous, Canadian courts and tribunals can have regard to similar provisions in international instruments.
- The interpretation given by foreign jurisdictions or international tribunals to provisions in international instruments or other domestic laws is not binding but is useful and can have persuasive value.
- The values reflected in international human rights law may help inform the contextual approach to statutory interpretation.

The Supreme Court of Canada, in *Baker*,³² dealt with the role of international law in determining the issue of the best interests of children in the context of the humanitarian and compassionate application made by their mother. The following comments of the majority are instructive with regards to the role of international instruments in interpreting human rights. The contextual approach espoused by the Court should be followed by the RPD and the RAD when assessing the issue of whether the risk faced by an individual constitutes a risk of persecution, torture, or cruel and unusual treatment or punishment.

[69] Another indicator of the importance of considering the interests of children when making a compassionate and humanitarian decision is the ratification by Canada of the Convention on the Rights of the Child, and the recognition of the importance of children's rights and the best interests of children in other international instruments ratified by Canada. **International treaties and conventions are not part of Canadian law unless they have been implemented by statute:** *Francis v. The Queen*, [1956] S.C.R. 618, at p. 621; *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141, at pp. 172-73. I agree with the respondent and the Court of Appeal that the Convention has not been implemented by Parliament. Its provisions therefore have no direct application within Canadian law.

[70] **Nevertheless, the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and**

³¹ The *IRPA* has explicitly incorporated only Articles 1(A)(2), 1E, 1F, and 33 of the *Refugee Convention*, and article 1 of CAT.

³² *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

judicial review. As stated in R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 330:

[T]he legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred. [Emphasis in bold added.]

The important role of international human rights law as an aid in interpreting domestic law has also been emphasized in other common law countries: see, for example, *Tavita v. Minister of Immigration*, [1994] 2 N.Z.L.R. 257 (C.A.), at p. 266; *Vishaka v. Rajasthan*, [1997] 3 L.R.C. 361 (S.C. India), at p. 367. It is also a critical influence on the interpretation of the scope of the rights included in the *Charter: Slight Communications*, supra; *R. v. Keegstra*, [1990] 3 S.C.R. 697. [Emphasis added]

[71] The values and principles of the Convention recognize the importance of being attentive to the rights and best interests of children when decisions are made that relate to and affect their future. In addition, the preamble, recalling the *Universal Declaration of Human Rights*, recognizes that "childhood is entitled to special care and assistance". A similar emphasis on the importance of placing considerable value on the protection of children and their needs and interests is also contained in other international instruments. The United Nations *Declaration of the Rights of the Child* (1959), in its preamble, states that the child "needs special safeguards and care". The principles of the Convention and other international instruments place special importance on protections for children and childhood, and on particular consideration of their interests, needs, and rights. They help show the values that are central in determining whether this decision was a reasonable exercise of the H & C power.

The RPD and the RAD will have the task of determining what constitutes a risk to life or a risk of cruel and unusual treatment or punishment. "Risk to life" has no qualifiers, however, "treatment or punishment" is qualified by the terms "cruel and unusual". These qualifiers are not defined in the legislation and therefore, their meaning will need to be interpreted. By way of analogy, the term "persecution" in the definition of Convention refugee is similarly not defined.

In determining the meaning of the words "cruel and unusual", the RPD and the RAD will have to have regard to the interpretation given to those terms in Canadian and international jurisprudence. It should be noted that in the immigration context, those terms have not been interpreted *vis-à-vis* the actions of foreign states or non-state actors as the words used in previous risk assessment regimes were not the same (the PRDCC Regulations referred to "extreme sanctions" and "inhumane treatment"³³). The words do appear in the *Canadian Bill of Rights* and the *Charter* and therefore, Canadian cases interpreting these statutes will be of utmost importance. We should note, however, that many of the cases deal with actions of the Canadian

³³ Although as noted in note 32, *supra*, the Supreme Court of Canada in *Burns* has equated Article 3 of the *European Convention* (which uses the words "inhuman or degrading") with s. 12 of the *Charter* (which uses the words "cruel and unusual").

state (the cases that do deal with the actions of other states involve extradition requests) and therefore, their applicability must be assessed carefully. International jurisprudence interpreting similar provisions in international instruments will also assist in accordance with the general principles of interpretation outlined above. And of course, as noted in *Baker*, international human rights instruments are important in that the values reflected in them help inform the contextual approach to statutory interpretation.

The following sections will examine the sources of interpretation that may assist the RPD and the RAD in assessing the risk grounds under s. 97(1)(b).

4.3. The PDRCC Regime.

Some guidance may be found in the PDRCC Guidelines.³⁴ Although they do not actually define the terms "risk to life", "extreme sanctions" or "inhumane treatment", they equate these

³⁴ The PDRCC Manual provides as follows:

What does the applicant need to establish before the decision-maker?

The PDRCC class defines persons who will be subject to recognizable risks if forced to leave Canada. Without limiting the interpretation of the definition, the applicant usually has to demonstrate that the risk can be objectively identifiable, not faced by other individuals in or from that country, and present in every part of that country. The type of risk considered has to be a threat to the person's life, extreme sanctions against that person, or inhumane treatment of that person....

The risks involved include actions that would constitute violations of fundamental rights, such as (but not limited to) affronts to the physical and psychological integrity of the individual. One specific example would be the prohibition against returning "a person to a State where there are substantial grounds for believing that he would be in danger of being subjected to torture" (Article 3 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*).

In some situations, persons who have violated the law or the social rules in their own society, face a possible risk of a legally sanctioned severe punishment or death penalty through the judicial system in their country of origin. For PCDOs, in cases involving extreme sanctions or death penalty, the issue is whether there is a real or substantial risk, as opposed to a hypothetical risk, that the person's life or integrity would be threatened. Is it "reasonably foreseeable" that a sentence may be imposed which would be abhorrent to Canadians, and Canadian standards? The test is whether the possible sanction would shock the conscience of Canadians.

While these penalties are legally sanctioned, these cases have also to be examined in light of internationally recognized human rights treaties. Under the *International Covenant on Civil and Political Rights* (ICCPR), the death penalty can be imposed as a final judgement of a court of competent jurisdiction, only for the most serious kind of crimes, in circumstances which are not contrary to the *Covenant* and other international agreements. Each case has to be examined on its own facts and circumstances to determine if the ICCPR has been violated by the death penalty. The UN Human Rights Committee, in assessing a case, considers, for example, the relevant personal factors of the individual, conditions on death row, and whether the proposed method of execution is particularly abhorrent. The applicant has to establish that the situation is

terms with violations of fundamental rights, such as affronts to the physical and psychological integrity of the individual. In this respect the approach to the meaning of risk to life or risk of extreme sanctions or inhumane treatment mirrors the CRDD's approach to the definition of persecution - both look to international human rights instruments for guidance.

4.3.1. Federal Court Jurisprudence on PDRCC

Federal Court decisions reviewing PDRCC determinations may shed some light on possible interpretations of risk to life and cruel and unusual treatment or punishment. Extortion by criminal elements³⁵ and serious mistreatment during a criminal investigation (in Iran)³⁶ have been found to be proper circumstances for consideration under PDRCC. Non-draconian penalties for refusal to serve in the army³⁷ and a sentence of six months to five years for draft evasion³⁸ were not considered extreme sanctions or inhumane treatment. Incidents of harassment and discrimination were found not to amount to inhumane treatment.³⁹ Risks associated with arbitrary incarceration (Tamils in Sri Lanka) may lead to a finding of risk to life or risk of extreme sanctions or inhumane treatment.⁴⁰ More generally, the *Sinnappu*⁴¹ case

unacceptable. Pertinent considerations are the offence, the nature of the system of justice in which trial took place or would occur, and the legal safeguards available in that system.

Note that when the risk is to the applicant's life, the *Regulations* contain an exception if the risk to life is caused by the inability of the receiving country to provide adequate health or medical care. It is not intended that PDRCC compensate for disparities between the health and medical care available in Canada and that available elsewhere in the world.

