Federal Court Cour fédérale

Date: 20241021

Docket: IMM-5291-23

Citation: 2024 FC 1647

Ottawa, Ontario, October 21, 2024

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

DIREN NACAR
RIZA NACAR

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicants, Riza Nacar and Diren Nacar, seek judicial review of the decision of a Senior Immigration Officer [the Officer] dated March 1, 2023, that refused their Pre-Removal Risk Assessment [PRRA] application.

[2] The Applicants argue that the Officer breached procedural fairness by not convening an oral hearing to determine their PRRA. They submit that the Officer made credibility findings

disguised as concerns about the sufficiency of their evidence and should, therefore, have convened an oral hearing. The Applicants further argue that the Officer's decision is not reasonable, including because the Officer misapprehended the evidence.

[3] For the reasons that follow, the Application is granted.

I. Background

[4] The Applicants, a married couple, are Turkish by citizenship, Kurdish by ethnicity and Alevi by religion. They allege that they cannot return to Turkey due to their Kurdish ethnicity and due to retaliatory measures taken against Riza Nacar [Riza] by Turkish authorities due to his activism and support for the leftist Pro Kurdish Peoples Democracy Party [the HDP]. Riza recounts many incidents of discrimination and harassment over his lifetime, including incidents that led his family to relocate from their village to Istanbul, where their harassment and discrimination continued due to their support for the pro-Kurdish political movement. Riza describes his support for the HDP and his participation in cultural and political events and other protests that resulted in his arrests and detentions in 2014, 2015 and 2021. Riza's narrative in support of the Applicants' PRRA describes many negative interactions with the police and other authorities due to his pro-Kurdish and pro-democracy activities and threats of harm and imprisonment while detained.

[5] The Applicants explain that following Riza's detention in October 2021, he was stopped at security checkpoints as he commuted to work and several of his friends who were also active HDP supporters were arrested; these events spurred their decision to leave Turkey.

[6] The Applicants recount that on November 9, 2021, they departed Turkey with the aid of a smuggler. They describe being questioned at the Istanbul airport regarding Riza's previous detentions, his association with other pro-Kurdish supporters and activists, including Berkan Bayer and Nihat Nacar, his involvement with the HDP and the purpose of his trip from Istanbul to Mexico. The Applicants flew to Mexico and remained for a week, then crossed into the United States and were detained by US immigration authorities for two weeks. Upon their release, they travelled to Buffalo and attempted to enter Canada at the Peace Bridge. They were refused entry to Canada due to the Canada–United States Safe Third Country Agreement, which requires refugee claimants to seek refugee protection in the first country of arrival. A few days later, on December 6, 2021, the Applicants entered Canada illegally on foot and surrendered themselves to the Canada Border Services Agency [CBSA].

[7] Given that Diren Nacar had previously withdrawn a claim for refugee protection in Canada, the Applicants were ineligible to make a claim for refugee protection, but were eligible for a Pre-Removal Risk Assessment [PRRA]. The Applicants submitted their PRRA in November 2022. The PRRA was refused on March 1, 2023.

II. The Decision under Review

[8] The Officer described the Applicants' background, noting that they fear persecution from the state due to Riza's political opinion and activism.

[9] The Officer accepted that Riza had participated in "some" activities in support of the HDP and Kurdish causes based on the affidavits, photos and social media posts submitted.

However, the Officer noted that Riza had not provided a letter of support from the HDP or explained why he was unable to do so, and that it was unclear whether he was a member of the HDP.

[10] The Officer acknowledged the affidavits of Nihat Nacar, Riza's uncle, and of Berkan Bayer, a long-time friend and pro-Kurdish activist now a refugee in Canada, noting that the affiants made only generalized statements about Riza's support and contributions to the HDP.

[11] The Officer acknowledged Riza's submission that he had been detained on three occasions, but noted the lack of any objective, corroborative evidence to "substantiate" these arrests. The Officer cited a Response to Information Request [RIR], which indicates that individuals are summoned by a written letter, phone calls and text messages, and where the arrest is without a warrant, custody orders or minutes are issued. The Officer noted that the Applicants did not explain why they were not able to provide such objective evidence. The Officer also noted that Berkan Bayer's affidavit did not mention any details of Riza's arrests, as would be expected given their long friendship.

