Federal Court  Cour fédérale

Date: 20101022

Docket: IMM-1828-09

Citation: 2010 FC 1044

Ottawa, Ontario, October 22, 2010

PRESENT: The Honourable Mr. Justice Crampton

BETWEEN:

SULEYMAN ALFAKA ALHARAZIM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Docket: IMM-2689-09

AND BETWEEN:

ABDUL WAHID ALHARAZIM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Suleyman Alfaka Alharazim and Mr. Abdul Wahid Alharazim are citizens of Sierra Leone. They fled Sierra Leone with their sister in February 2000 to escape the civil war that had plagued that country during much of the prior decade. They then applied for permanent residence under the convention refugees abroad class or the humanitarian protected persons abroad class, pursuant to sections 138-151 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (IRPR).

[2] In February 2009, Immigration Officer A. Blouin rejected their applications for permanent residence in separate, virtually identical, decisions made with respect to each of the Applicants.

[3] The Applicants seek to have the decisions set aside on the basis that Officer Blouin erred by:

i. failing to consider the compelling reasons exception in section 108(4) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA); and

ii. failing to provide them with an opportunity to address extrinsic evidence that influenced her conclusion that they are inadmissible for complicity in crimes against humanity, as contemplated by paragraph 35(1)(a) of the IRPA.

[4] For the reasons that follow, the Officer's determination that the Applicants are inadmissible for complicity in crimes against humanity is quashed. The balance of these applications is dismissed.

I. Background

[5] The Applicants are brothers who were living in Freetown, Sierra Leone during the civil war that does not appear to have effectively ended until some time after their departure. Suleyman

claims that he was beaten by members of the rebel forces. Both he and his brother also claim that some members of their extended families were killed, that their home and properties were burned, and that they witnessed their sister being raped. As a result, they fled with their sister to Guinea in early 2000 and eventually made their way to Dakar, Senegal.

[6] When the Applicants arrived in Dakar, they submitted applications for permanent residence as members of the convention refugees abroad class or as members of the humanitarian and protected persons abroad class. After an interview in August 2001, the Applicants' sister was granted a visa and she came to Canada, where she now lives. However, the Applicants were not granted visas because they had indicated that from 1997 to 1999 they were active members of the Civil Defence Unit (CDU) in Sierra Leone. Their applications were therefore sent for further review.

[7] In November 2008, the Applicants attended another interview for the purposes of determining the extent of their involvement in the CDU.

[8] In February 2009, their applications for permanent residence were denied.

II. The Decision under Review

[9] At the outset of the decision, Officer Blouin noted that under section 147 of the IRPR, foreign nationals are members of the country of asylum class if they are determined to be in need of resettlement because (a) they are outside their countries of nationality and habitual residence, and (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.

[10] Officer Blouin then noted that under paragraph 139(1)(d) of the IRPR, a permanent resident visa will only be issued to a foreign national in need of refugee protection if it is established that 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, voluntary repatriation or resettlement in their country of nationality or habitual residence, resettlement in another country, or an offer of such resettlement.

[11] Officer Blouin stated that the Applicants did not meet this requirement because the Lome Peace Accord had ended the civil war in 1999 and the United Nations High Commissioner for Refugees (UNHCR) had developed repatriation programs that had assisted hundreds of thousands of Sierra Leoneans to return to their country. Officer Blouin also noted that the Applicants had not provided a valid reason for not returning to Sierra Leone, except that they no longer had family there. Based on these findings, she rejected the applications on the ground that they did not satisfy the requirements in paragraph 139(1)(d) of the IRPR.

[12] Officer Blouin then went on to note that both Applicants had admitted that, between 1997 and 1999, they were active members of the CDU and had devoted themselves full time to providing support functions to the Economic Community of West African States Monitoring Group (ECOMOG), by identifying people they suspected of being rebels. Officer Blouin added that the Applicants had confirmed during their interviews that they knew that the individuals they had denounced would be detained, brutalized and possibly killed without any form of fair trial. After briefly noting that credible governmental and non-governmental organizations had documented systematic human rights violations committed by the ECOMOG and their collaborators, including the CDU, during the conflict in Sierra Leone, Officer Blouin concluded that the Applicants were

complicit in crimes against humanity and were thus inadmissible under section 35(1)(a) of the IRPA. Accordingly, she stated that she was also refusing the applications on that second ground.

