Federal Court Cour fédérale

Date: 20170609

Docket: IMM-3198-16

Citation: 2017 FC 564

Montréal, Quebec, June 9, 2017

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

MEDIATRICE UMWIZERWA

Applicant

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

I. Overview

> It is frequently recognized that a person who – or whose family – has suffered under atrocious forms of persecution should not be expected to repatriate. Even though there may have been a change of regime in his country, this may not always produce a complete change in the attitude of the population, nor, in view of his past experiences, in the mind of the refugee. [Emphasis added.]
>
> (As quoted in *Canada (Minister of Employment and Immigration) v Obstoj* (FCA), [1992] 2 FC 739, [1992] FCJ No 422 [*Obstoj*] as an excerpt from the UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* at para 136.)

[1] The Court finds that the Officer erred by failing to consider the refugee status recognized to the Applicant and her husband by the UNHCR and to acknowledge the deaths of their families in Rwanda amounted to past persecution. In doing so, the Officer did not make an explicit finding about past persecution and avoided the issue of compelling reasons.

[2] The Court finds that the *Obstoj* judgment of the Federal Court of Appeal has already resolved the matter in the most exceptional cases, as set out in that decision as per the most exceptional reasons of those whose natures are such that they cannot face life again in countries where they lost their families, history and past; and, that is due to their exceptional delicate psychological states. In this case, the family remained in a refugee camp for twenty years rather than return to the place of origin of the events.

II. Nature of the Matter

[3] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of the decision rendered by an immigration officer [Officer] based at the High Commission of Canada, in Pretoria, South Africa. By letter dated June 1, 2016, the Officer denied the Applicant's application for permanent residence as a Convention Refugee Abroad and Humanitarian-Protected Person Abroad, pursuant to the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR].

III. Background

[4] The Applicant (aged 32) and her husband (aged 34) are citizens of Rwanda and live in the

Dzaleka Refugee Camp in Malawi, with their two children (aged 9 and 4). They left Rwanda in the aftermath of the 1994 genocide: the Applicant lost her parents and three siblings who suffered dysentery and her husband's parents were killed. They met in the camp in 2005 and married in 2006.

[5] In 2014, the Applicant and her family applied for permanent residence in Canada in the Convention Refugees Abroad Class. The application was privately sponsored by the Anglican Diocese of Montréal. The Applicant hoped to be reunited with her brother and sister, now both established in Canada.

[6] On March 15, 2016, the Officer interviewed the Applicant and her husband with an interpreter at the refugee camp.

IV. Impugned Decision

[7] By letter dated June 1, 2016, the Officer denied the Applicant's application for permanent residence as a Convention Refugee Abroad and Humanitarian-Protected Person Abroad.

[8] The Officer found that the Applicant and her husband did not qualify as refugees under section 96 of the IRPA. Considering the positive changes in Rwanda since 1994, the Applicant and her husband did not satisfy the requirements thereof, having failed to establish a well-founded objective fear of persecution in their country of origin based on race, religion, nationality, membership in a particular social group or political opinion.

[9] Also, the Officer concluded that the Applicant and her husband were not seriously and personally affected by civil war, armed conflict or massive violation of human rights in their country of nationality, in accordance with section 147 of the IRPR, despite the fact of that which had occurred to their respective families as to how it had affected each one of them respectively.

[10] Consequently, the Officer was not satisfied that the Applicant met the requirements of paragraph 139(1)(e) of the IRPR.

V. Issues

[11] The parties submit following issues:

1. Did the Officer err in concluding that the Applicant did not qualify for Canadian permanent residence as a member of the Convention Refugee Abroad Class or of the Country of Asylum Class?
2. Did the Officer err in failing to consider whether subsection 108(4) of the IRPA ought to be applied?

VI. Relevant Provisions

[12] The following provisions are applicable in the proceedings.