[12] The Officer concluded that the Applicants submitted insufficient evidence to demonstrate that Riza was arrested "multiple times" by state authorities in Turkey.

[13] The Officer further found that while there are reports of incidents of discrimination against the Kurdish Alevi people and supporters of the HDP and pro-democratic causes, these are "not so serious or repetitive in nature that it amounts to persecution". The Officer cited the

2020 UK Home Office Country Policy and Information Note [UK Home Office Report], which noted, among other things, that the risk faced will depend on the person's profile and that an ordinary HDP member is unlikely to attract adverse attention.

[14] The Officer acknowledged that Riza had participated in political activities and supported pro-Kurdish causes, but concluded that there was "little evidence to demonstrate that [he] has come to the adverse attention of the authorities", and little evidence that his general support from the HDP and pro-Kurdish causes, coupled with his Kurdish Alevi background has elevated his profile.

[15] The Officer concluded that there was insufficient evidence to demonstrate that the Applicants are at risk from the state because of Riza's political opinion. The Officer reiterated that there was insufficient evidence to show that Riza was arrested, and no new evidence that he is currently wanted in Turkey, including for his connection to his uncle Nihat Nacar or Berkan Bayer—both HDP activists who are now refugees in Canada.

III. The Applicants' Submissions

[16] The Applicants submit that the Officer erred by not convening an oral hearing in accordance with paragraph 113(b) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [the Act] and paragraph 167(a) of the *Immigration and Refugee Protection Act Regulations*, SOR/2002-227 [the Regulations].

[17] The Applicants argue that the Officer's finding of insufficient evidence of Riza's arrests and the other allegations of persecution are veiled credibility findings. The Applicants note that Riza's sworn declaration in support of the PRRA provided a personal and detailed account of his negative interactions with state authorities and his arrests and detentions, all of which resulted from his participation in Kurdish celebrations and in pro-HDP events and protests. The Applicants submit that the Officer's finding that their allegations were not corroborated shows that the Officer did not believe them, otherwise no corroboration would be necessary.

[18] The Applicants note that the Officer did not even address whether an oral hearing should be convened, but rather ticked off the applicable box indicating that there was no oral hearing.

[19] The Applicants submit that an oral hearing would have provided an opportunity to clarify the issues that the Officer failed to understand, particularly about Riza's detentions. The Applicants add that an oral hearing should have been convened because they had not previously had any hearing, given that they were not eligible to claim refugee protection.

[20] The Applicants further submit that the Officer erred in finding that they were not at risk. They argue that the Officer overlooked or misapprehended the evidence, including in the National Documentation Package [NDP] regarding the risks faced by the Kurdish Alevi people, particularly those who are actively supporting the HDP. The Applicants also argue that the Officer misunderstood the RIR regarding the arrest process and arrest warrants; the RIR indicates that no arrest warrant is issued "when the investigation concerns more serious allegations, e.g. anti-terror legislation and politically sensitive cases".

[21] The Applicants point to Riza's narrative, declared by him to be true, describing the circumstances of his detentions and arrests. They argue that Riza was arrested without a warrant, and; therefore, he could not produce any such warrant. The Applicants also point to the documentary evidence, which explains that despite prohibitions on arbitrary arrests, these occur frequently and many anti-government protesters have been rounded up, detained and abused.

[22] The Applicants further submit that the Officer erred in finding that Berkan Bayer's affidavit was not sufficient to corroborate that Riza had been detained and arrested by Turkish police. The Applicants acknowledge that Berkan Bayer did not set out the details of Riza's arrests; but submit that this evidence is consistent in noting that Riza had participated in cultural and political activities in support of the pro-Kurdish political movement and that the Applicants "faced serious problems for their family background, for their support of the Kurdish cause, and also their involvement in the HDP". Berkan Bayer also attested that Riza had told him that it "was risky to live in Turkey", and recounted "the serious problems he had in connection with the support he had given…." The Applicants submit that Mr. Bayer's repeated references to the "problems" they faced corroborate their evidence of their treatment by Turkish authorities.