Particular attention will be paid to cases involving gender-related issues. Appendix 4 provides general guidelines on how to handle these cases in the context of the PDRCC process.

Guidance is also available to PCDOs to deal with cases which involve post-traumatic stress disorder (PTSD).

³⁵ *Vetoshkin, Nikolay v. M.C.I.* (F.C.T.D., no. IMM-4902-94), Rothstein, June 9, 1995. The claimant was subject to extortion because of his business and not because of his Russian nationality. He was not persecuted for a Convention reason but may well be subject to criminal activity if he returns to Chechnya. The Court concluded that this may well be a case for consideration under PDRCC and remitted it back to an immigration officer.

³⁶ *Ladbon, Kamran Modarresi v. M.C.I.* (F.C.T.D., no. IMM-1540-96), McKeown, May 24, 1996. The Court was of the view that because the consequences of being removed to Iran could be so serious for a person under criminal investigation, the case ought to be remitted back to the PCDO to consider the new evidence.

³⁷ *Baranchook, Peter v. M.C.I.* (F.C.T.D., no. IMM-876-95), Tremblay-Lamer, December 20, 1995. The PCDO officer examined the penalty for refusal to serve in the Israeli army and concluded that it was neither excessive nor draconian. The Court noted that the claimant (a Russian émigré) faced no objectively identifiable risk of extreme sanction or inhumane treatment.

³⁸ *Moskvitchev, Vitalli v. M.C.I.* (F.C.T.D., no. IMM-70-95), Dubé, December 21, 1995. The PCDO concluded that a sentence between six months and five years for draft evasion in Moldova could not be considered inhumane or extreme. The Court did not find this conclusion unreasonable.

³⁹ *Lishchenko, Valentin v. M.C.I.* (F.C.T.D., no. IMM-803-95), Tremblay-Lamer, January 9, 1996.

⁴⁰ *Balasubramaniam, Rasiah v. M.C.I.* (F.C.T.D., no. IMM-5369-99), Hansen, August 27, 2001. The Court concluded that the PCDO was mistaken regarding the nature of the offence (illegal exit) for which the claimants could be arrested and consequently minimized the likelihood of arrest upon their return to Sri Lanka. There

includes a thorough review of the entire PDRCC process based on evidence provided by immigration officials.

4.4. Charter Jurisprudence

- The test to determine if a certain punishment offends s. 12 of the *Charter* is one of proportionality: is the punishment so excessive as to outrage standards of decency? Is it disproportionate to the offence and the offender?
- The relevant factors in determining whether treatment is cruel and unusual include: whether the treatment is in accord with public standards of decency and propriety; whether it is unnecessary because of the existence of adequate alternatives; and whether it can be applied upon a rational basis and in accordance with ascertained or ascertainable standards.
- From the perspective of s. 7 of the *Charter*, the question is whether the punishment or treatment violates our sense of fundamental justice.
- Another way of stating the test is to ask whether the punishment or treatment shocks the conscience.
- If a punishment or treatment is contrary to fundamental justice, it is probably imposed in disregard of international standards.

The case law on the interpretation of s. 12 of the *Charter*, inasmuch as it interprets the phrase "cruel and unusual treatment or punishment" may be of some assistance to the RPD and the RAD. It should be noted, however, that s. 97(1)(b)(iii) excludes those risks that are inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards.

4.4.1. Cruel and Unusual Punishment

The governing principles⁴² to interpret whether a certain punishment offends s. 12 of the *Charter* come from the Supreme Court of Canada decision in *R. v. Smith*.⁴³ The standard to be

was evidence that Tamils were specifically targeted in the enforcement of the *Immigrants and Emigrants Act* of Sri Lanka and of their plight in Sri Lankan jails. The PCDO failed to assess the risks associated with incarceration. As well, given the real possibility that the adult claimants would be arrested and that they did not appear to have family in Colombo, the officer failed to undertake an independent risk assessment for the minor claimants.

⁴¹ *Sinnappu, Senar v. M.C.I.* (F.C.T.D., no. IMM-3659-95), McGillis, February 14, 1997. The Court found that, although the applicants would be deported to a state engaged in ongoing civil war, Charter rights had not been violated because there had been a risk assessment through the PDRCC process which revealed that the claimant was unlikely to suffer a risk to life, or a risk of extreme sanctions or inhumane treatment.

⁴² It should be noted that it is difficult to enunciate general principles from the judgements of the SCC interpreting s. 2(b) of the *Bill of Rights* or s. 12 of the *Charter*. The Court has often been divided, if not in the result, in the rationale for the disposition of the cases. The summary provided in this paper should be read with this caveat in mind.

applied in determining whether punishment is cruel and unusual is whether the punishment is so excessive as to outrage standards of decency and surpass all rational bounds of punishment. The test is one of proportionality: is the punishment disproportionate to the offence and the offender? Put another way, is the punishment grossly disproportionate to the inherent seriousness of the offence. (The issue before the Court in *Smith* was whether the mandatory minimum sentence of seven years for drug trafficking contravened s. 12. The majority held that it did.)

4.4.2. Cruel and Unusual Treatment

In *Soenen v. Thomas*,⁴⁴ the Alberta Queen's Bench was of the view that the principle of proportionality which has been applied in determining whether punishment is cruel and unusual has no application to the issue of whether treatment is cruel and unusual. The factors that are relevant in determining whether treatment is cruel and unusual include: whether the treatment is in accord with public standards of decency and propriety; whether is it unnecessary because of the existence of adequate alternatives; and whether or not the treatment can be applied upon a rational basis and in accordance with ascertained or ascertainable standards. (The issue before the Court in this case was whether limitations on visiting privileges, access to open-air exercise, and search and processing methods in pre-trial custody constituted cruel and unusual treatment. The Court held that they did not.)

4.4.3. Cruel and Unusual: Conjunctive Terms?

As to whether the terms "cruel and unusual" should be interpreted as being conjunctive (i.e., the punishment or treatment must be both cruel and unusual), the majority of the Supreme Court of Canada in *R. v. Miller and Cockriell*⁴⁵ (interpreting the words in the *Bill of Rights*) concluded that the phrase should be so interpreted. In a concurring judgement, Laskin C.J.C would have adopted a more flexible approach and interpret the words as interacting expressions colouring each other. Laskin's approach appears to have been followed in a number of subsequent cases, at least by some judges, including judges of the Supreme Court of Canada. See for example the judgement of Lamer J.J. (Dickson C.J. concurring) in *R. v. Smith*.⁴⁶

4.4.4. General Criteria Arising From Canadian Jurisprudence

Mr. Justice Lamer in *R. v. Smith*⁴⁷ pointed out that little had been said by the Courts interpreting s. 2(b) of the *Bill of Rights* about the meaning of cruel and unusual punishment or

⁴³ [1987] 1 S.C.R. 1045.

⁴⁴ (1983), 8 C.C.C. (3d) 224, 3 D.L.R. (4th) 658, 35 C.R. (3d) 206 (Alta. Q.B.).

⁴⁵ [1977] 2 S.C.R. 680.

⁴⁶ *Supra*, note 47.

⁴⁷ *Ibid.*

treatment. However, some guidance could be discerned from a minority of judges. He indicated that the criteria had been usefully synthesized by Professor Tarnopolsky in an article entitled "*Just Deserts or Cruel and Unusual Treatment or Punishment? Where Do We Look for Guidance?*",⁴⁸ as follows:

- Is the punishment such that it goes beyond what is necessary to achieve a legitimate penal aim?
- Is it unnecessary because there are adequate alternatives?
- Is it unnecessary to a large segment of the population?
- Is it such that it cannot be applied upon a rational basis in accordance with ascertained or ascertainable standards?
- Is it arbitrarily imposed?
- Is it such that it has no value in the sense of some social purpose such as reformation, rehabilitation, deterrence or retribution?
- Is it in accord with public standards of decency or propriety?
- Is the punishment of such a character as to shock general conscience or as to be intolerable in fundamental fairness?
- Is it unusually severe and hence degrading to human dignity and worth?