Section 96 of the IRPA:

Convention refugee	**Définition de *réfugié***
96 A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race,	**96** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée

religion, nationality, membership in a particular social group or political opinion,	du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Paragraph 108(1)(e) and subsection 108(4) of the IRPA:

Cessation of Refugee Protection	**Perte de l'asile**
Rejection	**Rejet**
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:	**108** (1) Est rejetée la demande d'asile et le demandeur n'a pas qualité de réfugié ou de personne à protéger dans tel des cas suivants :
…	[…]
(e) the reasons for which the person sought refugee protection have ceased to exist.	e) les raisons qui lui ont fait demander l'asile n'existent plus.
…	[…]
Exception	**Exception**
(4) Paragraph (1)(e) does not apply to a person who establishes that there are compelling reasons arising out of previous persecution,	(4) L'alinéa (1)e) ne s'applique pas si le demandeur prouve qu'il y a des raisons impérieuses, tenant à des persécutions, à la torture ou à

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.

des traitements ou peines antérieurs, de refuser de se réclamer de la protection du pays qu'il a quitté ou hors duquel il est demeuré.

Subsection 139(1) of the IRPR:

General requirements

139 (1) A permanent resident visa shall be issued to a foreign national in need of refugee protection, and their accompanying family members, if following an examination it is established that

(a) the foreign national is outside Canada;

(b) the foreign national has submitted an application for a permanent resident visa under this Division in accordance with paragraphs 10(1)(a) to (c) and (2)(c.1) to (d) and sections 140.1 to 140.3;

(c) the foreign national is seeking to come to Canada to establish permanent residence;

(d) the foreign national is a person in respect of whom there is no reasonable prospect, within a reasonable period, of a durable solution in a country other than Canada, namely

(i) voluntary repatriation or resettlement in their country of nationality or habitual residence, or

Exigences générales

139 (1) Un visa de résident permanent est délivré à l'étranger qui a besoin de protection et aux membres de sa famille qui l'accompagnent si, à l'issue d'un contrôle, les éléments suivants sont établis :

a) l'étranger se trouve hors du Canada;

b) il a fait une demande de visa de résident permanent au titre de la présente section conformément aux alinéas 10(1)a) à c) et (2)c.1) à d) et aux articles 140.1 à 140.3;

c) il cherche à entrer au Canada pour s'y établir en permanence;

d) aucune possibilité raisonnable de solution durable n'est, à son égard, réalisable dans un délai raisonnable dans un pays autre que le Canada, à savoir :

(i) soit le rapatriement volontaire ou la réinstallation dans le pays dont il a la nationalité ou dans lequel il

(ii) resettlement or an offer of resettlement in another country;

(e) the foreign national is a member of one of the classes prescribed by this Division;

(f) one of the following is the case, namely

(i) the sponsor's sponsorship application for the foreign national and their family members included in the application for protection has been approved under these Regulations,

(ii) in the case of a member of the Convention refugee abroad class, financial assistance in the form of funds from a governmental resettlement assistance program is available in Canada for the foreign national and their family members included in the application for protection, or

(iii) the foreign national has sufficient financial resources to provide for the lodging, care and maintenance, and for the resettlement in Canada, of themself and their family members included in the application for protection;

(g) if the foreign national intends to reside in a province other than the Province of Quebec, the foreign national and their family members included in the application for protection will be able to become successfully

avait sa résidence habituelle,

(ii) soit la réinstallation ou une offre de réinstallation dans un autre pays;

e) il fait partie d'une catégorie établie dans la présente section;

f) selon le cas :

(i) la demande de parrainage du répondant à l'égard de l'étranger et des membres de sa famille visés par la demande de protection a été accueillie au titre du présent règlement,

(ii) s'agissant de l'étranger qui appartient à la catégorie des réfugiés au sens de la Convention outre-frontières, une aide financière publique est disponible au Canada, au titre d'un programme d'aide, pour la réinstallation de l'étranger et des membres de sa famille visés par la demande de protection,

(iii) il possède les ressources financières nécessaires pour subvenir à ses besoins et à ceux des membres de sa famille visés par la demande de protection, y compris leur logement et leur réinstallation au Canada;

g) dans le cas où l'étranger cherche à s'établir dans une province autre que la province de Québec, lui et les membres de sa famille visés par la demande de protection pourront réussir leur établissement au Canada,

established in Canada, taking into account the following factors:

(i) their resourcefulness and other similar qualities that assist in integration in a new society,

(ii) the presence of their relatives, including the relatives of a spouse or a common-law partner, or their sponsor in the expected community of resettlement,