[23] The Applicants argue that the Officer concluded that Riza did not have a profile that would attract adverse attention without considering the totality of the evidence and contrary to new evidence, which was a letter from Riza's parents describing their interrogation by the police, following Riza's departure.

IV. The Respondent's Submissions

[24] The Respondent submits that the Officer was not required to convene an oral hearing as the factors that guide the need for an oral hearing were not present; there were no credibility issues. The Respondent submits that the Officer is entitled to weigh the probative value and sufficiency of the evidence without assessing credibility.

[25] The Respondent submits that the Officer considered all the allegations of risk and all the evidence and reasonably concluded that the Applicants would not face a risk of persecution or a risk of cruel or unusual treatment or punishment. The Respondent submits that the Applicants are asking the Court to reweigh the evidence, which is not the Court's role on judicial review.

[26] The Respondent submits that the Officer was not required to simply accept Riza Nacar's contention that he was arrested three times without evidence to support this claim.

[27] The Respondent disputes that the Officer overlooked any evidence submitted by the Applicants. The Respondent notes that given the lack of objective evidence submitted by the Applicants, the Officer relied on the NDP and the 2020 UK Home Office Report on the treatment of Kurdish people in Turkey. The Respondent submits that any risk of violence or persecution to those with a Kurdish Alevi background is a generalized risk; the Applicants have not demonstrated that they would personally be subjected to such persecution.

V. The Issues and Standard of Review

[28] A PRRA officer's determination of risk is reviewed on the reasonableness standard because this is a question of mixed fact and law (*Kadder v Canada (Citizenship and Immigration)*, 2016 FC 454 at para 11; *Garces Canga v Canada (Citizenship and Immigration)*, 2020 FC 749 at paras 19–20 [*Garces Canga*]).

[29] In *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16, 23 [*Vavilov*], the Supreme Court of Canada confirmed that reasonableness is the applicable standard of review for discretionary decisions and has provided extensive guidance to the courts in reviewing a decision for reasonableness.

[30] A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision-maker (*Vavilov* at paras 85, 102, 105–110). Decisions should not be set aside unless there are serious shortcomings that are sufficiently central or significant to render the decision unreasonable (*Vavilov* at para 100).

[31] The review of the issue of whether the Officer erred by not convening an oral hearing should also be reviewed on the reasonableness standard. Although, in the context of a PRRA and the application of paragraph 113(b) of the Act and section 167 of the Regulations, there are two lines of jurisprudence, the prevailing view, which I adopt, is that this is an issue of mixed fact and law to be determined on the reasonableness standard (see for example, *Huang v Canada*

(Citizenship and Immigration), 2018 FC 940 at para 16; *AB v Canada (Citizenship and Immigration)*, 2019 FC 165 at para 11; *Garces Canga* at para 23; *Ritual v Canada (Citizenship and Immigration)*, 2021 FC 717 at para 29; *Hare v Canada (Citizenship and Immigration)*, 2020 FC 763 at paras 11-12).

VI. The Statutory Provisions

[32] Section 113 of the Act provides:

113 Consideration of an application for protection shall be as follows:	**113** Il est disposé de la demande comme il suit :
(a) an applicant whose claim to refugee protection has been rejected may present only new evidence that arose after the rejection or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of the rejection;	**a)** le demandeur d'asile débouté ne peut présenter que des éléments de preuve survenus depuis le rejet ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'il n'était pas raisonnable, dans les circonstances, de s'attendre à ce qu'il les ait présentés au moment du rejet;
(b) a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required;	**b)** une audience peut être tenue si le ministre l'estime requis compte tenu des facteurs réglementaires;

[33] Section 167 of the Regulations provide:

167 For the purpose of determining whether a hearing is required under paragraph 113(b) of the Act, the factors are the following:	**167** Pour l'application de l'alinéa 113b) de la Loi, les facteurs ci-après servent à décider si la tenue d'une audience est requise :

(a) whether there is evidence that raises a serious issue of the applicant's credibility and is related to the factors set out in sections 96 and 97 of the Act;	**a)** l'existence d'éléments de preuve relatifs aux éléments mentionnés aux articles 96 et 97 de la Loi qui soulèvent une question importante en ce qui concerne la crédibilité du demandeur;
(b) whether the evidence is central to the decision with respect to the application for protection; and	**b)** l'importance de ces éléments de preuve pour la prise de la décision relative à la demande de protection;
(c) whether the evidence, if accepted, would justify allowing the application for protection.	**c)** la question de savoir si ces éléments de preuve, à supposer qu'ils soient admis, justifieraient que soit accordée la protection.