4.4.5. Deportation

A number of cases interpreting s. 2(b) of the *Bill of Rights* or s. 12 of the *Charter* have arisen in the immigration context. The issues usually involve removal from Canada, delays in processing applications, security certificates and danger opinions. Essentially, the cases deal with acts of the Canadian government and the Courts have tended to analyze the cases from that perspective. Accordingly, there is not much guidance with respect to what acts of foreign states (or non-State parties) may constitute cruel and unusual punishment or treatment. The case law is also still evolving. A limited sample of cases include:

- Deportation was held not to be cruel and unusual punishment in *Re Gittens and the Queen*⁴⁹ where the Federal Court preferred the approach followed by Laskin in *Miller and Cockriell*,⁵⁰
- The Supreme Court of Canada, in *Chiarelli*,⁵¹ agreed that deportation of a permanent resident is not imposed as a punishment and that assuming it is treatment, it is not cruel and unusual. The deportation of a permanent resident who has deliberately violated an essential condition of being permitted to remain in Canada by committing a serious criminal offence cannot be said to outrage standards of decency. The same conclusion was reached in *Canepa*,⁵² although the Court noted that the issue appeared to be still open with respect to "treatment".

⁴⁸ (1978), 10 Ottawa L. Rev. 1, as quoted by Lamer J. in *R. v. Smith*.

⁴⁹ [1983] 1 F.C. 152 (T.D.).

⁵⁰ *Supra*, note 49.

⁵¹ *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711.

⁵² *Canepa v. Canada (Minister of Employment and Immigration)*, [1992] 3 F.C. 270 (C.A.).

- As to whether deportation of a Convention refugee violates s. 12 of the *Charter*, the Federal Court in *Barrera*,⁵³ concluded that the issue was still open but that in the particular case, the issue was premature because the appellant was not attacking the correct decision-maker, namely the Minister, but the Appeal Division of the IRB.
- In *Nguyen*,⁵⁴ Mr. Justice Marceau, in *obiter* said the following:

... It would be my opinion, however, that the Minister would act in direct violation of the *Charter* if he purported to execute a deportation order by forcing the individual concerned back to a country where, on the evidence, torture and possibly death will be inflicted. It would be, it seems to me, a participation in a cruel and unusual treatment within the meaning of s. 12 of the *Charter*, or, at the very least, an outrage to public standards of decency, in violation of the principles of fundamental justice under s. 7 of the *Charter*. There are means to enjoin the Minister not to commit an act in violation of the *Charter*.
- In *Suresh*,⁵⁵ the Supreme Court of Canada considered the issue of deportation to torture. It noted that the *Charter* affirms Canada's opposition to government-sanctioned torture by proscribing cruel and unusual treatment or punishment in s. 12. The Court went on to consider whether deportation to torture would violate fundamental justice under s. 7 of the *Charter*. The Court held that international law rejects deportation to torture, even where national security interests are at stake and that this is the norm that best informs the content of the principles of fundamental justice under s. 7 of the *Charter*.

4.4.6. Death Penalty

Before the death penalty was abolished in Canada, the Supreme Court in *R. v. Miller and Cockriell*⁵⁶ concluded that the mandatory death penalty for murder did not constitute cruel and unusual punishment under s. 2(b) of the *Bill of Rights*. Since capital punishment has been abolished, it has not been necessary to determine whether the death penalty violates s. 12 of the *Charter*.

However, the Supreme Court in *Kindler*,⁵⁷ considered whether the extradition (by unconditional surrender) of a person to the United States to face a possible death sentence contravened s. 12 of the *Charter*. The majority held that it did not, that the punishment which might be imposed by surrendering the fugitive would be the result of laws and actions of another jurisdiction. In contrast, the dissenting judgement would have held that if Canada surrendered Mr. Kindler without seeking assurances from the U.S. government that the death penalty would not be imposed, it would violate s. 12 of the *Charter*. (The dissenting judgement of Mr. Justice Cory in *Kindler* explicitly finds that capital punishment, corporal punishment, lobotomy and castration constitute cruel and unusual treatment).

⁵³ *Barrera v. Canada (Minister of Employment and Immigration)*, [1993] 2 F.C. 3 (C.A.).

⁵⁴ *Nguyen v. Canada (Minister of Employment and Immigration)*, (1993), 18 Imm. L.R. (2d) 165 (F.C.A.), at 175-76.

⁵⁵ *Suresh v. Canada (Minister of Citizenship and Immigration)*, QL [2002] S.C.J. No. 3; 2002 SCC 1.

⁵⁶ *Supra*, note 48.

⁵⁷ *Kindler v. Canada (Minister of Justice)* [1991] 2 S.C.R. 779.

The most recent pronouncement of the Supreme Court of Canada with respect to this issue is *Burns*.⁵⁸ The Court, in a unanimous judgement, held that extradition without assurances that the death penalty would not be imposed would violate s. 7 of the Charter in all but exceptional cases. The Court agreed with the view in *Kindler* that because of the causal remoteness between the possible imposition of capital punishment by another state and the act of extraditing the fugitive, section 12 of the *Charter* did not apply directly. The punishment or treatment would not be imposed by the Canadian courts. The proper inquiry was whether extradition without assurances would violate the principles of fundamental justice under s. 7. The Court talked about whether a particular treatment or punishment may sufficiently violate our sense of fundamental justice as to tilt the balance against extradition. Examples might include stoning to death, lopping off the hands of a thief and ultimately, the Court concludes, extradition without assurances in all but exceptional cases.

4.4.7. Summary: Cruel and Unusual Punishment or Treatment

Before turning to an examination of s. 7, we can note that a review of the cases in which the Canadian Courts have considered whether punishments or treatments are cruel and unusual indicate that in general, the categories of circumstances being considered include:

- imposition of mandatory minimum sentences
- indeterminate detention
- confinement due to mental illness
- pre-trial custody
- prison conditions
- parole and mandatory supervision
- repeated prosecutions

The cases are generally decided using the principles of proportionality set out in *Smith*. A quick review of many of the cases indicates that the Courts do not find violations of s. 12 to occur that often.

4.4.8. Punishment Imposed in Disregard of International Standards

Turning to s. 7 and the concept of fundamental justice, the issue which will confront the RPD and the RAD is when will a punishment imposed pursuant to lawful sanctions be imposed in disregard of accepted international standards. Is the question of whether a punishment or treatment is contrary to fundamental justice under s. 7 the same question as whether it is imposed in disregard of international standards?

⁵⁸ *United States v. Burns*, [2001] 1 S.C.R. 283.

This brings us to the question of what are the principles of fundamental justice. *In Re B.C. Motor Vehicle Act*,⁵⁹ Lamer J. expressly recognized the role played by international law and opinion in elucidating this question:

[Principles of fundamental justice] represent principles which have been recognized by the common law, the international conventions and by the very fact of entrenchment in the Charter, as essential elements of a system for the administration of justice which is founded upon the belief in the dignity and worth of the human person and the rule of law.⁶⁰

In *Burns*, the Supreme Court looked to international abolitionist initiatives and practices in determining the question of whether extradition without assurances would be contrary to s. 7 of the *Charter*. The Court concluded:

[92] The existence of an international trend against the death penalty is useful in testing our values against those of comparable jurisdictions. This trend against the death penalty supports some relevant conclusions. First, criminal justice, according to international standards, is moving in the direction of abolition of the death penalty. Second, the trend is more pronounced among democratic states with systems of criminal justice comparable to our own. The United States (or those parts of it that have retained the death penalty) is the exception, although of course it is an important exception. Third, the trend to abolition in the democracies, particularly the Western democracies, mirrors and perhaps corroborates the principles of fundamental justice that led to the rejection of the death penalty in Canada.

In light of these comments, it would seem appropriate to conclude that if a punishment or treatment was contrary to fundamental justice, it would also be contrary to international standards.