III. Narrowing of Issues

[13] The Respondent concedes that Officer Blouin erred by failing to provide the Applicants with an opportunity to address extrinsic evidence.

[14] However, it is common ground between the parties that Officer Blouin's conclusion with respect to the Applicants' inadmissibility under paragraph 35(1)(a) provided a supplementary basis for rejecting their applications, such that her decision will stand if she did not err in failing to address subsection 108(4) of the IRPA.

[15] Accordingly, the parties agree that it is not necessary for me to address the error that was made with respect to the extrinsic evidence. However, to eliminate the potential adverse consequences to the Applicants that may flow from the Officer's determination that they are inadmissible under paragraph 35(1)(a), the Respondent conceded that I should simply quash that determination in my judgment below, which I will do. The remainder of these reasons for judgment will therefore be confined to the issue that has been raised in respect of subsection 108(4).

IV. Standard of review

[16] The issue of whether the Officer erred in failing to assess whether the Applicants met the requirements in subsection 108(4) of the IRPA has been held to be reviewable on a standard of correctness (*Decka v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 822, at para. 5).

[17] Although I recently followed *Decka* on this point (see *Rivadeneyra v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 845, at para. 20), on further reflection, I believe that this issue is reviewable on a standard of reasonableness. In this case, nothing turns on whether the standard of review is reasonableness or correctness, as I am satisfied that the Officer's failure to conduct an assessment under subsection 108(4) withstands review on either the reasonableness or the correctness standard.

[18] In March 2008, less than two weeks after the Supreme Court of Canada released its decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, Justice Dawson, who was then a member of this Court, recognized that *Dunsmuir* had "opened the door" to the possibility that reasonableness may be the proper standard of review on this issue (*Musialek v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 403, at paras. 6-7). However, in the absence of detailed submissions on that point from the parties in that case, she left the issue open.

[19] As in *Musialek*, the parties in this case did not make detailed submissions on this issue. However, given the frequency with which the issue of a failure to consider subsection 108(4) is being raised before this Court, I believe that it may be helpful for this Court to give greater guidance regarding the applicable standard of review at this time.

[20] In *Dunsmuir*, above, at para. 54, the Supreme Court stated: "Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity." It then proceeded to state, at para. 55, that a consideration of the following factors "will lead to the conclusion that the decision maker should be given

deference and a reasonableness test applied": (i) whether the statute in question contains a privative clause (i.e., a statutory direction from Parliament indicating the need for deference), (ii) whether the administrative regime in question is discrete and specialized, (iii) whether the decision-maker has special expertise, and (iv) whether the question of law is of "central importance to the legal system … and outside the … specialized area of expertise" of the decision-maker.

[21] In *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] S.C.J. No. 12, at para. 25, Justice Binnie, speaking for a majority of the Supreme Court, elaborated upon this point as follows:

> *Dunsmuir* recognized that with or without a privative clause, a measure of deference has come to be accepted as appropriate where a particular decision had been allocated to an administrative decision maker rather than to the courts. This deference extended not only to facts and policy but to a tribunal's interpretation of its constitutive statute and related enactments because 'there might be multiple valid interpretations of a statutory provision or answers to a legal dispute and that courts ought not to interfere where the tribunal's decision is rationally supported' (*Dunsmuir*, at para. 41).

[22] Justice Binnie then proceeded to apply, in the context of paragraph 67(1)(c) of the IRPA, the "contextualized analysis" described in *Dunsmuir* and found that the appropriate standard of review to apply in connection with the IAD's approach to paragraph 67(1)(c) is reasonableness (*Khosa*, above, at paras. 55 – 58).

[23] In my view, the application of the contextual analysis contemplated by *Dunsmuir* to the case at bar yields a similar result. In short the following considerations suggest that deference should be

accorded to Immigration Officers with respect to their interpretation of subsection 108(4) and when it applies:

i. Such officers exercise delegated authority from the Minister, their decisions with respect to applications under the convention refugees abroad class and the humanitarian protected persons abroad class are not subject to appeal, and those decisions are only reviewable by this Court if leave is granted (*Khosa*, above, at para. 55). The rights of appeal set forth in section 63 do not extend to decisions in these types of matters. (With respect to decisions of the Refugee Protection Division (RPD), the existence of section 162(1) of the IRPA suggests that some level of deference would be owed in relation to this issue (*Khosa*, above; *Canada (Minister of Citizenship and Immigration) v. Pearce*, 2006 FC 492, at para. 24).