VII. The Officer did not make veiled credibility findings; an oral hearing was not required

[34] There is a great deal of jurisprudence on the distinction between credibility findings and findings of insufficient evidence. The jurisprudence recognizes that in some circumstances, there is a fine line to be drawn and the Court must look beyond the language used by the decision maker to assess whether findings of insufficiency may be disguised or veiled credibility findings (*Majali v Canada (Citizenship and Immigration)*, 2017 FC 275 at para 31; *Garces Canga* at para 35).

[35] A decision-maker may find that evidence is not sufficient without making any determination of credibility. In other words, the evidence is accepted as truthful but found not to be enough to establish the claim. As noted by Justice Boswell in *AB v Canada (Citizenship and Immigration)*, 2020 FC 498 at para 115:

> [115] A PRRA officer does not make an adverse credibility finding every time he or she concludes that the evidence adduced by an applicant is insufficient to meet the applicant's evidentiary burden of proof (*Herman v Canada (Minister of Citizenship and Immigration*), 2010 FC 629 at para 17 [*Herman*]). There is a difference between the burden of proof, standard of proof, and the quality of the evidence necessary to meet the standard of proof (*Carillo v Canada (Minister of Citizenship and Immigration*), 2008 FCA 94 at para 16). A PRRA officer can make a negative credibility finding or simply disbelieve the evidence presented by the applicant. This approach is different from not being persuaded that an applicant has met his or her burden of proof on a balance of probabilities, without ever having considered whether the evidence is credible (*Herman*, at para 17).

[36] Whether a finding of insufficient evidence is a disguised credibility finding depends on several considerations, including the language used by the decision maker, the context, and the analysis. In the present case, the Officer refers only to insufficient evidence to establish both the arrests and detention and the risks alleged. The Officer does not make any reference to inconsistencies or omissions in the Applicants' account or in the affidavits provided in support. The Officer's findings regarding the lack of corroborative or objective evidence, on its own, does not lead to the conclusion that the Officer doubted the Applicants' credibility.

[37] In *Magonza v Canada (Minister of Citizenship and Immigration)*, 2019 FC 14, Justice Grammond explained "sufficiency" at paras 33-35:

> [33] Another manner of conveying the concept of sufficiency is to require corroboration: evidence that stands alone may not be sufficient. Of course, there is no accepted manner of quantifying credibility, probative value and weight. Thus, it is impossible to describe in advance what "amount" of evidence is "sufficient." "Sufficiency" is simply a word used by decision-makers to say that they are not convinced.
>
> [34] In refugee law, the central fact that must be proven is that there is "more than a mere possibility of persecution" (*Chan v*

> *Canada (Minister of Employment and Immigration)*, [1995] 3 SCR 593 at para 120, citing *Adjei v Canada (Minister of Employment and Immigration)*, [1989] 2 FC 680 (CA)). Usually, this can only be proved by indirect evidence and it is impossible to say in advance "how much." Deciding whether the evidence is sufficient is a practical judgment made on a case-by-case basis.
>
> [35] Because it is difficult to describe in words or in numbers the amount of evidence that will be sufficient to buttress a claim, sufficiency is an issue that will attract much deference on the part of reviewing courts (*Perampalam* at para 31). But like other factual findings, findings of insufficiency must be explained. One problem that often arises is that an "insufficient evidence" conclusion is really a manner of disguising an unexplained (or "veiled") credibility finding (*Liban v Canada (Citizenship and Immigration)*, 2008 FC 1252 at para 14; *Begashaw v Canada (Citizenship and Immigration)*, 2009 FC 1167 at paras 20–21; *Adetunji v Canada (Citizenship and Immigration)*, 2011 FC 869 at para 11; *Abusaninah v Canada (Citizenship and Immigration)*, 2015 FC 234 at para 54 [*Abusaninah*]; *Majali v Canada (Citizenship and Immigration)*, 2017 FC 275 [*Majali*]; *Ahmed* at para 38). Decision-makers should not "move the goalposts," as it were, when they have mere suspicions about credibility that they are unable to explain.