(iii) their potential for employment in Canada, given their education, work experience and skills, and

(iv) their ability to learn to communicate in one of the official languages of Canada;

(h) if the foreign national intends to reside in the Province of Quebec, the competent authority of that Province is of the opinion that the foreign national and their family members included in the application for protection meet the selection criteria of the Province; and

(i) subject to subsections (3) and (4), the foreign national and their family members included in the application for protection are not inadmissible.

compte tenu des facteurs suivants :

(i) leur ingéniosité et autres qualités semblables pouvant les aider à s'intégrer à une nouvelle société,

(ii) la présence, dans la collectivité de réinstallation prévue, de membres de leur parenté, y compris celle de l'époux ou du conjoint de fait de l'étranger, ou de leur répondant,

(iii) leurs perspectives d'emploi au Canada vu leur niveau de scolarité, leurs antécédents professionnels et leurs compétences,

(iv) leur aptitude à apprendre à communiquer dans l'une des deux langues officielles du Canada;

h) dans le cas où l'étranger cherche à s'établir dans la province de Québec, les autorités compétentes de cette province sont d'avis que celui-ci et les membres de sa famille visés par la demande de protection satisfont aux critères de sélection de cette province;

i) sous réserve des paragraphes (3) et (4), ni lui ni les membres de sa famille visés par la demande de protection ne sont interdits de territoire.

Sections 145, 146 and 147 of the IRPR:

Member of Convention refugees abroad class	**Qualité**
145 A foreign national is a Convention refugee abroad and a member of the Convention refugees abroad class if the foreign national has been determined, outside Canada, by an officer to be a Convention refugee.	**145** Est un réfugié au sens de la Convention outre-frontières et appartient à la catégorie des réfugiés au sens de cette convention l'étranger à qui un agent a reconnu la qualité de réfugié alors qu'il se trouvait hors du Canada.
Humanitarian-protected Persons Abroad	**Personnes protégées à titre humanitaire outre-frontières**
Person in similar circumstances to those of a Convention refugee	**Personne dans une situation semblable à celle d'un réfugié au sens de la Convention**
146 (1) For the purposes of subsection 12(3) of the Act, a person in similar circumstances to those of a Convention refugee is a member of the country of asylum class.	**146** (1) Pour l'application du paragraphe 12(3) de la Loi, la personne dans une situation semblable à celle d'un réfugié au sens de la Convention appartient à la catégorie de personnes de pays d'accueil.
Humanitarian-protected persons abroad	**Personnes protégées à titre humanitaire outre-frontières**
(2) The country of asylum class is prescribed as a humanitarian-protected persons abroad class of persons who may be issued permanent resident visas on the basis of the requirements of this Division.	(2) La catégorie de personnes de pays d'accueil est une catégorie réglementaire de personnes protégées à titre humanitaire outre-frontières qui peuvent obtenir un visa de résident permanent sur le fondement des exigences prévues à la présente section.
Member of country of asylum class	**Catégorie de personnes de pays d'accueil**
147 A foreign national is a member of the country of asylum class if they have been determined by an officer to be in need of resettlement because	**147** Appartient à la catégorie de personnes de pays d'accueil l'étranger considéré par un agent comme ayant besoin de se réinstaller en raison des

	circonstances suivantes :
(a) they are outside all of their countries of nationality and habitual residence; and	a) il se trouve hors de tout pays dont il a la nationalité ou dans lequel il avait sa résidence habituelle;
(b) they have been, and continue to be, seriously and personally affected by civil war, armed conflict or massive violation of human rights in each of those countries.	b) une guerre civile, un conflit armé ou une violation massive des droits de la personne dans chacun des pays en cause ont eu et continuent d'avoir des conséquences graves et personnelles pour lui.

