Federal Court  Cour fédérale

Date: 20210827

Docket: IMM-7283-19

Citation: 2021 FC 892

[ENGLISH TRANSLATION]

Ottawa, Ontario, August 27, 2021

PRESENT: The Honourable Madam Justice Roussel

BETWEEN:

DOR, MFRO, DARO

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of a decision of the Refugee Appeal Division [RAD], dated November 20, 2019, dismissing the applicants' appeal for lack of jurisdiction under paragraph 110(2)(d) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The applicants argue that this provision contravenes subsection 15(1) of the *Canadian*

Charter of Rights and Freedoms, Part I of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c 11 [Charter].

[2] This is not the first time that this provision has been the subject of a constitutional challenge. In *Kreishan v Canada (Citizenship and Immigration)*, 2019 FCA 223 [*Kreishan*], the Federal Court of Appeal had to determine whether paragraph 110(2)(d) of the IRPA violated section 7 of the Charter. It held that paragraph 110(2)(d) of the IRPA does not implicate section 7 of the Charter.

[3] For the following reasons, the application for judicial review is dismissed.

II. Facts

[4] The female applicant and her two minor sons are citizens of Colombia.

[5] The female applicant is a psychologist by profession. From 2008 to 2017, she worked in a mental health clinic as coordinator of the addiction rehabilitation program. As a result of information she received in the course of her work and passed on to the authorities, a search was conducted in a drug sales and distribution centre. The female applicant then received several threats from drug dealers who stated that her work was detrimental to their business and that she and her family would have to suffer the consequences. The female applicant and her husband filed a report with the police and the prosecutor’s office on February 2, 2017.

[6] A few weeks later, she received another message telling her that if she loves her children, she should leave town. She returned to the prosecutor's office on March 21, 2017 with her husband. They were told that the case had been assigned to a prosecutor and that they should wait for the prosecutor to contact them.

[7] On the morning of March 27, 2017, as the female applicant and her husband left the house, her husband saw a man with a gun on his belt approaching them. He pushed the female applicant inside the house and locked the family in the bathroom. They heard gunshots, but their neighbour, a police officer, intervened and the offenders left. The female applicant and her family then decided to move. A few days after they left, the female applicant's sister went to their house to retrieve some of their belongings and found a package in the garage containing a threat.

[8] On April 13, 2017, the female applicant's husband received a message in which he was told that the female applicant had caused the offenders to lose a very lucrative deal and that for this reason their family would be taken out. The female applicant's mother also received a written threat a few days later. The female applicant and her family left Colombia to make a refugee protection claim in Canada.

[9] On April 27, 2017, the female applicant and her family arrived in Canada via a land port of entry from the United States and claimed refugee protection. Since they have family in Canada, their claims were found to be eligible and were referred to the Refugee Protection

Division [RPD]. The female applicant's husband's claim, however, was suspended pursuant to subsection 103(1) of IRPA.

[10] On September 3, 2019, the RPD rejected the applicants' refugee protection claims. It found that the applicants have an internal flight alternative elsewhere in Colombia and that it would be reasonable for them to seek refuge there.

[11] The applicants appealed the RPD's decision to the RAD. They sought a stay of decision making on the RAD's jurisdiction to hear the appeal until a decision could be rendered on the application for leave to appeal to the Supreme Court of Canada from the Federal Court of Appeal's decision in *Kreishan*.

[12] In a decision rendered on November 20, 2019, the RAD denied the application for a stay on the basis that it must apply the law as it exists at the time the decision is made. It also dismissed the appeal for lack of jurisdiction, since the applicants are covered by paragraph 110(2)(d) of the IRPA. It concluded that since the applicants are persons who came directly from the United States, but whose claims for refugee protection were determined to be eligible under section 159.5 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR], notwithstanding paragraph 101(1)(e) of the IRPA, they cannot appeal the RPD's decision to the RAD pursuant to paragraph 110(2)(d) of the IRPA.

[13] The RAD's decision is the subject of this application for judicial review.

[14] On December 28, 2020, the applicants filed a notice of constitutional question and proof of service with the attorneys general of all provinces and territories and the Attorney General of Canada pursuant to section 57 of the *Federal Courts Act*, RSC 1985, c F-7 [FCA]. An amended notice of constitutional question was served on the attorneys general and filed on January 14, 2021 to reflect the change in the hearing date. No attorney general has intervened in this matter.

III. Legislative context

[15] It is useful to recall the context of this application for judicial review. It is described by the Federal Court of Appeal in *Kreishan* and in *Canada (Citizenship and Immigration) v Canadian Council for Refugees*, 2021 FCA 72.

[16] Under subsection 99(3) of the IRPA, a person who makes a claim for refugee protection at a port of entry into Canada must make their claim to an immigration officer. The officer decides whether the claim is eligible and, if so, refers the claim to the RPD for determination in accordance with subsection 100(1) of the IRPA. Paragraph 101(1)(e) of the IRPA states that a claim is ineligible if the claimant comes, directly or indirectly, from a country designated in the regulations other than their country of nationality or habitual residence.

[17] Subsection 102(1) of the IRPA specifies that the regulations include, for the purpose of sharing responsibility for the examination of refugee protection claims with other countries, the designation of countries that comply with Article 33 of the Refugee Convention and Article 3 of the Convention against Torture (IRPA, s 102(1)(a)); the establishment of the list of countries that comply with Article 33 of the Refugee Convention and Article 3 of the Convention against

Torture, which is renewed as required (IRPA, s 102(1)(b)); and the cases and criteria for the application of paragraph 101(1)(e) of the IRPA (IRPA, s 102(1)(c)). The designation of a country depends on a number of factors. These include whether or not the country is a party to an agreement with Canada regarding sharing responsibilities in the examination of refugee protection claims (IRPA, s 102(2)(d)).