4.5. International Jurisprudence

4.5.1. European Court of Human Rights⁶¹ (ECHR)

The following cases interpret Article 3 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, which reads as follows:

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

4.5.1.1. Inhuman or Degrading Treatment : Legal Principles

- The Court noted the distinction between torture and inhuman treatment or punishment in *Aydin v. Turkey*, September 25, 1997. The special stigma of “torture” was found to attach to only “deliberate

⁵⁹ [1985] 2 S.C.R. 486.

⁶⁰ See also *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; and *R. v. Keegstra*, [1990] 3 S.C.R. 697.

⁶¹ The cases can be found in the ECHR's web site < <http://hudoc.echr.coe.int/hudoc>>

inhuman treatment causing very serious and cruel suffering”.⁶² In this case, a 17 year-old woman was blindfolded, detained by gendarmes over three days, raped by an official, stripped naked, beaten, slapped, threatened, abused, questioned by strangers, and pummelled with ice-cold water from high pressure jets while being spun around in a tyre. The Court found that this ill treatment amounted to torture.

- In *the Tyrer case*, March 15, 1978, at issue was the sentence imposed on a fifteen-year old boy convicted of unlawful assault occasioning actual bodily harm. The boy’s sentence – three strokes of the birch – was executed several weeks after its imposition. The Court found that the suffering experienced by the applicant did not amount to torture or inhuman punishment; the question was whether it amounted to degrading punishment. The Court noted that there was a distinction between degrading punishment and punishment in general. For punishment to be degrading, the humiliation or debasement must attain a particular level of severity beyond that associated with punishment in general. The assessment of whether a punishment is degrading is relative, and depends on all of the circumstances, in particular the nature and context of the punishment, as well as the manner and method of its execution.

In *Tyrer*, the following factors were considered: the institutionalized character of the violence whereby the applicant was treated as an object by an official of the State; the official procedure at the punishment; the infliction of the strokes by total strangers; birching on the bare posterior; physical pain; and weeks of anticipation. Based on these considerations, the Court held that the birching amounted to degrading punishment.

The Court also noted that punishment does not lose its degrading character simply because it is an effective deterrent or aid to crime control. The Court found that while publicity is a relevant factor, its absence would not prevent a punishment from being degrading; victims can be degraded in their own eyes.

- In the *Soering case*, June, 26, 1998, the Court considered whether the extradition from Great Britain of a German national, wanted in the United States on charges of murder, breached Article 3.⁶³ The Court found that if the applicant were extradited, he would be at risk of inhuman or degrading treatment or punishment, namely being sentenced to death and facing the “death row phenomenon”. The Court noted that ill treatment, including punishment, must attain a minimum level of severity to fall within the scope of Article 3.⁶⁴

The assessment of this minimum is...relative; it depends on all the circumstances of the case, such as the nature and context of the treatment of punishment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim.

In *Soering*, the Court relied on the following description of inhuman and degrading treatment:

⁶² See also ECHR, *Selmouni v. France*, July 28, 1999.

⁶³ The *Soering case* has been considered in Canada on a number of occasions. See *United States of America v. Burns*, [2001] 1 S.C.R. 283; *Reference Re Ng Extradition (Can.)*, [1991] 2 S.C.R. 858; *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779.

⁶⁴ This test appears to come from ECHR, *Ireland v. The United Kingdom*, December 13, 1977 (see section 4.5.1.3. below). It is also noted in *Tyrer, supra*.

Treatment has been held by the Court to be both "inhuman" because it was premeditated, was applied for hours at a stretch and "caused, if not actual bodily injury, at least intense physical and mental suffering", and also "degrading" because it was "such as to arouse in [its] victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance".... In order for a punishment or treatment associated with it to be "inhuman" or "degrading", the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate punishment.... In this connection, account is to be taken not only of the physical pain experienced but also, where there is a considerable delay before execution of the punishment, of the sentenced person's mental anguish of anticipating the violence he is to have inflicted on him. [Case references omitted]

The Court found that, read as a whole, the Convention did not include a general prohibition against the death penalty; Article 3, therefore, could not be construed as prohibiting the death penalty. In this case, the Court considered the length of detention prior to execution, the conditions on death row, the applicant's age and mental state, and the possibility of extradition to Germany. The Court found that consideration of these factors led to the conclusion that extradition to the US would amount to a breach of Article 3.

- In *Tomasi v. France*, June 25, 1992, the applicant was held in custody and interrogated. The Court found that the large number of blows inflicted on the applicant and their intensity were sufficient to render the treatment inhuman and degrading.⁶⁵ The Court noted that when a person is taken into police custody in good health, and is found injured at the time of release, it is incumbent upon the State to provide a plausible explanation for the injuries. Failing such an explanation, an issue under Article 3 arises.

In a concurring opinion, Judge de Meyer held:

Any use of physical force in respect of a person deprived of his liberty which is not made strictly necessary as a result of his own conduct violates human dignity and must be regarded as a breach of the right guaranteed under Article 3 of the Convention.

Examples of conduct that might necessitate the use of force included escape attempts and acts carried out against oneself or against another person.

- In *Raninen v. Finland*, December 16, 1997, the applicant complained of being handcuffed while being transported from a County Prison to a military hospital. He alleged he was the victim of degrading treatment. The Court relied on the minimum level of severity test set out in *Ireland*. Further, the Court noted, that when considering whether a punishment or treatment is "degrading", the Court would have regard to whether its object is to humiliate and debase the individual concerned. Lastly, the Court will look to see if the treatment or punishment adversely affected the individual's personality in a manner incompatible with Article 3. In this regard, the public nature of the punishment or treatment may be relevant. However, publicity is not necessary, as a victim may be humiliated in their own eyes, even if not in the eyes of others.⁶⁶

⁶⁵ See also ECHR, *Ribitsch v. Austria*, November 21, 1995, where the applicant received a number of injuries while in police custody. The Court followed *Tomasi*.

⁶⁶ See *Tryer*, *supra*.

The Court found that lawful handcuffing, not entailing the use of force or public exposure, or exceeding what is necessary in the circumstances, does not normally amount to degrading treatment. In this case, the handcuffing was unnecessary, imposed in the context of an unlawful arrest and detention, and the applicant had suffered brief public exposure. Although the applicant claimed he felt humiliated, the Court was not convinced that the handcuffing had adversely affected his mental state. Further, the applicant did not establish that the handcuffing was aimed at debasing or humiliating him. Nor did the handcuffing affect the applicant physically. On those grounds, the Court found that there was no violation of Article 3.

4.5.1.2. Criminal Responsibility of Minors

- In *T v. United Kingdom* and *V. v. United Kingdom*, December 16, 1999 (QL [1999] T.N.L.R. No. 907), the Court considered whether the attribution of criminal responsibility (convictions for the abduction and murder of a boy aged two) to the applicants in respect of acts committed at the age of 10 could in itself amount to inhuman or degrading treatment. The Court concluded that it did not. It noted that there was no consensus among states of the Council of Europe as to the minimum age of criminal responsibility and no clear tendency could be ascertained from examining relevant international texts and instruments, including the United Nations *Convention on the Rights of the Child*.

4.5.1.3. Conditions of Arrest and Detention

- In *Ireland v. The United Kingdom*, December 13, 1977, the Court was examining whether certain methods of interrogation used by the United Kingdom in certain detention centres violated Article 3 of the European Convention. These techniques included: (1) wall-standing (standing spread-eagled against the wall, with the fingers put high above the head against the wall, the legs spread apart and the feet back, causing the person to stand on their toes with the weight of the body mainly on the fingers); (2) hooding (putting a black or blue coloured bag over the detainees and at least initially, keeping it there all the time except during interrogation); (3) subjection to noise (exposure to continuous loud and hissing noise); (4) deprivation of sleep; and (5) deprivation of food and drink.

The Court noted that the five techniques were applied in combination, with premeditation and for hours at a stretch, they caused, if not actual bodily injury, at least intense physical and mental suffering and also led to acute psychiatric disturbances during interrogation. The techniques accordingly fell into the category of inhuman treatment within the meaning of Article 3. The techniques were also degrading since they were such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance.