[38] In *Azzam v Canada (Citizenship and Immigration)*, 2019 FC 549 at para 30 [*Azzam*]. Justice Grammond again explained the concept of "sufficiency":

> Evidence is said to be sufficient if it meets the burden of proof. Given that, in immigration matters, that burden is on a balance of probabilities standard, evidence will only be deemed sufficient if [it] makes the existence of the fact at issue "more likely than not" – which is the definition of the balance of probabilities standard. Conversely, evidence is insufficient if the fact at issue remains unlikely.

[39] Evidence may be found insufficient if it stands alone and is uncorroborated: *Magonza* at para 33; *Azzam* at para 33; *Sallai v Canada (Citizenship and Immigration)*, 2019 FC 446 at para 56. Evidence may also be found insufficient "where it does not contain enough detail to persuade

the decision-maker of the existence of the facts necessary to trigger the application of a legal rule" (*Azzam* at para 33; *Adeleye v Canada (Citizenship and Immigration)*, 2020 FC 640 at paras 10, 13; *Olusola v Canada (Immigration, Refugees and Citizenship)*, 2019 FC 46 at para 18).

[40] In *Senadheerage v Canada (Citizenship and Immigration)*, 2020 FC 968 at paras 23–35 [*Senadheerage*], Justice Grammond acknowledged the divergence in this Court's jurisprudence on objective corroborative evidence and offered further guidance. Justice Grammond explained that a decision-maker can require corroborative evidence if: (1) the decision-maker clearly sets out an independent reason for requiring corroboration, such as doubts regarding the applicant's credibility, implausibility of the applicant's testimony or the fact that a large portion of the claim is based on hearsay; or (2) if the evidence could reasonably be expected to be available and, after being given an opportunity to do so, the applicant failed to provide a reasonable explanation for not obtaining it (*Senadheerage* at para 36).

[41] In the present case, the Officer clearly expected that objective evidence of Riza's arrests would be available (whether this was a reasonable expectation is canvassed below) and therefore, sought corroborative evidence. The Officer did not err in characterizing his conclusion that the evidence did not provide sufficient detail to establish the claim on a balance of probabilities as "insufficient evidence". This was not a disguised credibility finding.

[42] In the present case, the Officer did not err by determining the PRRA without convening an oral hearing; however, it may have been a better approach to do so to further explore the evidence and probe the Applicants' account.

VIII. The Decision is Not Reasonable

[43] The Officer's conclusion that the Applicants submitted insufficient evidence that they are at risk because of their political opinion is not justified by the totality of the evidence including Riza's evidence, the affidavits and the country condition documents.

[44] The Officer was not satisfied that Riza had established that he was detained and/or arrested on three occasions and had several other negative interactions with the police due to his political opinion and activities. The Officer's expectation that Riza would provide objective evidence to support his HDP membership, activism and arrests was not reasonable given the country condition documents.

[45] The Officer narrowly construed or misapprehended the country condition documents regarding when an arrest warrant would be expected. While it is true that Riza did not provide objective evidence of his three arrests such as warrants or other documents, he did explain the circumstances of his detentions and arrests on each occasion. The country condition documents do not confirm that an arrest for particular activities would result in a warrant, a summons or "minutes" in the circumstances described by Riza. I agree with the Applicants that the criminal process in Turkey is far more complex. Moreover, the country condition documents acknowledge that the authorities do not consistently follow the law or their own procedures. The type of corroboration expected by the Officer may simply not have been possible.