[18] To date, the United States is the only country designated for the purposes of paragraph 101(1)(e) of the IRPA. This designation is provided for in section 159.3 of the IRPR (as amended by SOR/2004-217 at s 2), which came into force on December 29, 2004, at the same time as the *Agreement between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims by Nationals of Third Countries*, signed on December 5, 2002, and commonly referred to as the Safe Third Country Agreement [STCA].

[19] The objectives of the STCA include facilitating the orderly processing of refugee protection claims, improving burden-sharing and cooperation between Canada and the United States, and avoiding indirect violations of the principle of non-refoulement.

[20] According to Article 2 of the STCA, the agreement does not apply to refugee status claimants who are citizens of Canada or the United States or who, not having a nationality, are ordinarily resident in Canada or the United States.

[21] Article 4 of the STCA provides that “the Party of the country of last presence” will consider the refugee status claim of any person who arrives at a land border port of entry of the two countries. The “country of last presence” is defined as “that country, either Canada or the United States, in which the refugee claimant was physically present immediately prior to making a refugee status claim at a land border port of entry” (STCA, Article 1). In other words, a refugee protection claimant who arrives at a Canadian land port of entry from the United States cannot make a refugee protection claim in Canada. The responsibility for the claim rests with the United States. If the claimant arrives at a United States land port of entry from Canada, Canada is responsible for processing the claim. This is to prevent asylum shopping (*Kreishan* at para 1).

[22] The STCA provides for exceptions to the requirement to make a refugee status claim in the country of last presence. For example, Canada retains responsibility for determining the refugee status of claimants from the United States who have family members in Canada or who are unaccompanied minors. These exceptions are implemented by section 159.5 of the IRPR, which provides an exemption from paragraph 101(1)(e) of the IRPA in certain situations.

[23] On June 29, 2010, the *Balanced Refugee Reform Act*, SC 2010, c 8 [Reform Act], introduced several amendments to the IRPA, including the creation of the RAD. Two years later, the *Protecting Canada’s Immigration System Act*, SC 2012, c 17 [PCISA] was passed. The summary of the PCISA states that the IRPA is amended to, among other things, provide for expedited processing of refugee protection claims. The PCISA introduced other amendments to the IRPA, including new restrictions on the right to appeal to the RAD, among them paragraph 110(2)(d) of the IRPA.

[24] Paragraph 110(2)(d) of the IRPA reads as follows:

Restriction on appeals	**Restriction**
110 (2) No appeal may be made in respect of any of the following:	**110 (2)** Ne sont pas susceptibles d'appel :
. . .	. . .
(d) subject to the regulations, a decision of the Refugee Protection Division in respect of a claim for refugee protection if	**d)** sous réserve des règlements, la décision de la Section de la protection des réfugiés ayant trait à la demande d'asile qui, à la fois :
(i) the foreign national who makes the claim came directly or indirectly to Canada from a country that is, on the day on which their claim is made, designated by regulations made under subsection 102(1) and that is a party to an agreement referred to in paragraph 102(2)(d), and	**(i)** est faite par un étranger arrivé, directement ou indirectement, d'un pays qui est — au moment de la demande — désigné par règlement pris en vertu du paragraphe 102(1) et partie à un accord visé à l'alinéa 102(2)d),
(ii) the claim — by virtue of regulations made under paragraph 102(1)(c) — is not ineligible under paragraph 101(1)(e) to be referred to the Refugee Protection Division;	**(ii)** n'est pas irrecevable au titre de l'alinéa 101(1)e) par application des règlements pris au titre de l'alinéa 102(1)c) ;
. . .	. . .

[25] Therefore, pursuant to paragraph 110(2)(d) of the IRPA, refugee protection claimants who have passed through the United States and whose claims are found to be eligible under section 159.5 of IRPR, and despite paragraph 101(1)(e) of the IRPA, do not have the right to

appeal the RPD's decision to the RAD. Instead, they must apply to this Court for leave and for judicial review of the RPD's decision.

[26] For a better understanding of the mandate and powers of the RAD, refer to paragraphs 41 to 45 of *Kreishan*, as well as the Federal Court of Appeal's decision in *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 [*Huruglica*].

[27] In this case, it is sufficient to note that appeals before the RAD generally proceed without a hearing, depending on the record that has been presented to the RPD (IRPA, s 110(3)), and that new evidence can only be presented to the RAD if the explicit criteria of subsection 110(4) of the IRPA and the factors developed by the case law are met. The RAD may hold a hearing if the file meets the three-prong test set out in subsection 110(6) of IRPA. While the RAD is intended to serve as a "safety net" to correct errors of law or fact by the RPD (*Huruglica* at para 98), the appeal to the RAD is not a true *de novo* process (*Huruglica* at para 79).

IV. Issues

[28] The applicants are seeking to have the RAD's decision set aside on the basis that the absence of a right of appeal to the RAD under paragraph 110(2)(d) of the IRPA violates their right to substantive equality and thus infringes subsection 15(1) of the Charter. They are asking the Court to declare subparagraphs 110(2)(d)(i) and (ii) of the IRPA unconstitutional and of no force and effect, pursuant to subsection 52(1) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[29] The applicants essentially alleged that paragraph 110(2)(d) of the IRPA [TRANSLATION] "explicitly" distinguishes between enumerated grounds ([TRANSLATION] "nationality" and age) and analogous grounds ([TRANSLATION] "citizenship" and "family") by granting a right of appeal to the RAD [TRANSLATION] "to U.S. citizens and to claimants without nationality ordinarily residing in the United States" who are excluded from the STCA, and explicitly prohibits an appeal to the RAD from being granted to the other refugee claimants who are exempted from STCA. In addition, they alleged that paragraph 110(2)(d) of the IRPA has a distinctly adverse effect on Colombian families, women, children, and persons with physical or mental disabilities, as it imposes a burden or denies a benefit in a way that reinforces, perpetuates, or exacerbates a pre-existing disadvantage.