VII. Analysis

A. *Did the Officer err in concluding that the Applicant did not qualify for Canadian permanent residence as a member of the Convention Refugee Abroad Class or of the Country of Asylum Class?*

(1) Submissions by the Applicant

[13] The Applicant submits that the Officer's decision is flawed since he ignored evidence and failed to justify his findings. The Applicant and her husband, who were recognized as refugees by the UNHCR, expressed their fear of persecution and their trauma, both in their written application and during their interview. They submitted objective reports indicating that serious and systemic human rights violations were perpetuated in Rwanda. According to the Applicant, the Officer failed to cite evidence in support of his findings pertaining to the change of circumstances in Rwanda (*Kanapathipillai v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8195 (FC), IMM-5186-97 at para 5; *Omoregbe v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1189, IMM-6710-03 at para 26; *Cepeda-Gutierrez v Canada*

(Minister of Citizenship and Immigration), 1998 CanLII 8669 (FC), [1998] FCJ NO 1425 at paras 16-17).

(2) Submissions by the Respondent

[14] The Respondent contends that the Officer's conclusion that the Applicant is not a Convention refugee or a member of the Country of Asylum Class is reasonable. The Applicant provided subjective and speculative evidence with respect to the prospective risk faced in Rwanda and failed to contradict that the situation in her country of origin had greatly changed since the 1994 genocide. Relying on *Pushparasa v Canada (Citizenship and Immigration)*, 2015 FC 828 at para 27 [*Pushparasa*], the Respondent further argues that although the Applicant was recognized as refugee by the UNHCR, she still bore the onus to prove that she was at risk.

(3) Respondent's additional representations

[15] The Respondent states from the outset that the interpretation as to the compelling reasons exception is not relevant to the present case, as the only relevant issue is to decide whether the Officer should have undertaken an analysis under subsection 108(4) of the IRPA. For the exception of paragraph 108(1)(e) of the IRPA to be considered, the Applicant must have established (i) that she was a refugee or a person in need of protection at some point in the past; and (ii) that she no longer is a refugee or a person in need of protection due to a change of circumstances in her country (*Jairo v Canada (Citizenship and Immigration)*, 2014 FC 622 at para 26 [*Jairo*]; *Yamba v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 457, 2000 Can LII 15191 at para 6 [*Yamba*]). Since the Officer never made a finding – explicit or

implicit – that the Applicant had suffered past persecution and that the conditions of paragraph 108(1)(e) were met, no analysis under subsection 108(4) of the IRPA was necessary and there was no need to establish whether compelling reasons were present. (That, although the Applicant and her husband had lost their closest family members.)

[16] The Respondent submits that even when an implicit finding was accepted by the Court in different cases, the facts of each case were obvious and unambiguously led to a finding of past persecution (*Jairo*, above; *Cabdi v Canada (Citizenship and Immigration)*, 2016 FC 26 [*Cabdi*]; *Buterwa v Canada (Citizenship and Immigration)*, 2011 FC 1181; *Decka v Canada (Minister of Citizenship and Immigration)*, 2005 FC 822). The Applicant and her family were never direct victims of previous persecution or other acts giving rise to a protected person status.

(4) Applicant's response

[17] The Applicant claims that the Respondent takes a rigid and formalistic approach contrary to the Refugee Convention and to the Federal Court of Appeal (*Yamba*, above; *Jairo*, above, at para 27; *Obstoj*, above; *Cabdi*, above, at para 33) when stating that absent an explicit finding that the Applicant was a refugee in the past, there was no need to address subsection 108(4) of the IRPA. Such a narrow interpretation of the law could have a negative bearing on the protection of refugee families.

[18] The Applicant disagrees with the Respondent's argument that the prior recognition of refugee status by the UNHCR is insufficiently explicit regarding past persecution. <u>She submits that the Respondent's argument that the Applicant's past persecution is not sufficiently</u>

compelling because they were not directly persecuted and they did not witness their parents being killed is a restrictive interpretation which does not comport with common sense nor with the Refugee Convention principles (UNHCR Handbook, at paragraph 136). (It is recognized that the UNHCR Handbook has been used in jurisprudence previously, as in the *Obstoj* decision of the Federal Court of Appeal.)

(5) Analysis

[19] It is trite law that an immigration officer's findings as to whether an applicant meets the requirements of the law to qualify as a Convention refugee or as a member of the Country of Asylum class, is a question of mixed fact and law reviewable on a standard of reasonableness (*Pushparasa*, above, at para 19; *Janvier v Canada (Citizenship and Immigration)*, 2015 FC 278 at para 21; *Bakhtiari v Canada (Citizenship and Immigration)*, 2013 FC 1229 at para 22).