As to whether the techniques constituted torture, the Court noted that it depended principally on the intensity of the suffering inflicted. It referred to Resolution 3452 (XXX) adopted by the General Assembly of the United Nations on December 9, 1975 which provides that “torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment” and concluded that the five techniques did not constitute torture.⁶⁷

- In *Dougoz v. Greece*, June 6, 2001, the applicant was a Syrian national. He complained of the conditions of his detention while he awaited expulsion to Syria. The Court noted that detention

⁶⁷ The dissenting opinions of four judges offer very interesting views on the meaning of torture.

conditions could amount to inhuman or degrading treatment. When assessing conditions of detention, account must be taken of the cumulative effects of the conditions. In this case, the Court found that the serious overcrowding and absence of sleeping facilities, over a period of 17 months, amounted to degrading treatment and violated Article 3.

- In *Rehbock v. Slovenia*, November 28, 2000, the applicant complained of inhuman treatment during his arrest and later detention. The Court found that the applicant had suffered a double fracture of the jaw and facial contusions during the arrest. The Court found that the amount of force used was excessive and unjustified in the circumstances, and amounted to inhuman treatment. However, the Court found that the applicant's treatment during detention, namely the failure of prison staff to provide him with pain-killing medication on several occasions, did not amount to inhuman treatment.
- In *Egmez v. Cyprus*, December 21, 2000, the Court found that the applicant had suffered the intentional infliction of injuries by arresting officers, with no justification. The Court held that the injuries were not serious enough to amount to torture but that they were inhuman treatment.
- In *Tekin v. Turkey*, June 9, 1998, the Court found that the conditions of detention and the treatment to which the applicant had been subjected amounted to inhuman and degrading treatment. The Court determined the applicant had been held in a cold and dark cell, blindfolded and treated, in connection with his interrogation, in a way that left wounds and bruises on his body. Further, the Court noted that, in respect of a person deprived of his liberty, recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and in principle violates Article 3.

4.5.1.4. Risk of Persecution

- In *Ahmed v. Austria*, November 27, 1996, an expulsion order against a Somali refugee was stayed. Ahmed lost his refugee status in 1992, following a criminal conviction in Austria. However, the Court held that his expulsion would breach Article 3 by exposing him to a risk of persecution. The situation in Somalia had not changed since the applicant had been given refugee status; the country remained in the grips of a fratricidal war between rival clans. The applicant remained at risk of persecution because he was suspected of belonging to one of the clans.⁶⁸

4.5.1.5. Medical Treatment⁶⁹

- *Bensaid v. The United Kingdom*, May 6, 2001, concerned the expulsion of an Algerian, following findings by immigration officials that his indefinite leave to remain in the U.K. had been obtained by deception, his marriage being one of convenience. The applicant was a schizophrenic suffering from long-term mental illness. He argued that his expulsion would result in a relapse and the deterioration of his condition due to the difficulties obtaining medicine, and the stresses and violence involved with living in an area where there was active terrorism. While the Court recognized that, in principle, an

⁶⁸ See also ECHR, *Vilvarajah and Others v. The United Kingdom*, September 26, 1991; ECHR, *Chahal v. The United Kingdom*, October 25, 1996; ECHR, *H.L.R. v. France*, April 22, 1997.

⁶⁹ It is important to note that s. 97(b)(iv) explicitly excludes cases where the risk to life or of cruel and unusual treatment or punishment is caused by inadequate health or medical care. Since these cases consider issues of medical/psychiatric treatment, they may be of minimal assistance in the Canadian context.

expulsion with such consequences could violate Article 3, in this case, the risks were purely speculative.

- In *Aerts v. Belgium*, July 30, 1998, the applicant complained of his detention in the psychiatric wing of a prison. Although the Court found that the standard of care given to the patients was inadequate from an ethical and humanitarian point of view, and further, that any prolonged detention carried an undeniable risk of mental health deterioration. In this case, the Court had no proof of deterioration in the applicant's mental health. The effects of his detention were not serious enough to amount to inhuman or degrading treatment.⁷⁰
- In *D. v. United Kingdom*, May 2, 1997, the ECHR considered whether removing a convicted drug courier in the advanced stages of AIDS to his country of origin, St. Kitts, would expose him to inhuman or degrading treatment in breach of Article 3. The Court concluded that it did in the very exceptional circumstances of this case. The Court emphasized that aliens who had served their prison sentences and were subject to expulsion could not in principle claim any entitlement to remain in the territory of a contracting state in order to continue to benefit from medical, social or other forms of assistance provided by the expelling state during their stay in prison.

4.5.1.6. Disappeared People

- In *Çakici v. Turkey*, July 8, 1999, the applicant complained that the disappearance of his brother amounted to inhuman treatment in relation to himself.⁷¹ The Court found that the applicant had not been subjected to inhuman treatment and noted that there was no general principle that family members of a "disappeared person" are thereby victims of inhuman treatment.

Whether a family member is such a victim will depend on the existence of special factors which gives the suffering of the applicant a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human rights violation. Relevant elements will include the proximity of the family tie – in that context, a certain weight will attach to the parent-child bond –, the particular circumstances of the relationship, the extent to which the family member witnessed the events in question, the involvement of the family member in the attempts to obtain information about the disappeared person and the way in which the authorities responded to those enquiries. The Court would further emphasise that the essence of such a violation does not so much lie in the fact of the "disappearance" of the family member but rather concerns the authorities' reactions and attitudes to the situation when it is brought to their attention. It is especially in respect of the latter that a relative may claim directly to be a victim of the authorities' conduct.

- *Çiçek v. Turkey*, September 5, 2001, concerned the disappearance of the applicant's two sons and her grandson. The Court could not find a breach of Article 3 in relation to the applicant's sons or grandson because there was no evidential base; the disappearances were characterized by a total lack of information, so any finding as to the treatment the disappeared endured would be total speculation. However, the Court did find a breach of Article 3 in respect of the applicant. The applicant made applications to the public prosecutor following the disappearances, but no serious consideration was

⁷⁰ See also ECHR, *Herczegfalvy v. Austria*, September 24, 1992.

⁷¹ See ECHR, *Timurtas v. Turkey* June 13, 2000, where the father of a disappeared person was found to be a victim of inhuman treatment contrary to Article 3 following callous treatment by authorities in response to inquiries about his son's situation; ECHR, *Tas v. Turkey*, November 14, 2000.

given to her concerns. She had no news of her sons for almost six years. The Court found that the uncertainty, doubt, and apprehension over such a long period had caused her severe pain and anguish, amounting to a breach of Article 3.

- In *Mahmut Kaya v. Turkey*, March 28, 2000, the Court found that the exact circumstances in which the applicant's deceased brother had been detained and injured were unknown. The medical evidence established that the level of suffering was not cruel and severe; it did not amount to torture. The binding of the deceased's wrists with wire, resulting in cuts to the skin, and the prolonged exposure of his feet to water or snow, however, amounted to inhuman and degrading treatment.

4.5.1.7. Destruction of Property

- In *Seçluk and Asker v. Turkey*, April 24, 1998, the applicants' houses were set on fire by gendarmes. The villagers were prevented from putting the fires out. The fires resulted in destruction of the property and most of its contents. Some period of time later, a mill belonging to one of the applicants was set on fire and destroyed. The applicants moved away from their village. Of the applicants, two were aged 54 and 60, and had lived in the village their whole lives. Their home and property was destroyed in a premeditated fire by security forces, depriving the applicants of their livelihoods and forcing them to leave their village. The applicants were taken by surprise and had to stand by and watch the burning of their homes. Inadequate precautions were taken for their safety, their protests were ignored, and no assistance was provided to them afterwards. The Court held that the applicants had suffered so severely that the actions of the gendarmes could be characterized as inhuman treatment.
- Similarly, in *Dulas v. Turkey*, January 3, 2001, the applicant's home and property had been burned before her eyes, she was forcibly evicted, left destitute, and without security.⁷² The applicant was over 70 years old at the time her home was destroyed; she was left without shelter or support, and was obliged to leave the village she had lived in all her life. The Court held that the actions causing her suffering amounted to inhuman treatment.

4.5.1.8. Miscellaneous

- In *A. v. United Kingdom*, September 23, 1998, the Court concluded that the State failed to protect the nine-year old complainant from beatings (with a garden cane) by his stepfather. The stepfather had been acquitted of a charge of assault. The Court concluded that the beatings violated Article 3 and that the State had to be held accountable for failing to provide protection. Under English law at the time it was a defence to a charge of assault on a child that the treatment in question amounted to "reasonable chastisement".
- On the other hand, in an earlier judgement in *Costello-Roberts v United Kingdom*, March 25, 1993, the Court considered whether private school "slippering" constituted degrading punishment and concluded that it did not. The facts of the case were that the headmaster administered a "slippering", hitting the complainant three times on his buttocks, through his shorts, with a rubber sole-gym shoe.

⁷² See also ECHR, *Bilgin v. Turkey*, November 16, 2000.

The Court did not find the punishment to violate Article 3. It noted: “In order for punishment to be degrading and in breach of Article 3, the humiliation or debasement involved must attain a particular level of severity and must in any event be other than the usual element of humiliation inherent in any punishment. Indeed, article 3, by expressly prohibiting inhuman and degrading punishment, implies that there is a distinction between such punishment and punishment more generally.”

- The case of *Nsona v. Netherlands*, October 26, 1996, concerned the removal of a nine year-old Zairean girl from the Netherlands. The child arrived in the Netherlands with a woman alleging to be her deceased mother’s sister. Purportedly, there were no living relatives in Zaire. The child was removed from the Netherlands quickly, in the company of a stranger who absconded when the plane landed in Zurich. The government of the Netherlands made no arrangements to have a responsible person meet her in Kinshasa. However, there was no suggestion that the girl sustained any damage to her mental or physical health. The Court commented that while the actions of the government were certainly open to criticism, the circumstances of the case did not warrant a finding that the girl had been the victim of inhuman or degrading treatment or placed at risk of exposure to such treatment.
- In *López Ostra v. Spain*, November 23, 1994, the applicant complained of being the victim of degrading treatment. The applicant lived a few metres away from an industrial unit that treated liquid and solid waste from a number of leather tanneries. A malfunction caused smells, noise, polluting fumes, and health problems. The applicant alleged effects of the plant were so serious and caused her such distress as to amount to degrading treatment in violation of Article 3. The Court disagreed. The Court recognized that while the conditions were very difficult for the applicant, they did not amount to degrading treatment.
- In *Jabari v. Turkey*, July 11, 2000, the applicant had committed adultery in Iran and had fled before criminal proceedings could be taken against her. If returned to Iran, the applicant alleged she would face a risk of inhuman punishment, such as whipping, flogging, or death by stoning. The Court held that the applicant’s expulsion from Turkey would place her at risk of being subjected to treatment in violation of Article 3.
- In *Efstratiou v. Greece*, December 18, 1996, the applicants’ daughter received a suspension from school following her refusal to participate in a parade commemorating National Day. The applicants were Jehovah’s Witnesses and their daughter’s refusal to participate stemmed from their belief in pacifism as a fundamental tenet of their religion. The Court found that the school suspension did not amount to ill treatment of the minimum severity required to be contrary to Article 3.⁷³
- Of note is *Sevtaş Veznedaroglu v. Turkey*, April 11, 2000. In that case, the Court found that the inertia displayed by the authorities in investigating the allegations was inconsistent with the procedural obligations placed upon them under Article 3. The failure to investigate the allegations of torture amounted to a violation of Article 3. The Court noted that without the requirement of an effective official investigation into such allegations, the legal prohibition in Article 3 would be ineffective in practice.

⁷³ See also ECHR, *Valsamis v. Greece*, December 18, 1996.

4.5.2. United Kingdom: Cruel and Unusual Punishment

In the following cases, the UK Courts consider various statutes from different Commonwealth countries. They are included because they interpret the phrase "cruel and unusual punishment".

- In *Guerra v. Baptiste*, November 6, 1995, the Privy Council examined whether delay on death row constituted cruel and unusual punishment contrary to the Constitution of Trinidad and Tobago. It concluded that to execute the appellant after a lapse of four years and 10 months between the imposition of a sentence of death and completion of the entire domestic appellate process would constitute cruel and unusual punishment. Furthermore, the giving of less than 17 hours notice to the appellant of his execution breached his constitutional rights. The sentence was commuted to life imprisonment.
- The same result was reached by the Court of Appeal in *Pratt and Another v. Attorney-General for Jamaica and Another*, November 2, 1993. The Court noted: "It was part of the human condition that a condemned man would take every opportunity to save his life through use of the appellate procedure. If it enabled the prisoner to prolong the appellate hearings over a period of years, the fault was to be attributed to the appellate system that permitted such delay and not to the prisoner who took advantage of it. Appellate procedures that echoed down the years were not compatible with capital punishment. The death-row phenomenon must not become established as a part of the jurisprudence." Again, the sentences were commuted to life imprisonment.
- In *Thomas v. Baptiste (Commissioner of Prisons)*, [1999] J.C.J. No. 12 (P.C.), (QL) an appeal was brought with leave from the Court of Appeal of Trinidad and Tobago. The appellants appealed the lawfulness of their death sentences for murder. The appellants argued that the imposition of the sentences would amount to cruel and unusual punishment given the length of time they had been in prison and the conditions under which they had been kept. The Privy Council found the pre-trial and post-trial periods of detention were not so prolonged that it would now be unconstitutional to carry out the death sentences. In the case of Thomas, he had spent 2 years and 8 months in custody pre-trial, and 2 years and 7 months post-trial. Hilaire spent a total of 7 years and 5 months pre- and post-trial. With regard to the conditions under which the prisoners were kept, the Privy Council noted that the appellants were detained in cramped and foul smelling cells, deprived of exercise and access to fresh air for long periods of time, and when allowed to exercise, were handcuffed. The Privy Council questioned whether the conditions "went beyond harsh and could properly be described as cruel and unusual". The Court found that the determination that prison conditions were cruel and unusual amounted to a value judgement requiring an analysis of local conditions, particularly in third world countries, both inside and outside of prison. Furthermore, the Court noted that *Pratt* did not establish a principle that prolonged detention prior to execution constituted cruel and unusual punishment. It was the additional cruelty of imposing the death sentence following prolonged detention that was cruel and unusual punishment.

The Court also noted that in cases where a condemned man was shackled, flogged, tortured or kept in solitary confinement, the imposition of the death penalty following such treatment would be cruel and unusual. However, in this case, neither the conditions of detention nor the length of time in custody were so extreme as to make the imposition of the death sentence cruel and unusual punishment.

- In *Higgs v. Minister of National Security*, [1999] J.C.J. No. 55 (P.C.) (QL), the appellants argued that, having regard to the conditions under which they had been held and the length of time they had been

detained, both before and after conviction, the imposition of death sentences would amount to “inhuman or degrading treatment or punishment” contrary to the Constitution of the Bahamas. The Privy Council stated that the relevant principle was as follows: “if a man has been sentenced to death, it is wrong to add other cruelties to the manner of his death.” This principle does not apply to treatment that cannot be regarded as aggravating punishment. Pre-trial delay and prison conditions are not additional forms of punishment. The question is whether there is a nexus between the matters complained of and the sentence of death, or, in other words, was the treatment the prisoner complains of an aggravation of the death sentence? The Privy Council noted that this assessment is made more difficult when conditions are aggravated by overcrowding and lack of resources. In this case, the period of detention and the detention conditions were not punishments aggravating the imposition of the death sentence; there was no nexus.

- In *Boodram et al v. Baptiste (Commissioner of Prisons)*, [1999] J.C.J. No. 27 (P.C.) (QL), on appeal from the Court of Appeal for Trinidad and Tobago, the appellants submitted that hanging constituted cruel and unusual punishment. The Court found that hanging was the only lawful method of execution and was not necessarily cruel, despite the evidence provided by the appellants of the suffering caused by hanging.
- In *Briggs v. Baptiste (Commissioner of Prisons)*, [1999] T.N.L.R. No. 762 (P.C.) (QL), the Court found that repeated reading of the death warrant did not amount to cruel and unusual treatment.
- In *Treadaway v. Chief Constable of West Midlands* (July 29, 1994), the Queen’s Bench Division granted exemplary damages to a man who had been seriously assaulted by police officers in order to obtain a confession to involvement in armed robberies, for which he was later convicted by a jury. The Court found that the treatment of the plaintiff constituted torture.

4.5.3. Australia: Cruel and Unusual Punishment

Only one relevant case from the Australian High Court was found, however, there are many cases at lower levels. Those cases are not reviewed here.

- The leading case appears to be *Sillery v. The Queen (1981) 55 ALJR 509, at p 513; 35 ALR 227*. Sillery was convicted of hijacking a plane and sentenced to imprisonment for life. The trial judge held that a sentence of life imprisonment was mandatory under the statute. Sillery appealed. The issue was one of statutory interpretation: did the statute require a sentence of life imprisonment or did the trial judge have discretion not to impose a life sentence? The High Court found that a mandatory sentence of life imprisonment for hijacking, given the broad statutory definition of the offence, would be “cruel and unusual, because it serves no valid legislative purpose”. The Court noted that the power to inflict cruel and unusual punishments should not be read into the Australian Constitution and that it was doubtful that Parliament had the authority to make laws authorizing cruelty. Further, all statutes should be construed (in the absence of unmistakable language to the contrary) humanely, according to modern civilized standards.

4.5.4. United States: Cruel and Unusual Punishment

The Eight Amendment to the United States Constitution prohibits "cruel and unusual punishment". There are an endless number of cases dealing with this amendment, particularly in the context of capital punishment, prison conditions and solitary confinement. A full review of the American jurisprudence is beyond the scope of this paper but there is one case worth mentioning.

- In *Furman v. Georgia*, [1972] SCT-QL 2435, the Supreme Court considered whether the death penalty constituted cruel and unusual punishment. The opinion of Mr. Justice Marshall (concurring) includes a lengthy history of the phrase "cruel and unusual" dating back to the treason trials of 1685 - the "Bloody Assizes" - which followed an abortive rebellion by the Duke of Monmouth, which marked the culmination of the parade of horrors, and which most historians believe was the event that finally spurred the adoption of the *English Bill of Rights* containing the progenitor of the American prohibition against cruel and unusual punishments (paragraph 171).

Mr. Justice Marshall sets out four criteria that help a Court determine what constitutes cruel and unusual punishment:

- Punishments that involve so much physical pain and suffering that civilized people cannot tolerate them (paragraph 203).
- Punishments that are unusual (i.e., the meaning in the legislation is not clear). If such treatments exist, they must be intended to serve a humane purpose (paragraph 204).
- Punishments that are excessive and serve no valid legislative purpose (paragraph 205).
- A punishment may be valid and serve a legislative purpose but it may be invalid if popular sentiment abhors it. This sentiment can be discerned from an examination of the evolving standards of decency that mark the progress of a maturing society. In this sense, *stare decisis* bows to changing values (paragraphs 200 and 206).

4.5.5. Summary and Conclusions

The Australian and the American cases reviewed suggest that a punishment that serves no valid legislative purpose may be found to be "cruel and unusual".

The UK Judicial Committee of the Privy Council cases offer some insight into situations concerning capital punishment, prison conditions, and the length of time prisoners are detained.

The cases from the ECHR rely on a distinction between torture and inhuman or degrading treatment or punishment. As noted in *Aydin*, "torture" refers to cases where ill treatment is deliberate and causes particularly cruel suffering. The test set out in *Ireland* and *Tyler* is used when assessing whether ill treatment is severe enough to fall within the scope of Article 3. The assessment is relative, and takes into account all the circumstances of the case.

For treatment to amount to degrading punishment, it must be distinguished from punishment in general. As noted in *Tyler*, the humiliation or debasement associated with degrading punishment must attain a higher level of severity than that associated with punishment

in general. The factors looked at by the ECHR when considering if a punishment or treatment is inhuman or degrading include: the level of humiliation involved; the intensity of physical or mental suffering; delay; premeditation; the victim's feelings of fear, anguish, and inferiority; publicity; whether the aim of the treatment was to humiliate or debase the individual; and the effects of the treatment.

The ECHR has found inhuman and degrading treatment in a wide variety of cases. For example, the disappearance of family members, detention conditions, burning and destruction of property, police violence upon arrest or in detention, birching, the "death row phenomenon" and the return of refugees to places where they have a well-founded fear of persecution.

Situations where inhuman and degrading treatment was not found by the ECHR have included the removal of a nine-year-old girl, alone, to her country of origin; school suspensions for Jehovah's witnesses refusing to participate in national celebrations; failure to provide painkillers to individuals in custody; disappearance of family members; and exposure to smells, noise and pollution from an industrial plant.

The application of the principles established in the ECHR may be of some use in interpreting the phrase "cruel and unusual treatment or punishment" in the *IRPA*, particularly since the Supreme Court of Canada in *Burns* has equated the words in Article 3 of the *European Convention* (inhuman and degrading) with s. 12 of the *Charter*. For example, the distinction drawn by the ECHR between torture and inhuman or degrading treatment or punishment may be useful, whereby the label of "torture" is reserved for deliberate treatment causing particularly cruel suffering. Further, the requirement that treatment or punishment must reach a minimum level of severity in order to be regarded as inhuman or degrading, and thus distinguished from legitimate punishment or treatment. Additionally, the factors looked at in assessing the severity of the treatment or punishment, and the contexts in which inhuman or degrading treatment or punishment has been found, may provide useful references.

EXCLUSION FROM THE DEFINITION

Section 98 of the *IRPA* establishes the exclusion grounds under Articles 1E and 1F both for Convention refugee protection *as well as* for persons in need of protection.

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.

Given that the reference to sections E and F of Article 1 of the Refugee Convention is the same as currently exists within the context of Convention refugee protection, the principles and jurisprudence set out in the IRB, Legal Services Paper, *The Interpretation of the Convention Refugee Definition in the Case Law*, December 31, 1999 and addendum dated December 31, 2001 (chapter 10) may be applied within the expanded consolidated grounds context. Where special considerations apply, they are noted below.

4.6. Article 1E

This Convention shall not apply to a person who is recognised by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

The existing case law suggests that the CRDD should consider whether the claimant has a well-founded fear of persecution for a Convention reason in the Article 1E country.⁷⁴ This approach can be expanded to include a consideration of whether *any* of the consolidated grounds of protection apply within the putative 1E country.

4.7. Article 1F

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

- (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
- (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

The same criteria as are currently applied in the Convention refugee context may be applied within the consolidated grounds context. Note that, in the context of 1F exclusion, the Federal Court has ruled *against* a balancing between the seriousness of the risk and the seriousness of the crime committed.⁷⁵ Thus, even in cases where the claimant faces a clear risk to life or of cruel and unusual treatment or punishment, the exclusion grounds will operate.⁷⁶

4.8. Extradition

Under section 105(3), if a person is ordered surrendered under the *Extradition Act* for a serious offence (an offence punishable by a term of imprisonment of ten or more years), the order of surrender will be deemed to be a rejection of a claim for refugee protection based on Article 1F(b).

5. CHANGE OF CIRCUMSTANCES (CESSATION) AND COMPELLING REASONS

Section 108 provides that *cessation* and *compelling reasons* will apply to the consolidated protection grounds as well:

108. (1) A claim for refugee protection shall be rejected, and a person is not a Convention refugee or a person in need of protection, in any of the following circumstances:

⁷⁴ *Kroon, Victor v. M.E.I.*, (F.C.T.D., no. IMM-3161-93), MacKay, January 6, 1995.

⁷⁵ With respect to Article 1F(b), serious non-political crimes, the Court has stated that where it is appropriate to use a proportionality test under Article 1F(b) is in the weighing of the gravity of the crime as part of the process of determining if we should brand it as “political”. See *Gil v. Canada (Minister of Employment and Immigration)*, [1995] 1 F.C. 508 (C.A.) at 535.

⁷⁶ As to prospects of removing such a person from Canada, the process will be subject to the principles adopted by the Supreme Court of Canada in *Suresh*, *supra*, note 62.

- (a) the person has voluntarily reavailed themselves of the protection of their country of nationality;
 - (b) the person has voluntarily reacquired their nationality;
 - (c) the person has acquired a new nationality and enjoys the protection of the country of that new nationality;
 - (d) the person has voluntarily become re-established in the country that the person left or remained outside of and in respect of which the person claimed refugee protection in Canada; or
 - (e) the reasons for which the person sought refugee protection have ceased to exist.
- (2) On application by the Minister, the Refugee Protection Division may determine that refugee protection referred to in subsection 95(1) has ceased for any of the reasons described in subsection (1).
- (3) If the application is allowed, the claim of the person is deemed to be rejected.
- (4) Paragraph (1)(e) does not apply to a person who establishes that there are compelling reasons arising out of previous persecution, torture, treatment or punishment for refusing to avail themselves of the protection of the country which they left, or outside of which they remained, due to such previous persecution, torture, treatment or punishment.

The differences between the existing cessation and compelling reasons provisions⁷⁷ and the new provisions⁷⁸ simply reflect their application in the consolidated grounds context. Given the substantially similar language used, no substantial change to the interpretation of the provisions is envisaged. Thus, the principles and jurisprudence set out in the IRB Legal Services paper *Interpretation of the Convention Refugee Definition in the Case Law*, December 31, 1999 and addendum dated December 31, 2001 (chapter 7) may be applied within the expanded consolidated grounds context.

6. STANDARD OF PROOF

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*⁷⁹ 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

⁷⁷ *Immigration Act*, s. 2(2).

⁷⁸ *IRPA*, s. 108.

⁷⁹ *Adjei v. Canada (Minister of Employment and Immigration)*, [1989] 2 F.C. 680; (1989), 7 Imm. L.R. (2d) 169 (C.A.)

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.

7. SUGGESTED FRAMEWORK OF ANALYSIS⁸⁰

1. Determine the country or countries of reference.
2. Determine if the risk is to life or of punishment or treatment. This will involve assessing the credibility of the allegations of risk and making findings of fact about what the risks are and who the agent of harm is. Determine if the risk is faced by the claimant personally.
3. Assess whether the risk to life or of treatment or punishment is inherent or incidental to lawful sanctions. Also, it will be necessary to consider whether the treatment or punishment is imposed in disregard of accepted international standards. The assessment of the first question is to be based on an examination of the laws of the country of reference. The assessment of the second question is to be based on relevant human rights international instruments (see also point 5). If the treatment or punishment is inherent or incidental to lawful sanctions and is not imposed in disregard of accepted international standards, the claimant is not a person in need of protection.
4. If relevant to the case, determine whether the risk is caused by the inability of the country of reference to provide adequate health or medical care. If so, the claimant is not a person in need of protection.
5. If the treatment or punishment is not incidental or inherent to lawful sanctions, or is imposed in disregard of accepted international standards, or is not caused by inadequate health or medical care, determine whether it is "cruel and unusual". This assessment will be based on a consideration of domestic and international law.
6. If the risk is to life or of cruel and unusual treatment or punishment, determine whether the risk is faced generally by other individuals in or from that country.
7. If the risk is to life or of cruel and unusual treatment or punishment and is not faced generally, assess whether state protection is available and whether the claimant would face a serious possibility or a reasonable chance of death or cruel and unusual treatment or punishment.
8. Assess whether the risk is faced in every part of the country. If faced in only part of the country, determine if the claimant has an internal flight alternative.

⁸⁰ This framework is strictly for the issues raised in s. 97(1)(b), not for the entire range of issues that will need to be determined in the consolidated hearing.

8. PROTECTION REGIMES IN OTHER COUNTRIES

In most European countries, a claimant may apply for Convention refugee status and also apply for “subsidiary status”. Subsidiary status is granted to those claimants who are deserving of protection but who do not fit the criteria of a Convention refugee. The experience in those countries is that there is a significant decrease in the numbers of claimants who receive Convention refugee status as the subsidiary status is used more liberally.⁸¹

In countries that offer subsidiary protection, international human rights instruments are relied upon heavily as the indicators of when protection is justified for the claimant. For example, in the U.S., if a claimant is not granted Convention refugee status, a review is then instituted as to whether CAT applies. In Europe, violations of Article 3 of the European Convention are the most common ground for granting subsidiary status. Article 7 of the ICCPR and Article 35 of the *Convention on the Rights of the Child* are also routinely considered. In the U.K., “exceptional leave to enter or remain” is granted to those fleeing civil war, generalized violence or environmental disasters. Violations of the right to family life are also considered as a possible ground for subsidiary protection. International human rights instruments play a pivotal role in helping decision-makers identify who may be in need of protection. Europeans see subsidiary status as vital to giving meaning to human rights obligations under instruments such as those listed above. By contrast, Canadians have given meaning to those instruments through their interpretation of persecution and particular social group under the Convention.

Some countries hear the applications for Convention refugee status and subsidiary protection at the same time, at one hearing (“consolidated grounds”). This is the kind of statutory scheme which IRPA will introduce. Countries that currently have consolidated grounds for protection include Sweden and Denmark. Other countries such as France, Germany, the Netherlands, the U.K. and the U.S., have separate procedures. A claimant applies for subsidiary protection once the claim for Convention refugee status has failed.

8.1. Sweden

An application for asylum in Sweden results in a single procedure in which the claimant tells his story and the decision-maker decides whether there are grounds for granting the claimant protection. The grounds are always considered in a particular order. First, the Convention is applied to the circumstances of the claim. If the facts do not support a granting of Convention refugee status, then the decision-maker goes on to consider whether Article 3 of the European Convention or CAT apply. Lastly, humanitarian and compassionate grounds for granting protection are considered.

If the decision-maker finds that the Convention does not apply to the particular claim, reasons must be given to support that finding. The claimant has a right of appeal from a refusal of Convention refugee status even if granted protection under a different ground.

⁸¹ Jens Vesled-Hansen, “Complementary or subsidiary protection? Offering an appropriate status without undermining refugee protection.” Delivered at seminar on “International Protection Within One Single Asylum Procedure” Norrköping, Sweden, April 23-24, 2001.

The head of the Swedish determination system (Goran Hakensson, Director General of the Aliens Appeals Board), notes that the order in which the grounds are applied is critical to the maintenance of the integrity of the Convention. Where a claimant fits the criteria of a Convention refugee it is imperative that he or she be granted Convention refugee status and not a “lesser” protected status. It is important to note that in Sweden a claimant is granted the same rights whether he receives Convention refugee status or subsidiary status, so the importance of considering the Convention first is not to ensure the claimant the greater bundle of rights, but rather, to ensure the perpetuation of the proper development of the Convention itself.

8.2. Denmark

Denmark has had a consolidated procedure for granting protection since April , 2001. All the evidence in support of granting protection is heard in a single procedure. Decisions must be made based on the following sequencing. First, decision-makers apply the Convention to the facts. If the Convention is not applicable, then the European Convention and CAT are considered. Last, conditions in the country are considered. If there is general widespread violence, the claimant will be granted protection. Humanitarian and compassionate grounds are not considered within this single procedure. An H&C review is available by way of a separate application to the appropriate government department.

As in Sweden, claimants in Denmark receive the same level of protection and the same rights regardless of the whether there are found to be in need of protection under the Convention or due to violations of other human rights instruments.