[30] The respondent argued that the applicants' argument is without merit because the applicants have not established that the issue in this case, being the applicants' passage through the United States, is a personal characteristic that is based on an enumerated or analogous ground.

[31] In addition, the respondent submitted that the applicants are arguing for the first time in their supplementary submission that paragraph 110(2)(d) of the IRPA creates adverse effect discrimination, a concept that has existed in Canadian law since *Ontario Human Rights Commission v Simpson-Sears*, [1985] 2 SCR 536. While there is discretion for this Court to consider new issues, in the present circumstances, all the facts and elements related to the new arguments were known to the applicants at the time of the application for leave and the perfection of the record, so the new issue should have been raised in a timely manner at the leave

stage. The respondent argued that accepting new and complex legal arguments after the time limit for filing affidavit evidence has expired is prejudicial to it.

[32] Alternatively, the respondent submitted that the evidence presented by the applicants does not establish that the lack of a right of appeal to the RAD has a disproportionate effect on Colombians, women, children and persons with disabilities. Finally, the respondent argued that if the Court were to find that the impugned provision does make a distinction based on an enumerated or analogous ground, or by adverse effect, such a distinction is not discriminatory.

[33] In response to the respondent's argument that the applicants are raising for the first time the prejudicial effects of paragraph 110(2)(d) of the IRPA, the applicants stated that, although their arguments were not in the initial memorandum, in light of the test set out by the Supreme Court of Canada in *Fraser v Canada (Attorney General)*, 2020 SCC 28 [*Fraser*], all of their arguments regarding the prejudicial effects of paragraph 110(2)(d) of the IRPA were contained therein. They were simply restated in light of the test set out in *Fraser*, which was issued after the applicants' record was filed. They argued that the respondent had ample time to request additional time to file affidavits or make additional submissions.

[34] The Court agrees with the respondent that a new argument should not be raised at the further memorandum stage (*AB v Canada (Citizenship and Immigration)*, 2020 FC 19 at paras 72, 74; *Lakatos v Canada (Citizenship and Immigration)*, 2019 FC 864 at paras 25–29; *Al Mansuri v Canada (Public Safety and Emergency Preparedness)*, 2007 FC 22).

[35] However, upon review of the applicants' initial memorandum, the Court notes that while their submissions could have been better articulated, the applicants nevertheless raised a range of arguments regarding the effects of paragraph 110(2)(d) of the IRPA. The words [TRANSLATION] "adverse effect" are even used in paragraph 58 of the applicants' initial memorandum and some of the arguments presented simply do not fit an argument about a distinction based solely on national origin or citizenship.

[36] The lack of understanding alleged by the respondent cannot justify the Court's refusal to hear the applicants' argument. From the hints in the applicants' initial memorandum, the respondent should have anticipated the argument of adverse effect discrimination. It chose not to cross-examine the applicants' affiants and not to file any additional affidavits, thereby running the risk that the Court might not agree.

[37] Before closing on the issues, a comment is in order. At the hearing, the Court asked the parties whether it could rule on the constitutional issue since it was being raised for the first time in this Court. It is well established that, except in cases of urgency, constitutional issues cannot be raised for the first time before the reviewing court if the administrative decision-maker had the power and practical opportunity to decide them (*Okwuobi v Lester Pearson School Board; Casimir v Quebec (Attorney General)*; *Zorrilla v Quebec (Attorney General)*, 2005 SCC 16 at paras 38–40; *Erasmo v Canada (Attorney General)*, 2015 FCA 129 at para 33; *Forest Ethics Advocacy Association v Canada (National Energy Board)*, 2014 FCA 245 at paras 46, 55; *Al-Abbas v Canada (Citizenship and Immigration)*, 2019 FC 1000 at para 7 [*Al-Abbas*]).

[38] The parties argued that since the RAD lacked jurisdiction to hear the appeal, the constitutional issues could only be raised in this Court. The applicants noted that in *YZ v Canada (Citizenship and Immigration)*, 2015 FC 892 [*YZ*], the applicants had attempted to challenge the constitutionality of the designated country of origin regime by appealing to the RAD. The RAD decided that it did not have jurisdiction to rule on the constitutionality of paragraph 110(2)(d) of the IRPA and that the only question it could decide was whether the conditions listed in that paragraph had in fact been met (*YZ* at para 5).

[39] In the present case, the applicants argued that if they had raised the constitutional argument before the RAD, they would have received the same response. They added that, in fact, they had asked the RAD to stay the case pending the decision in *Kreishan*, but that the RAD had refused to do so.

[40] The Court adopts the reasoning of Justice John Norris in *Al-Abbas*. In that case, the applicant brought an application for judicial review of an RAD decision dismissing his appeal for want of jurisdiction. The applicant argued in his application that subsection 36(1) of the *Reform Act* was unconstitutional because it infringed his rights under sections 7 and 15 of the Charter. The effect of the impugned provision was to preclude an appeal to the RAD from a decision of the RPD on a matter referred to the RPD before the section came into force. The constitutional argument had not been raised before the RAD. On the issue of this Court's jurisdiction to determine the constitutional challenge on the judicial review application, Justice Norris stated:

> [12] While Parliament has clearly conferred *Charter* jurisdiction on the RAD, it is equally clear that it intended to preclude individuals in the applicant's situation from access to the RAD for any purpose, including the making of constitutional arguments.

> This is a nuance that does not usually arise in the jurisprudence dealing with the *Charter* jurisdiction of administrative tribunals. I note, however, that similar results have been reached by this Court with respect to bars to access to the Immigration Appeal Division: see *Kroon v Canada (Minister of Citizenship and Immigration)*, 2004 FC 697 at paras 32-33; *Ferri v Canada (Minister of Citizenship and Immigration)*, [2006] 3 FCR 53, 2005 FC 1580 at paras 35-48 [Ferri]; *Benavides Livora v Canada (Minister of Citizenship and Immigration)*, 2006 FC 104 at para 10; and *Singh v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 455 at paras 55-56. While not determinative, it is also worth noting that the RAD itself has reached a similar conclusion with respect to its lack of jurisdiction to hear any appeal barred by section 110(2) of the *IRPA*, even one challenging the constitutionality of that provision: see, for example, *Re X*, 2013 CanLII 76400 at paras 14-18 (CA IRB) and *Re X*, 2016 CanLII 106279 at paras 6-17 (CA IRB).

[41] Justice Norris found that deciding the constitutional issue for the first time on the judicial review application "would not impermissibly bypass the decision-maker who has been entrusted to determine the issue in the first place" (*Al-Abbas* at para 14). Notwithstanding this conclusion, however, he refused to consider the merits of the constitutional arguments because of the inadequacy of the evidentiary record before him.

[42] The Court also notes that constitutional arguments do not appear to have been raised before the RAD in *Kreishan.* Despite this, both the Court and the Federal Court of Appeal have considered the constitutionality of paragraph 110(2)(d) of the IRPA in light of section 7 of the Charter.

[43] Accordingly, the Court considers that it can rule on the applicants' constitutional argument.

V. Analysis

A. *Standard of review*

[44] Generally speaking, the standard of review applicable to the RAD's interpretation of its jurisdiction to hear an appeal under paragraph 110(2)(d) of the IRPA is that of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, at para 115).

[45] However, the applicants challenged the constitutionality of paragraph 110(2)(d) of the IRPA and asked the Court to declare it to be of no force or effect. Since the RAD has not ruled on the issue and the Court is acting as a court of first instance, no standard of review is applicable in this case.

B. *Section 15 of the Charter*

[46] Section 15 of the Charter reads as follows:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.	**15.** (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

[47] The analytical framework applicable to an application based on subsection 15(1) of the Charter has been reiterated by the Supreme Court of Canada on numerous occasions. It is a two-step analysis designed to promote substantive equality.

[48] To establish a *prima facie* violation of subsection 15(1) of the Charter, the applicant must first show that the impugned provision creates, on its face or in its effect, a distinction based on an enumerated or analogous ground. Second, and if so, the impugned law must impose a burden or deny a benefit in a way that has the effect of reinforcing, perpetuating or exacerbating disadvantage, including a historical disadvantage suffered (*Ontario (Attorney General) v G*, 2020 SCC 38 at para 40; *Fraser* at paras 27, 30; *Quebec (Attorney General) v Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 at para 25; *Centrale des syndicats du Québec v Quebec (Attorney General)*, 2018 SCC 18 at para 22; *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at paras 19–20 [*Taypotat*]; *Quebec (Attorney General) v A*, 2013 SCC 5 at paras 324, 418 [*Quebec v A.*]; *Withler v Canada (Attorney General)*, 2011 SCC 12 at para 61).

[49] The Supreme Court of Canada has confirmed that the same two-step approach applies regardless of whether the discrimination alleged is direct or indirect (*Fraser* at para 48).

C. *Application*

(1) Step 1: Distinction based on an enumerated or analogous ground

a) *At first glance*

[50] The applicants first argued that paragraph 110(2)(d) of the IRPA creates an "explicit" distinction based on "nationality", an enumerated ground, and citizenship, an analogous ground, between U.S. citizens and persons without nationality ordinarily resident in the U.S, on the one hand, and citizens of all other countries, on the other. They argue that U.S. citizens and persons without nationality ordinarily resident in the U.S., being excluded from the application of the STCA, are entitled to appeal to the RAD from an adverse RPD decision, while nationals of all other countries who have been granted an exception to the STCA are not.

[51] The respondent argued that the only distinction made by paragraph 110(2)(d) of the IRPA is based on passage through the United States, a ground that is not enumerated or analogous. Further, he argued that the cases of *YZ* and *Feher v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 335, on which the applicants rely, do not apply in this case. Unlike those cases, paragraph 110(2)(d) of the IRPA does not distinguish between different claimants on the basis of their national origin or citizenship. All refugee protection claimants, regardless of national origin or citizenship, who arrive in Canada through a land port of entry from the United States are denied access to the RAD. The respondent asked the Court to follow the decision in *Altamirano v Canada (Citizenship and Immigration)*, 2015 FC 964 [*Altamirano*], which

determined that paragraph 110(2)(d) of the IRPA does not create a distinction based on national origin (*Altamirano* at paras 10–11).

[52] Given the manner in which paragraph 110(2)(d) of the IRPA interacts with section 159.3 of the IRPR and the STCA, the Court is prepared to presume, for the purposes of its analysis, that paragraph 110(2)(d) of the IRPA creates a distinction on the basis of national origin and citizenship between U.S. refugee protection claimants and claimants without nationality residing in the U.S., on the one hand, and citizens of all other countries, on the other.

[53] As for the application of this Court's decision in *Altamirano*, the Court notes that this is a 13-paragraph decision where the Court refused to declare paragraph 110(2)(d) of the IRPA invalid on the basis that the applicant had not served a notice of constitutional question pursuant to section 57 of the FCA. There is no indication that the applicant in that case had made an argument as to the distinction between U.S. and stateless refugee protection claimants who are ordinarily resident in the U.S. and claimants of other nationalities or citizenships. Nor is it clear from the decision whether the Court's conclusion is based on the first or second prong of the subsection 15(1) Charter analysis.

[54] The applicants also alleged that paragraph 110(2)(d) of the IRPA explicitly distinguishes between age, an enumerated ground, and the "family social group", which they ask the Court to recognize as an analogous ground. The applicants charged that the impugned provision grants refugee protection claimants with family in Canada and unaccompanied minors an exception to the STCA, and then denies them a right of appeal to the RAD.

[55] As with national origin and citizenship, the Court is prepared to assume for the purposes of its analysis that the manner in which paragraph 110(2)(d) of the IRPA interacts with section 159.5 of the IRPR creates a distinction based on age.

[56] Regarding the "family social group", the applicants asked the Court to recognize it as an analogous ground. They explained that the Supreme Court of Canada has suggested in several cases that family is an analogous ground (*Symes v Canada*, [1993] 4 SCR 695 at 762, 770, 825; *Thibaudeau v Canada*, [1995] 2 SCR 627 at para 212; *Fraser* at para 114, 123). They argued that the "family social group" must be given a broad and liberal interpretation and that it satisfies the criteria articulated in *Corbière v Canada (Minister of Indian Affairs and Northern Development)*, [1999] 2 SCR 203 [*Corbière*], which allows for a ground of distinction to be characterized as analogous if it is based on, among other things, a personal characteristic that is either immutable or changeable at an unacceptable cost to personal identity [*Corbière* at para 13].

[57] In this regard, the applicants alleged that the "family social group" has been clearly recognized by the Supreme Court of Canada in *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, as a ground that is based on immutable characteristics. In addition, the Federal Court of Appeal, this Court and numerous RPD and RAD decisions have recognized that the "family social group" has suffered disadvantage and discrimination. Finally, the "family social group" is protected by human rights legislation in Canadian law, specifically paragraphs 3(3)(d), (e) and (f), and section 96 of the IRPA, section 48 of the *Charter of Human Rights and Freedoms*, RSQ c C-12, the preamble to the *Canadian Bill of Rights*, SC 1960, c 44, and the *Universal Declaration of Human Rights*, UN GA Res 217 A (III), 10 December 1948.

[58] As in *Fraser*, the Court is uncomfortable with recognizing a new family-based analogous ground, as the record and the parties' submissions do not provide the necessary insight to consider the impact of such a measure (*Fraser* at paras 116–123). The applicants merely stated that "the family social group" meets the test set out in *Corbière*, but do not define that group precisely. Given the limited submissions and evidence on this issue, the Court does not believe it would be appropriate for it to rule on this issue in the context of this application for judicial review.

b) *By adverse effect*

[59] The applicants alleged that paragraph 110(2)(d) of the IRPA creates a distinction by adversely affecting Colombian families, women, children and persons with mental or physical disabilities. Without access to the RAD, these groups of claimants receive "inferior safety nets" because they are deprived of:

> [TRANSLATION]
> (1) an independent sui generis quasi-judicial tribunal with more expertise/knowledge than the RPD on legal and sometimes factual issues;
> (2) the application of less deference than the Federal Court;
> (3) an oral hearing before one or three members, including the use of active assistance of counsel/cross-examinations/objections, expert and witness testimony and a recording of the hearing;
> (4) the appointment or replacement of a designated representative if he or she is inadequate to protect children and persons with a mental disorder;
> (5) a longer stay in Canada with a statutory stay of deportation;
> (6) the presentation of new medical and psychological evidence as well as documentary evidence not available or accessible before the RPD to restore their credibility and the absence of any internal flight alternative or state protection;
> (7) the possibility of countering a finding of specialized knowledge of the RPD;

(8) UNHCR intervention;
(9) the possibility of being granted refugee or person in need of protection status quickly;
(10) consideration of the updated national documentation package on the country on the RAD's own initiative;
(11) the benefit of flexible procedures and an informal and expedient legal framework;
(12) the application of the Chairperson's Guidelines under paragraph 159(1)(h) of the IRPA which recognize the historical disadvantage and need for substantive equality for sub-groups of women (including families), children and vulnerable persons.

[Footnotes omitted.]

[60] Regarding the adverse effect on Colombian families, the applicants alleged, among other things, that they are persecuted in Colombia because of their membership in the "family social group". According to them, the evidence shows that for more than 10 years, many Colombian families have been fleeing the cartels, child recruitment and domestic violence in Colombia. Expert testimony from U.S. professor and lawyer Elissa Steglich indicated that U.S. asylum claims under the "family social group" are doomed to failure because nuclear families do not qualify as a social group. The claimants argue that paragraph 110(2)(d) of the IRPA therefore arbitrarily deprives Colombian families of the RAD under the false premise that they had a choice to make their refugee protection claim in the U.S. when, in fact, Canada is the only viable choice for these families in the U.S. Moreover, by shortening the stay of claimants with family in Canada in order to deter others from coming to Canada, the provision has the effect of arbitrarily interfering with the claimants' freedom to associate with their family.

[61] Regarding the adverse impact on women, the applicant testified that she is seeking refugee protection as a [TRANSLATION] "leading woman psychologist fighting drug addiction in

Colombia". The applicants argued that, according to a report by the United Nations High Commissioner for refugees filed in the record, women leaders are targeted by armed groups, and that this is the most common reason for persecution cited by Colombian women seeking refugee protection in Canada. According to expert professor and lawyer Elissa Steglich, refugee protection claims by women fleeing cartels or domestic violence are also doomed to fail in the United States. The applicants argue that paragraph 110(2)(d) of the IRPA therefore has a disproportionate impact on Colombian women. It has [TRANSLATION] "the unintended retrogressive effect of punishing women who flee violence by putting them in the crosshairs of expensive and ungenerous proceedings contrary to sections 15, 26 and 28 of the Charter and paragraphs 3(3)(d), (e) and (f) of the IRPA."

[62] The applicants also relied on the Chairperson's *Guideline Number 4: Women Refugee Claimants Fearing Gender-Related Persecution*. They argued that the guideline recognizes [TRANSLATION] "the many particular problems faced by women at their hearings who have a gender-related fear of persecution: battered woman syndrome; trauma; shame; difficulty presenting their case and obtaining evidence; and poverty."

[63] As for the detrimental effect of paragraph 110(2)(d) of the IRPA on children, the applicants alleged that Colombian children accompanied by their parents are fleeing cartels and recruitment by non-state armed groups. They rely on a report by the Centre intégré universitaire de santé et de services sociaux du Centre-Sud-de-l'Île-de-Montréal, entitled "Demandeurs d'asile, réfugiés et migrants à statut précaire" [refugee claimants, refugees and migrants with precarious status], to demonstrate that a large proportion of refugee protection claimants in

Canada are minors and that, as a result, they are disproportionately affected by the provision. The applicants also relied on the Chairperson's *Guideline 3: Children Making Refugee Claims* [Guideline No. 3] and argue that paragraph 110(2)(d) of the IRPA has the effect of depriving children of important accommodations put in place by these guidelines.

[64] They alleged that the female applicant suffers from depression and anxiety, which prevents her from functioning normally. In spite of this, she was named as the designated representative of her two minor children, one of whom was diagnosed with a rare and incurable disease in Canada. The female applicant acknowledges that she failed to present evidence of her mental condition and her child's medical condition to the RPD. However, she alleges that paragraph 110(2)(d) of the IRPA has the effect of depriving her children, who are victims of an inappropriate designated representative, of the possibility of having the representative replaced before the RAD and of benefiting fully from Guideline No. 3 and paragraph 170(e) of the IRPA, which provide for the right to produce evidence, examine witnesses and make submissions before the RPD.

[65] According to the applicants, the absence of the right to appeal to the RAD would have a devastating effect on unaccompanied minors, possibly even leading them to suicide. They rely on the affidavit of child psychiatrist and professor Cécile Rousseau, as well as *Canadian Physicians for Refugee Care v Canada (Attorney General)*, 2014 FC 651 [*Canadian Physicians*], which states that the Charter must be presumed to provide at least as much protection as international human rights instruments ratified by Canada (*Canadian Physicians* at para 445).

[66] Finally, the applicants argue that paragraph 110(2)(d) of the IRPA prevents mentally or physically disabled claimants from presenting new evidence critical to their case, thereby impeding the Chairperson's *Guideline 8: Procedures for Vulnerable Persons Appearing Before the IRB*, which reiterates the ongoing commitment of the Immigration and Refugee Board [IRB] to provide procedural accommodation for such persons so that they are not disadvantaged in presenting their cases.

[67] In addition to the above evidence, the applicants submitted the following evidence:

(1) statistical reports from the IRB on the acceptance rate of refugee protection claimants from various countries between 2015 and 2020;

(2) a publication by the Office of the United Nations High Commissioner entitled "What to Know About Irregular Border Crossings";

(3) the written expert testimony of lawyer Bruno Gélinas-Faucher, a member of the bars of Quebec, Ontario and New York, stating that he is not aware of any exception in the United States to the right of appeal for non-citizens who have been granted an exception to the STCA;

(4) the written testimony of Dr. Ezat Mossallanejad, an advocate for refugee protection claimants who are victims of torture, who states that he is aware that individuals who are victims of torture can present medical and psychological evidence before the RAD, but that many refugee protection claimants who are victims of torture do not have access to the RAD and the opportunity to present such evidence;

(5) the written testimony of Sylvie Laurion, a psychologist who works with refugee protection claimants, on the importance of psychological reports to the IRB, including

the RAD, and on the obstacles and difficulties refugee claimants face in accessing these reports; and

(6) the affidavit of the female applicant, which states, among other things, that she was being persecuted in Colombia by powerful drug traffickers because she dedicated herself to fighting drug addiction as a psychologist, that she was unaware that she had to speak about her mental condition and that of her son, who has a rare disease, that she failed to include a psychological report for her mental condition, that she was unaware of its relevance, and that she would have lacked the financial resources to pay for a psychologist before the RPD.

[68] After reviewing the record, the Court cannot agree with the applicants' arguments that paragraph 110(2)(d) of the IRPA creates a distinction by adverse effect on Colombian families, women, children and persons with mental or physical disabilities.

[69] Adverse effect discrimination occurs when a seemingly neutral law has a disproportionate impact on members of groups protected from discrimination on an enumerated or analogous ground. Rather than explicitly targeting members of groups protected from differential treatment, the law indirectly disadvantages them (*Fraser* at paras 30, 45–48).

[70] The burden is on the applicants to make a *prima facie case* that the law has a disproportionate effect on them because of their membership in an enumerated or analogous group (*Fraser* at para 52; *Taypotat* at para 21).

[71] According to *Fraser*, two types of evidence are particularly useful in proving that a law has a disproportionate effect on members of a protected group, namely, evidence of the circumstances of the group and evidence of the consequences of the law (*Fraser* at para 56). Ideally, allegations of adverse effect discrimination should be supported by both types of evidence. While these two types of evidence are not always required, the evidence must include more than an accumulation of hunches (*Fraser* at paras 60–61; *Taypotat* at para 34). It also requires more than general statistical evidence with little or no connection to the particular context of the case (*Taypotat* at paras 31–32; *Begum v Canada (Citizenship and Immigration)*, 2018 FCA 181 at paras 61, 80).

[72] The Court finds that the evidence presented does not establish that the lack of a right to appeal to the RAD has a disproportionate effect on the applicants because of their membership in a enumerated or analogous group. The evidence is fragmentary and has significant gaps.

[73] The statistical data the applicants provided regarding the success of refugee protection claimants by country of origin is too general. The statistics on appeals filed by country of persecution do not indicate the reasons for the rejection of appeals for lack of jurisdiction by the RAD. According to the explanations provided by the RAD, the category “Dismissed—Lack of RAD Jurisdiction” includes claims made by designated foreign nationals, rejected claims for which the RPD made a finding of no credible basis, rejected claims that were referred because they fell within an exception to the STCA, and claims the RPD declared to be abandoned. Nor do they report on the proportion of claimants who are women, children, or persons with physical or mental disabilities, or on the alleged grounds of persecution. In addition, the countries listed are

the first country of persecution reported by the claimant to the RPD and do not necessarily reflect the national origin or citizenship of the claimants. Finally, it is noted that the tables include all appeals filed: appeals filed by claimants or by the Minister that have not yet been decided by the RAD, and appeals referred to the RAD by the Federal Court.

[74] As for the statistics on claims made to the RPD by country, they do not show the number of claimants who arrived through the United States. According to the explanations accompanying the statistical data, the tables include all types of cases referred to the RPD, including claims referred by the Federal Court or the RAD for reconsideration, as well as other types of cases heard by the RPD, such as reopening requests.

[75] The applicants cannot argue that this is statistical evidence of "clear and consistent statistical disparities in how a law affects a claimant's group" (*Fraser* at paras 62-63; *Taypotat* at para 33). While these statistics provide information relating to certain general categories, the Court is not in a position to draw the conclusions desired by the applicants.

[76] As for the evidence from the U.S. law experts, Elissa Steglich and Bruno Gélinas-Faucher, who argue, among other things, that an asylum-seeker who has taken advantage of an exception to the STCA has a right of appeal in the United States, regardless of nationality, and that refugee protection claims based on domestic and criminalized violence are unlikely to be granted, the Court finds that this evidence is insufficient and lacks context. The affiants provide no legislative history and offer no explanation of the process applicable to claimants. The Court cannot base a finding of adverse effect on what was presented to it in this case. Moreover, just

because the United States has chosen to grant a right of appeal to refugee protection claimants who have taken advantage of an exception to the STCA does not mean that the absence of a right of appeal in Canada creates a disproportionate impact on refugee protection claimants in a similar situation.

[77] Similarly, the two reports by the Office of the United Nations High Commissioner address irregular border crossings of refugee protection claimants. The report entitled “Irregular Arrivals at the Border: Background Information Jan-May 2019” mentions that the majority of claimants who cross the border irregularly are families, single parents with children, couples and individuals travelling alone. It also mentions that one-third of irregular entries into Quebec in the first months of 2019 were children accompanying their parents. The Court questions the relevance of this evidence. First, it focuses on refugee protection claimants who cross the border irregularly. These claimants have a right of appeal to the RAD. Second, it does not demonstrate the composition of claimants who make a claim at a land port of entry from the United States. The Court cannot conclude from this evidence that the lack of a right of appeal to the RAD has a disproportionate impact on a group protected by an enumerated or analogous ground.

[78] The written testimony of Dr. Rousseau, Dr. Laurion, and the advocate for refugee protection claimants is of no assistance to the applicants. First, it has not been shown that the applicants were victims of torture. Second, the Court is of the view that the applicants place too much emphasis on the possibility of presenting new medical or psychological evidence to the RAD. If the RAD were to conduct a *de novo* analysis, one might ask whether the denial of access to the RAD would have a disproportionate impact on the physically or psychologically disabled,

given the barriers to presenting medical or psychological evidence before the RPD set out in the written testimony of Dr. Rousseau and Dr. Laurion. However, this is not the case. The RAD bases its analysis on the RPD record and will only admit new evidence if it meets the statutory and jurisprudential criteria (IRPA, subsection 110(4); *Huruglica* at para 79). The appeal to the RAD is not an opportunity to fill in the gaps in the record before the RPD. The applicants must put forward their best evidence and present their best arguments before the RPD.

[79] Moreover, the evidence does not establish that a right of appeal to the RAD would address the difficulties some claimants may have in accessing mental health professionals. It is true that claimants would have more time to do so. However, the Court has no data on the length of time it takes for claimants to access professionals, either in Quebec or elsewhere in Canada, or on the average length of time before the RAD decides an appeal. It also has no information on how many psychological reports are accepted by the RAD in an appeal, which subgroups have submitted them, and what factual context led to their submission.

[80] While the Chairperson's Guidelines recognize the vulnerability of certain groups of refugee claimants and apply to all divisions of the IRB, they are also intended to accommodate, at the procedural level, the difficulties that claimants may have in presenting their cases. They also specify the relevant considerations in assessing claims and evidence. Counsel should remain alert to any difficulties their clients may have in testifying and, where appropriate, communicate their concerns to the RPD. They should also stress to their clients the importance of disclosing any factors that may reduce their chances of being recognized as refugees.

[81] In conclusion, although the Court recognizes that there are disadvantages arising from the absence of a right of appeal to the RAD, the Court is of the opinion that the applicants have not submitted evidence demonstrating that paragraph 110(2)(d) of the IRPA has a "disproportionate" impact on Colombian families (based on national origin or citizenship, family not being a recognized analogous ground), women, children or persons with physical or psychological disabilities.

[82] Being prepared to assume that paragraph 110(2)(d) of the IRPA creates a distinction based on national origin, citizenship and age because of the way the provision interacts with sections 159.3 and 159.5 of the IRPR and the STCA, the Court now intends to examine whether paragraph 110(2)(d) of the IRPA satisfies the second prong of the analysis of subsection 15(1) of the Charter.

(2) Step 2: Reinforcing, perpetuating or exacerbating disadvantage

[83] The second step in the analysis under subsection 15(1) of the Charter is to determine whether the impugned provision is discriminatory because it imposes a burden or denies a benefit in a way that has the effect of reinforcing, perpetuating or exacerbating disadvantage, including the disadvantage historically suffered (*Fraser* at paras 27, 50, 76; *Taypotat* at para 20; *Quebec v A* at para 331).

[84] The Court cannot agree with the applicants' argument that the prohibition on appealing to the RAD implies that their fears are less worthy of protection than those of U.S. or stateless claimants who are ordinarily resident in the United States. The reason that U.S. and stateless

refugee protection claimants who are ordinarily resident in the United States are excluded from the application of the STCA, and thus have access to the RAD, is that they cannot claim asylum in the United States for a fear of persecution in the United States. This is because the United States is not their first safe country of arrival, but their country of residence. It is not because of any perception that their claims are more valuable or that they deserve more protection.

[85] The same is true for the applicants' argument that paragraph 110(2)(d) of the IRPA discriminates against claimants with family members in Canada and unaccompanied minors by denying them access to the RAD.

[86] Even if family were an analogous ground of discrimination under subsection 15(1) of the Charter, the applicants have provided no evidence of systemic or historical disadvantage faced by claimants with family in Canada. On the contrary, it is because these claimants have family in Canada that their claims can be heard by the RPD (IRPR, s 159.5). If this were not the case, their claims would be ineligible and they would be returned to the United States.

[87] In the case of unaccompanied minors, it is clear that the exception to the inadmissibility of their claim under section 159.5 of the IRPR is related to their status as more vulnerable persons. However, the Court does not consider, in the words of the applicants, that the absence of a right of appeal to the RAD [TRANSLATION] "perpetuates the stereotype that children are objects of law and not subjects of law and as such deserve to suffer" or that it reinforces the disadvantage [TRANSLATION] "that children must always suffer the fate or choice of their parents".

[88] As noted in *Gosselin v Quebec (Attorney General)*, 2002 SCC 84 [*Gosselin*], distinctions based on age are common and necessary to maintain order in our society and do not automatically evoke the context of pre-existing disadvantage that suggests discrimination and arbitrary denial of privilege (*Gosselin* at para 31).

[89] The restriction on the right of appeal must be considered in its overall legislative context, which includes the STCA (*Fraser* at para 42). The purpose of the STCA is to allow Canada and the United States to better manage the flow of refugee protection claimants and to share responsibility for the examination of asylum claims between the two countries. While the STCA provides for exceptions for certain claimants, the rule remains that claims are ineligible when claimants present themselves at a land port of entry. These exceptions are specified in section 159.5 of the IRPR and take into account the vulnerability of minor refugee claimants and the principle of family reunification set out in the IRPA. Since these claimants have the opportunity to make a claim for refugee protection in a safe country, Canadian law has held that a negative decision by the RPD on their claim must be considered final. The vulnerability of minor refugee claimants is not heightened because a provision in IRPA does not confer a greater procedural advantage on them.

[90] It is important to remember that it is the fact of arriving from a designated country that is a party to an agreement, namely the United States, that denies refugee claimants appeal rights to the RAD, regardless of national origin, citizenship, gender, age or disability. If they had made their claims for refugee protection other than at a land port of entry, these same claimants would have a right of appeal to the RAD because they would not be subject to the STCA.

[91] However, the applicants did not challenge the constitutionality of the STCA in this case.

[92] In sum, the Court rejects the applicants' argument that the effect of the impugned provision is to widen the disparity experienced by the most vulnerable claimants because of a more expensive and less generous remedy before this Court. Although the grounds for judicial review are narrower than the grounds for appeal to the RAD, the Court cannot conclude that the difference in procedural treatment has the effect, as the applicants allege, of perpetuating disadvantage or the application of stereotypes or prejudices against Colombian claimants, women, children or persons with physical or mental disabilities.

VI. Conclusion

[93] For the reasons set out above, arguments based on subsection 15(1) of the Charter cannot succeed. The applicants have not established that the distinctions that may be drawn under paragraph 110(2)(d) of the IRPA are discriminatory.

[94] Since the applicants have not shown that a right guaranteed by subsection 15(1) of the Charter has been violated, it is not necessary for the Court to consider whether paragraph 110(2)(d) of the IRPA is justified under section 1 of the Charter.

[95] For all these reasons, the Court concludes that the application for judicial review must be dismissed.

VII. Certified question

[96] In their supplemental memorandum, the applicants ask the Court to certify the following question:

> [TRANSLATION]
>
> Do subparagraphs 110(2)(d)(i) and (ii) of the IRPA infringe subsection 15(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 (the Charter) in a manner that cannot be justified by section 1 of the Charter, and are therefore of no force and effect pursuant to subsection 51(2) of the *Constitution Act, 1982*?

[97] The criteria for certifying a question are well established. The proposed question must be determinative of the outcome of the appeal, transcend the interests of the parties to the litigation, and involve matters of significant consequence or general application. In addition, the issue must have been considered by the Federal Court and it must arise from the case itself, not simply from the way in which the Federal Court decided the case. A question that is in the nature of a reference or whose answer depends on the facts of the case cannot raise a properly certified question (*Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22, at paras 46–47; *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130, at para 36; *Mudrak v Canada (Citizenship and Immigration)*, 2016 FCA 178, at para 15–17; *Lai v Canada (Public Safety and Emergency Preparedness)*, 2015 FCA 21, at para 4; *Zhang v Canada (Citizenship and Immigration)*, 2013 FCA 168, at para 9; *Varela v Canada (Citizenship and Immigration)*, 2009 FCA 145, at paras 28–29; *Canada (Minister of Citizenship and Immigration) v Zazai*, 2004 FCA 89, at paras 11–12; *Canada (Minister of Citizenship and Immigration) v Liyanagamage*, [1994] FCA No 1637 (FCA) (QL), at para 4).

[98] The Court agrees with the parties that the question raises an important issue that transcends the interests of the parties in this case and would be determinative of the outcome of an appeal. The Court will, however, rephrase the proposed question and certify the following:

> Does paragraph 110(2)(d) of the *Immigration and Refugee Protection Act*, SC 2001, c 27, infringe subsection 15(1) of the *Charter* in a way that cannot be justified by section 1 of the Charter?

JUDGMENT in IMM-7283-19

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed.

2. The following question of general importance is certified:

> Does paragraph 110(2)(d) of the *Immigration and Refugee Protection Act*, SC 2001, c 27, infringe subsection 15(1) of the Charter in a way that cannot be justified by section 1 of the Charter?

"Sylvie E. Roussel"
Judge

Certified true translation
Michael Palles, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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