[20] The Court finds that the Officer's decision fails to exhibit justification, transparency and intelligibility. It must be noted that the Applicant and her husband have been recognized as refugees by the UNHCR and that they have been in a protracted camp situation in Dzaleka for over twenty years.

[21] As demonstrated by the interview notes consigned in the Computer Assisted Immigration Processing System, when asked by the Officer to explain how they risked persecution in Rwanda at the present time, the Applicant and her husband answered that they left Rwanda after their family were decimated by sickness and killings, that they were traumatized and that they could not imagine returning to this country. They stated that they no longer had family in Rwanda and

that they had lost their properties. Finally, they noted that people were still fleeing Rwanda and that they feared to return there (Applicant's Record, at pp 9-10).

[22] The relevance of paragraph 136 of the UNHCR Handbook must be underlined here:

> The second paragraph of this clause contains an exception to the cessation provision contained in the first paragraph. It deals with the special situation where a person may have been subjected to very serious persecution in the past and will not therefore cease to be a refugee, even if fundamental changes have occurred in his country of origin. The reference to Article 1 A (1) indicates that the exception applies to "statutory refugees". At the time when the 1951 Convention was elaborated, these formed the majority of refugees. The exception, however, reflects a more general humanitarian principle, which could also be applied to refugees other than statutory refugees. It is frequently recognized that a person who – or whose family – has suffered under atrocious forms of persecution should not be expected to repatriate. Even though there may have been a change of regime in his country, this may not always produce a complete change in the attitude of the population, nor, in view of his past experiences, in the mind of the refugee. [Emphasis added.]

[23] In *Cabdi*, above, Justice Patrick Gleeson has held:

> [33] There is some suggestion in the jurisprudence that a clear statement conferring the prior existence of refugee status on the claimant is required to trigger the compelling reasons exception in subsection 108(4) (for example *JNJ v Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 1088 para 41, 194 ACWS (3d) 1225). There is no clear statement in this case. However, there is also jurisprudence establishing that the finding can occur through implication arising from the reasoning set out in the decision (*Decka v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 822 paras 11–15, 140 ACWS (3d) 354; *Alharazim* at para 36; *Kumarasamy* at para 10). To require a clear statement where the finding of past persecution, albeit implicit, is a necessary implication arising from the reasoning of the decision, would, in my view, be to elevate form over substance. I am of the opinion that the RAD made an implicit finding of past persecution satisfying the first of the two preconditions. [Emphasis added.]

[24] In *Jairo*, above, Justice Yves de Montigny (formerly of the Federal Court, now of the Federal Court of Appeal) wrote for this Court:

> [27] I agree with counsel for the Applicants that where compelling reasons arising out of previous persecution are relevant to the determination of a refugee protection claim, the compelling reasons proviso must be explicitly considered, whether raised by the refugee protection claimant or not. The Board cannot avoid the issue of compelling reasons by not making an explicit finding about past persecution: *BTB v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1181; *Yamba v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 457; *Nagaratnam v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1208; *Rose v Canada (Minister of Citizenship and Immigration)*, 2004 FC 537. [Emphasis added.]

[25] The Court finds that the Officer erred by failing to consider the refugee status recognized to the Applicant and her husband by the UNHCR and to acknowledge the deaths of their families in Rwanda amounted to past persecution. In doing so, the Officer did not make an explicit finding about past persecution and avoided the issue of compelling reasons.

B. *Did the Officer err in failing to consider whether subsection 108(4) of the IRPA ought to be applied?*

(1) Submissions by the Applicant

[26] The Applicant claims that the Officer erred in failing to evaluate whether they were compelling grounds to grant refugee status for past persecution under subsection 108(4) of the IRPA considering the persecution they had suffered during the Rwanda genocidal civil war of 1994 (*Rose v Canada (Minister of Citizenship and Immigration)*, 2004 FC 537; *Kumarasamy v Canada (Citizenship and Immigration)*, 2012 FC 290; *Cabdi*, above).

(2) Submissions by the Respondent

[27] Relying on *Jairo*, above, and *Alfaka Alharazim v Canada (Citizenship and Immigration)*, 2010 FC 1044 [*Alharazim*], the Respondent argues that the Officer did not err by not conducting an analysis under subsection 108(4) of the IRPA: (1) the Applicant never made such submission to the Officer; (2) the Officer did not find that the Applicant had met the definition of a Convention refugee at some point in the past; and (3) the Officer did not have the duty to proactively consider the compelling reasons exception since the Applicant's evidence did not equate to *prima facie* evidence of "appalling and atrocious past persecution".

(3) Respondent's additional representations

[28] The Respondent reiterates that the interpretation of compelling reasons exception provided by subsection 108(4) of the IRPA is not relevant in the case before the Court.

[29] The Respondent relies on the interpretation and application of subsection 108(4) of the IRPA as per *Moya v Canada (Citizenship and Immigration)*, 2016 FC 315 [*Moya*], where this Court identified two lines of jurisprudence. The first stands for the idea that the compelling reasons exception is directed at a special and limited category which includes those who have suffered appalling persecution (*Moya*, above, at paras 103-104; see also *Obstoj*, above; *Alharazim*, above), and the second rejects the notion that past persecution must be atrocious and appalling, noting that a rigid test based on the level of atrocity should be avoided and that establishing compelling reasons is a factual determination based on all the evidence (*Suleiman v Canada (Minister of Citizenship and Immigration)*, [2005] 2 FCR 26, 2004 FC 1125 [*Suleiman*];

Kotorri v Canada (Minister of Citizenship and Immigration), 2005 FC 1195). In *Moya*, above, this Court concluded that even the second line of jurisprudence following *Suleiman*, above, did not reject the principle that compelling reasons exception is for a “special and limited category” and a “tiny minority” of refugee claimants (*Moya*, above, at para 123).

[30] The Respondent argues that the Applicant has neither presented evidence demonstrating past persecution that is appalling and atrocious, nor a situation that is applicable to a “tiny minority” of refugee claimants, despite the respective family situation of both. A vague and undetailed allegation of trauma, loss of family members and property, and an unwillingness to return to the country of origin are facts which are not exceptional as they would be applicable to almost all refugee claimants.

(4) Applicant’s response

[31] The Applicant submits that it would be irrational to require applicants in refugee camps to explicitly invoke legal provisions such as subsection 108(4) of the IRPA and reiterates the obligation for the Officer to consider whether the evidence presented establishes that there are compelling reasons (*Yamba*, above, at para 6).

(5) Analysis

[32] The applicability of subsection 108(4) is a question of mixed fact and law, and will be reviewed under the reasonableness standard (*Cabdi*, above, at para 18; *Rajadurai v Canada*

(Citizenship and Immigration), 2013 FC 532 at para 23; *Sow v Canada (Citizenship and Immigration)*, 2011 FC 1313 at para 21; *Alharazim*, above, at paras 16-25).

[33] The Court finds that the Officer should have analyzed whether the Applicant had demonstrated compelling reasons under subsection 108(4) of the IRPA.

[34] In the case at bar, since the Officer determined there was a change of circumstances in Rwanda, there was an obligation on his part to assess the compelling reasons exception provided by the law, for certain exceptional cases, wherein certain individuals cannot envisage a return. The past persecution of the closest family members, who died therefrom, appears clearly and the protracted camp situation of the Applicant and her family calls for a thorough analysis of the exception to paragraph 108(1)(e) of the IRPA, recognizing that the Applicant and her family preferred to stay in a refugee camp for twenty years rather than to return to a country which was the origin of their personalized trauma by loss of life and suffering.

[35] As stated in *Yamba*, above, at para 6:

> [6] In summary, in every case in which the Refugee Division concludes that a claimant has suffered past persecution, but this has been a change of country conditions under paragraph 2(2)(e), the Refugee Division is obligated under subsection 2(3) to consider whether the evidence presented establishes that there are "compelling reasons" as contemplated by that subsection. This obligation arises whether or not the claimant expressly invokes subsection 2(3). That being said the evidentiary burden remains on the claimant to adduce the evidence necessary to establish that he or she is entitled to the benefit of that subsection.