[46] With respect to the Officer's findings that there was insufficient objective corroborative evidence, the Officer again narrowly construed the supporting affidavits. Although the weight to be attributed to the evidence is for the Officer to determine, the Officer erred by finding that the affidavits from Berkan Bayer and Nihat Nacar were not consistent with Riza's account simply because they did not include a description of Riza's arrests, as the Officer expected. While it is true that these affidavits did not specifically describe Riza's arrests in 2014, 2015 or 2021, their descriptions of Riza's experiences due to his pro-Kurdish, pro-HDP activities are consistent with Riza's own evidence in his narrative in support of the PRRA. The objective country condition documents also describe similar outcomes for persons who engage in activities in support of the HDP. The Officer appears to have drawn a negative inference from the lack of details of Riza's arrests, rather than assessing whether the affidavits provided otherwise consistent evidence.

[47] The affidavit of Berkan Bayer states, among other things, that Riza is a well-known supporter of the pro-Kurdish HDP, that he participated in political activities, and that the Applicants "faced serious problems" for their family background, for their support for the Kurdish cause, their involvement with the HDP and anti-government activities against the Turkish government. He also repeatedly referred to "the serious problems" Riza had faced from the Turkish government due to his support for the HDP.

[48] The affidavit of Nihat Nacar provides similar information, including that the Applicants left Turkey due to the risk they faced from their support for the Kurdish cause, that Riza is a well-known supporter, and that other Kurdish activists with the same profile as Riza have also been arrested.

[49] Both affiants indicated their willingness to provide further evidence as needed.

[50] The Officer also appears to have expected Riza to produce a membership card in the HDP. However, Riza did not state that he was a member or held a membership card, but rather that he was a supporter of the HDP and an activist.

[51] The UK Home Office Report, relied on by the Officer, states at section 5.3.1 that the HDP do not provide membership cards or document cards. Supporters of the HDP are not required to register, whereas members register in an online system. The same report further notes that 30,000 to 40,000 HDP members registered at the Court of Cassation; however, six million people voted for—i.e., supported—the HDP in elections. In light of this evidence, it appears unlikely that the Applicants could have obtained a letter or some document to show their support for the HDP.

[52] The Officer relied on the UK Home Office Report to find that "while there are reports and incidents of discrimination against the above mentioned groups, they are not so serious or repetitive in nature that it amounts to persecution." The Officer cited section 2.4.15, which states that "simply being a member or supporter of the HDP is not likely to result in a person facing persecution", but further states:

> When ordinary members of the HDP have come to the adverse attention of the authorities, this has generally been whilst participating in demonstrations and rallies, or for being vocal in criticising the government or the president or speaking out on Kurdish political issues, or for taking an active and visible interest in the court case of a relative who is high-profile member of the HDP. Otherwise, an ordinary member is less likely to attract the adverse attention of the authorities on account of their political

> beliefs. It will be up to each person to demonstrate that their membership or support of the HDP (or their perceived membership or support) will have brought them to the adverse attention of the authorities to such an extent that they would experience a risk of serious harm or persecution on return. [My emphasis]

[53] The Officer's finding that Riza did not have a profile that would bring him to the attention of Turkish authorities appears to overlook that Riza had come to the attention of Turkish authorities.

[54] The Officer acknowledged that "he [Riza] participated in some activities in support of the HDP and pro-Kurdish causes", and the supporting evidence corroborates that Riza was an activist and participated in demonstrations and protests. The Applicants' evidence and the corroborating evidence described that Riza participated in demonstrations, rallies and other activities. The affidavits of Berkan Bayer and Nihat Nacar state that Riza was "well known". Even if the Officer discounted the evidence of Riza's arrests, Riza's narrative recounting many altercations with authorities due to his participation in protests and his questioning at the Istanbul airport regarding his past detentions, supports that his profile was not that of an "ordinary member".

[55] In conclusion, the Officer's finding that the Applicants failed to establish their claim pursuant to sections 96 or 97 of the Act lacks justification and must be redetermined.

JUDGMENT in file IMM-5291-23

THIS COURT'S JUDGMENT is that:

1. The Application for Judicial Review is granted.
2. The Applicants Pre-Removal Risk Assessment must be redetermined by a different Officer.
3. There is no question for certification.

"Catherine M. Kane"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

D. Clifford Luyt	FOR THE APPLICANTS
Pavel Filatov	FOR THE RESPONDENT

SOLICITORS OF RECORD:

D. Clifford Luyt Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANTS
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT