Federal Court  Cour fédérale

**Date: 20210429**

**Docket: IMM-153-20**

**Citation: 2021 FC 375**

**Ottawa, Ontario, April 29, 2021**

**PRESENT: The Honourable Mr. Justice Brown**

**BETWEEN:**

**ANA CECILIA MATA GUEVARA**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision by the Refugee Appeal Division [RAD] of the Immigration and Refugee Board dated November 18, 2019, which upheld the decision of the Refugee Protection Division [RPD]. The RAD confirmed the RPD's decision that the Applicant is not a Convention refugee nor a person in need of protection pursuant to section 96 and section 97 of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 [*IRPA*] [Decision].

[2] The Applicant is a citizen of Mexico. The Applicant says she fled to Canada because her father “controlled and dominated me and abused me and also used his employees for such purposes. He has also told me I should kill myself and that he will make sure I repay him for every cent her has spent on me.”

[3] She alleged her father had mistreated and abused her and might have been responsible for the deaths of some who opposed him. She says it was not unusual for her father to talk about using his wealth for “influence peddling.”

[4] In 2011, the Applicant came to school in Canada. She says she wanted to escape her father but was financially dependent on him. In 2015, she graduated; her father insisted she return to Mexico. She says his employees treated her so badly that she attempted suicide. She returned to Canada in 2016 and made a refugee claim. She told her sister where she was and shortly after, her father and sister came to Canada and convinced her to withdraw her refugee claim. She states she felt a lot of pressure and felt she had no other support. She says they drove her to the RPD to withdraw her claim and then to the Immigration Office where she met with an officer [CBSA Officer] who gave her a future date to obtain her passport.

[5] The Applicant states she was no longer under their influence after they left, and she reconsidered and told the CBSA Officer she was afraid to return to Mexico. The CBSA Officer gave her until January 20, 2017 to reopen her claim.

[6] The Applicant says she has a lot of difficulty making decisions due to her mental health. She met with the CBSA Officer on January 20, 2017 when the CBSA Officer spoke to her father on the phone to arrange a flight ticket for her return home. She also spoke to her father who at that time told her she should kill herself. She told this to the CBSA Officer who gave her another extension to reopen her claim.

[7] The Applicant's claim was re-opened and she was heard by the RPD in 2018.

[8] The Applicant provided evidence from a psychiatrist and a social worker to the RPD. The psychiatrist stated "while diagnostic clarification will take more time, on the differential I would include GAD, MDD, PTSD, prodromal psychosis, as well as autism spectrum."

[9] The RPD denied the Applicant's claim and determined she was neither a Convention refugee nor person in need of protection. The RPD said the Applicant had not presented reliable testimony to support a valid claim and there was no serious possibility she would face persecution in Mexico for a Convention reason if she were returned, pursuant to section 96 of *IRPA.* The RPD also said the evidence did not show her removal to Mexico would subject her to a risk to her life or a risk to cruel and unusual punishment or a danger of torture, pursuant to subsection 97(1) of *IRPA.*

## I. Decision under review

[10] The Applicant appealed the RPD decision to the RAD. The RAD dismissed the appeal finding the determinative issue was whether the RPD erred in its assessment of the objective

basis for the Applicant's fear of her father, including its assessment of the documentary evidence. Regarding fear she will be harmed by her father, the RAD found their relationship had changed since she had filed her initial claim for refugee status such that the "evidence demonstrates a man who has given up on his daughter and no longer wants to be involved in her life."

## II. Issues

[11] The Applicant alleges the RAD erred in failing to consider her "compelling reasons" argument under subsection 108(4) of *IRPA*, and failing to find there was a reasonable apprehension that the RPD was biased.

## III. Standard of Review

[12] In *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 [*Canada Post*] Justice Rowe said *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] set out a revised framework for determining the applicable standard of review for administrative decisions. The starting point is a presumption a standard of reasonableness applies. This presumption can be rebutted in certain situations, none of which apply in this case. Therefore, the Decision is reviewable on a standard of reasonableness.

[13] In *Canada Post*, Justice Rowe explains what is required for a reasonable decision, and what is required of a court reviewing on the reasonableness standard:

> [31] A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in

> relation to the facts and law that constrain the decision maker" (*Vavilov*, at para. 85). *Vavilov*, at para 86 states "it is not enough for the outcome of a decision to be justifiable. Where reasons for a decision are required, the decision must also be justified, by way of those reasons, by the decision maker to those to whom the decision applies." The reviewing court must be satisfied the decision maker's reasoning "adds up":
>
> [104] Similarly, the internal rationality of a decision may be called into question if the reasons exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise. This is not an invitation to hold administrative decision makers to the formalistic constraints and standards of academic logicians. However, a reviewing court must ultimately be satisfied that the decision maker's reasoning "adds up".
>
> [105] In addition to the need for internally coherent reasoning, a decision, to be reasonable, must be justified in relation to the constellation of law and facts that are relevant to the decision: *Dunsmuir*, at para. 47; *Catalyst*, at para. 13; *Nor-Man Regional Health Authority*, at para. 6. Elements of the legal and factual contexts of a decision operate as constraints on the decision maker in the exercise of its delegated powers.
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> [Emphasis added]

## IV. Analysis

[14] The Applicant submits the RAD erred by refusing to consider compelling reasons under subsection 108(4) of *IRPA*, and erred by failing to consider the Applicant could not raise the bias issue until she received the RPD's decision, at which point the reasonable apprehension of bias became apparent. I will consider each.

### A. *Compelling reasons*

[15] The Applicant submits the RAD erred by not considering the compelling reasons provision of *IRPA*. The RAD held it did not need to consider subsection 108(4) because it found

no forward-looking risk under sections 96 or 97 of *IRPA*. The Respondent agreed there is flexibility in applying the compelling reasons doctrine, and I agree the compelling reasons is not limited to circumstances where there is a change in country conditions.

[16] However, the Respondent says the compelling reasons exemption in section 108 does not apply because the RAD did not find a valid refugee claim. I respectfully disagree. In my view this argument has no merit because the RAD failed in this case to complete its task, i.e., to consider and determine the applicability of paragraph 108(1)(e) and subsection 108(4) in the special circumstances of this case.

[17] Paragraph 108(1)(e) of *IRPA* states a refugee claim may be rejected if the reasons for which the person sought refugee protection have ceased to exist. Subsection 108(4) states paragraph 108(1)(e) does not apply if there are compelling reasons arising out of previous persecution, torture, treatment or punishment that resulted in the claimant not availing themselves of the protection of the country:

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| **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 : |
| **(a)** the person has voluntarily reavailed themself of the protection | **a)** il se réclame de nouveau et volontairement de la |

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| of their country of nationality; | protection du pays dont il a la nationalité; |
| **(b)** the person has voluntarily reacquired their nationality; | **b)** il recouvre volontairement sa nationalité; |
| **(c)** the person has acquired a new nationality and enjoys the protection of the country of that new nationality; | **c)** il acquiert une nouvelle nationalité et jouit de la protection du pays de sa nouvelle nationalité; |
| **(d)** the person has voluntarily become re-established in the country that the person left or remained outside of and in respect of which the person claimed refugee protection in Canada; or | **d)** il retourne volontairement s'établir dans le pays qu'il a quitté ou hors duquel il est demeuré et en raison duquel il a demandé l'asile au Canada; |
| **(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, 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. | **(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 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. |
| [Emphasis added] | [Je souligne] |

[18] In this case, instead of taking subsection 108(4) into consideration as the jurisprudence indicates should be done, the RAD conducted a narrow forward-looking risk assessment, which I emphasize is not objectionable in the normal case. However, in this case the agent of persecution had completely changed his position, from that of an abuser of the Applicant, to a father who, as the RAD found, had "callously and cruelly told her that she should kill herself" in 2017 and as of the RAD decision had "decided to abandon his daughter."

[19] In my view the RAD unreasonably "side-stepped the question of past persecution and proceeded directly to review present conditions" as also happened in *Buterwa v Canada (Minister of Citizenship & Immigration)*, 2011 FC 1181 [Mosley J] [*Buterwa*]. Therefore, as was the case in *Buterwa*, judicial review will be granted in the case at bar. The issue of past persecution was on the table as relied upon by the Applicant. The RAD's analysis scrupulously avoided any comment on past persecution, focussing exclusively on future persecution. Not having conducted any assessment of past persecution whatsoever, the RAD then determined it did not need to conduct a compelling reason analysis because it had not made a finding of past persecution. This is circular logic. With respect, the RAD made no finding regarding past persecution because it chose not to. As in *Buterwa* the RAD simply ignored 108(4). In my view, this aspect of the Decision is unreasonable.

[20] With respect, in this case there was a complete change of circumstances. The Applicant squarely raised a subsection 108(4) compelling reasons argument. Her argument in my view had a prospect of success given not only that the RAD had favourably assessed her evidence, but in addition, the RAD had explicitly disfavoured the RPD's credibility findings stating it owed no

deference to the RPD. Moreover, the RAD made no clear finding against the Applicant's credibility. The RAD had no difficulty assessing forward-looking risk, but and with respect, that was a non-issue when the father's position changed so significantly.

[21] In my respectful view, in these circumstances the RAD was under a statutory obligation duty to take two additional steps. First, it should have assessed the Applicant's fear of persecution under section 96, and secondly, if she met that test, the RAD ought to have considered and assessed the compelling reason arguments advanced under subsection 108(4) pursuant to the following jurisprudence: *Suleiman v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1125 [Martineau J]:

> 16 It must not be forgotten that subsection 108(4) of the Act refers only to "compelling reasons arising out of previous persecution, torture, treatment or punishment". It does not require a determination that such acts or situation be "atrocious" and "appalling". Indeed, a variety of circumstances may trigger the application of the "compelling reasons" exception. The issue is whether, considering the totality of the situation, i.e. humanitarian grounds, unusual or exceptional circumstances, it would be wrong to reject a claim or make a declaration that refugee protection has ceased in the wake of a change of circumstances. "Compelling reasons" are examined on a case by case basis. Each case is a "cas d'espèce". In practice, this means that each case must be assessed and decided on its own merit, based on the totality of the evidence submitted by the claimants. As was decided by the Federal Court of Appeal in *Yamba v. Canada (Minister of Citizenship & Immigration)*, 254 N.R. 388, [2000] F.C.J. No. 457 (Fed. C.A.) at para. 6, in every case in which the Board concludes that a claimant has suffered past persecution, where there has been a change of country conditions to such an extent as to eliminate the source of the claimant's fear, the Board is obligated to consider whether the evidence presented establishes the existence of "compelling reasons".
>
> [Emphasis added]

[22] *Buterwa*:

> 11 Here, there is nothing in the member's reasons that would support a finding that the Board did not accept that the applicant had experienced past persecution, as in *Brovina*. To the contrary, it is clear that the member accepted the applicant's testimony without reservation. That testimony was capable of establishing that the applicant had been persecuted as a child in the DRC. The member side-stepped the question of past persecution and proceeded directly to review present conditions in the DRC. This did not, in my view, absolve the Board from its statutory obligation to consider whether the applicant had established compelling reasons why he should not be required to go back there. That obligation was simply ignored.
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> [Emphasis added]

[23] I note the Respondent relies on *Brovina v Canada Minister of Citizenship & Immigration)*, 2004 FC 635 [Layden-Stevenson J] in which the facts were quite different. There, it was implicit the tribunal had found against the claimant; that may not be said in the present case where the indications were the RAD found in the Applicant's favour:

> 5 The difficulty with this argument is that the RPD did not find that Mrs. Brovina had suffered past persecution. For the board to embark on a compelling reasons analysis, it must first find that there was a valid refugee (or protected person) claim and that the reasons for the claim have ceased to exist (due to changed country conditions). It is only then that the Board should consider whether the nature of the claimant's experiences in the former country were so appalling that he or she should not be expected to return and put himself or herself under the protection of that state.
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> 6 Here, there was no finding of past persecution and it is implicit in the decision that, notwithstanding that the RPD believed Mrs. Brovina, it did not accept that she had been subject to past persecution. On the contrary, it noted that very few Albanians qualify as refugees because of political involvement. The leadership roles and the high level positions held by Mrs. Brovina's son and daughter-in-law in the Democratic Party constituted the reason for allowing their claims. Mrs. Brovina, on the other hand, was never politically active. She was, unfortunately, in her son's apartment when it was ransacked and

> she, again unfortunately, happened to answer the telephone. However, there was no evidence to suggest that the perpetrators were interested in her. In the absence of a finding of past persecution, subsection 108(4) has no application.
>
> [Emphasis added]

[24] In my view, the Decision failed to take into account constraining law in relation to subsection 108(4), as required by *Canada Post* at para 31 in which the Supreme Court of Canada states: "[a] reasonable decision is 'one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker' (*Vavilov*, at para. 85)."

B. *Reasonable apprehension of bias*

[25] Before the RAD, the Applicant submitted the RPD exhibited a reasonable apprehension of bias in its reasons for refusing to subpoena the production of the CBSA Officer's notes concerning the discussion the Officer had with the Applicant's father. The RPD concluded the notes were unnecessary and irrelevant. It also found them "not material, especially in the absence of the father" [emphasis added]. The Applicant argued the last part of this reasoning by the RPD demonstrated reasonable apprehension of bias in that it is perverse to prevent material evidence being led simply because the agent of persecution was not present. The RAD dismissed this objection for several reasons concluding it was absurd to require the agent of persecution to give evidence, and because the bias allegation was waived because the Applicant's counsel was present but had not objected. I agree the observation was absurd, and was made unreasonably and in error. In addition, counsel could not have complained because this comment was not made at the hearing but in subsequent written reasons. The RAD erred in finding otherwise.

[26] However, in my view, the fact the RPD made an obvious error in the course of giving reasons is a far cry from establishing, let alone by cogent evidence, a reasonable apprehension of bias, the test for which is set out by Justice de Grandpré in *Committee for Justice & Liberty v Canada (National Energy Board)*, 1976 CanLII 2 (SCC), [1978] 1 SCR 369:

> 40 The proper test to be applied in a matter of this type was correctly expressed by the Court of Appeal. As already seen by the quotation above, the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.

[27] With respect, there is no merit in this submission. The Respondent submits, and I agree, the RPD's comment does not come close to a finding of a reasonable apprehension of bias. As stated in *Poczkodi v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 956 [per Kane J] at para 51: "a reasonable apprehension of bias requires more than an allegation based on a passing comment in the decision. The allegation must be accompanied by cogent evidence…."

## V. Conclusion

[28] In my respectful view, the Decision is not reasonable because it is not based on the legal constraints surrounding the compelling reasons exception set out in subsection 108(4) of *IRPA*. Therefore, the Decision will be set aside to be redetermined by a different decision maker.

## VI. Certified Question

[29] Neither party proposed a question of general importance, and none arises.

**JUDGMENT in IMM-153-20**

**THIS COURT'S JUDGMENT is that** the Decision is set aside, the matter is remanded for redetermination by a different decision-maker, no question is certified and there is no Order as to costs.

"Henry S. Brown"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-153-20 |
| **STYLE OF CAUSE:** | ANA CECILIA MATA GUEVARA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |

**HEARING HELD BY VIDEOCONFERENCE ON APRIL 26, 2021 FROM OTTAWA, ONTARIO (COURT) AND TORONTO, ONTARIO (PARTIES)**

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| **JUDGMENT AND REASONS:** | BROWN J. |
| **DATED:** | APRIL 29, 2021 |

**APPEARANCES:**

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| Karina Thompson | FOR THE APPLICANT |
| Samina Essajee | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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| Karina Thompson<br>Barrister and Solicitor<br>Toronto, Ontario | FOR THE APPLICANT |
| Attorney General of Canada<br>Toronto, Ontario | FOR THE RESPONDENT |