[36] Consequently, it was unreasonable for the Officer to disregard whether there were compelling grounds to grant refugee status under subsection 108(4) of the IRPA.

C. *Reflections as to potential question for certification*

[37] The Respondent submits following serious question of general importance for certification:

Does a finding that a person has suffered past persecution need to be expressly made by the decision-maker for the compelling reasons provision of subsection 108(4) of the *Immigration and Refugee Protection Act* to be considered?

[38] The Respondent refers to conflicting answers to this question in the Federal Court's jurisprudence and claims that clarity in interpretation of subsection 108(4) of the IRPA would be beneficial.

[39] The Applicant contends that the question formulated by the Respondent has been resolved by the Federal Court of Appeal in *Obstoj*, above, and the Court is in agreement therein:

> [19] There can be no doubt that in so doing Parliament has gone beyond what is required by the terms of the Convention. Article 1 C(5) of that document, clearly the inspiration for subsection 2(3) of our Act, in its terms applies only to so-called "statutory" refugees, i.e. those whose status as such had been recognized prior to the date of the Convention. On any reading of subsection 2(3) it must extend to anyone who has been recognized as a refugee at any time, even long after the date of the Convention. It is hardly surprising, therefore, that it should also be read as requiring Canadian authorities to give recognition of refugee status on humanitarian grounds to this special and limited category of persons, i.e. those who have suffered such appalling persecution that their experience alone is a compelling reason not to return

> them, even though they may no longer have any reason to fear further persecution. [Emphasis added.]
>
> [20] The exceptional circumstances envisaged by subsection 2(3) must surely apply to only a tiny minority of present day claimants. I can think of no reason of principle, and counsel could suggest none, why the success or failure of claims by such persons should depend upon the purely fortuitous circumstance of whether they obtained recognition as a refugee before or after conditions had changed in their country of origin. Indeed an interpretation which produced such a result would appear to me to be both repugnant and irrational. It would also, as noted, render paragraph 69.1(5)(b) quite incomprehensible.

[40] The Respondent replies that the decision *Obstoj* does not address the question submitted, as the question that the Federal Court of Appeal sought to clarify was whether the compelling reasons exception, as it then existed, only applied to claimants who already obtained a recognition as Convention refugees from the Refugee Division:

> [14] It follows, in my view, that since the Refugee Division, when conducting a hearing into a claim to refugee status, may hear evidence and consider questions raised by subsection 2(3), the credible basis tribunal, when deciding whether or not there is credible or trustworthy evidence on which the Refugee Division might find in the claimant's favour, is likewise so empowered.
>
> (*Obstoj*, above.)

[41] The Respondent relies on *Cabdi*, above, which presents the debate as to how a decider is to arrive at the conclusion of past persecution:

> [33] There is some suggestion in the jurisprudence that a clear statement conferring the prior existence of refugee status on the claimant is required to trigger the compelling reasons exception in subsection 108(4) (for example *JNJ v Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 1088 para 41, 194 ACWS (3d) 1225). There is no clear statement in this case. However, there is also jurisprudence establishing that the finding can occur through implication arising from the reasoning set out in

> the decision (*Decka v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 822 paras 11–15, 140 ACWS (3d) 354; *Alharazim* at para 36; *Kumarasamy* at para 10). [Emphasis added.]

[42] The Court specifies that the *Obstoj* judgment of the Federal Court of Appeal in its entirety for its detail should be read, recognized, acknowledged and understood for its clarity in application to the case at bar.

[43] The Court finds that the *Obstoj* judgment of the Federal Court of Appeal has already resolved the matter in the most exceptional cases, as set out in that decision as per the most exceptional reasons of those whose natures are such that they cannot face life again in countries where they lost their families, history and past; and, that is due to their exceptional delicate psychological states. In this case, the family remained in a refugee camp for twenty years rather than return to the place of origin of the events.

VIII. Conclusion

[44] The application for judicial review is granted.

JUDGMENT in IMM-3198-16

THIS COURT'S JUDGMENT is that the application for judicial review be granted. The matter is to be considered anew by a different decision-maker therein. There is no serious question of general importance to be certified in view of the jurisprudence already established by the Federal Court of Appeal directly thereon.

"Michel M.J. Shore"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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