ii. In making determinations with respect to applications for permanent residence under the convention refugees abroad class and the humanitarian protected persons abroad class under sections 138 – 151 of the IRPR, Immigration Officers must develop and exercise considerable expertise in connection with often difficult issues of fact, mixed fact and law, and "the imperatives and nuances of the legislative regime" (*Khosa*, above, at paras. 25 and 56). (The same is true with respect to the RPD in respect of its decisions.)

iii. The nature of the question of that has been raised in the case at bar is not of "central importance to the legal system … and outside the … specialized area

> of expertise" of an Immigration Officer. In contrast to constitutional questions, true questions of jurisdiction, questions that are at the heart of the administration of justice and questions regarding the jurisdictional lines between two or more competing specialized tribunals (*Dunsmuir*, above, at paras. 58-61), the question as to when an Immigration Officer (or the RPD) is required to perform an assessment under section 108(4) is a narrow legal question that arises solely under the highly specialized area of immigration and refugee law. Indeed, the same is true with respect to the issue as to whether the "compelling reasons" contemplated by subsection 108(4) exist in a given case. Moreover, these legal questions "are clearly intertwined with the factual matrix in which they arise" (*Ramsawak v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 636, at para. 13). In addition, unlike the proper interpretation of subsection 112(3) and section 113 of the IRPA (*Li v. Canada (Minister of Citizenship and Immigration)*, 2010 FCA 75, at para. 20), these are not questions that go to the heart of the legislative scheme. On the contrary, they relate to a statutory provision that has application only in exceptional or extraordinary circumstances.

[24] It does not appear that there are any considerations, as contemplated by *Dunsmuir* and *Khosa*, above, which suggest that a standard of correctness should be applied in reviewing this issue.

[25] Accordingly, I find that the appropriate standard of review to apply in connection with the issue of whether the Officer erred in failing to conduct an assessment under subsection 108(4) is

reasonableness. However, nothing turns on this, as I have determined that even on a correctness standard, the Officer did not err in this regard.

V. Analysis

A. *Did the Officer err by failing to consider the compelling reasons exception in section 108(4) of the IRPA?*

[26] The Applicants claim that their applications for permanent residence were rejected on the basis of a change in circumstances since their departure from Sierra Leone. In this context, they claim that the Officer had a duty to consider the potential applicability of subsection 108(4), whether or not they had made any explicit submissions in respect of that provision. I disagree.

[27] The Officer's refusal to grant permanent resident visas to the Applicants was based on her finding that the Applicants had not met one of the cumulative requirements set forth in subsection 139(1) of the IRPR. Specifically, the Officer found that the Applicants had not met the requirement in paragraph 139(1)(d), which states:

> **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
>
> […]
>
> (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

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

[28] The Officer explained that the Applicants "do not meet these requirements, because since the Lome Peace Accord that ended the civil war in 1999 and the repatriation programs of UNHCR, hundreds of thousands Sierra Leoneans who had fled during the conflict have returned to Sierra Leone." The Officer added: "You were unable to provide me with a valid reason for you to not return to your home country, except that your family was no more in Sierra Leone."

[29] In this context, it was not necessary for the Officer to consider the potential applicability of subsection 108(4).

[30] In the first part of the decision, the Officer appears to have gone straight to an assessment of whether the Applicants met the requirements of paragraph 139(1)(d), as she was entitled to do, without ever having reached any conclusions as to whether the Applicants satisfied the requirements of membership in the Convention Refugees Abroad Class or the Humanitarian-Protected Persons Abroad class, as contemplated by paragraph 139(1)(e) of the IRPR.

[31] This approach is similar to the approach taken by the RPD in cases where there has been a change in circumstances. In those cases, it is settled law that the RPD is entitled to proceed directly to a forward-looking assessment of whether the applicant for refugee protection has a well-founded fear of future persecution, without first making a determination of whether a person has suffered past persecution and, if so, whether subsection 108(4) applies. (*Hassan v. Canada (Minister of Employment and Immigration)*, [1992] F.C.J. No. 946 (C.A.); *Yusef v. Canada (Minister of Employment and Immigration)*, [1995] F.C.J. No. 35, at para. 2 (C.A.); *Brown v. Canada (Minister*

of Citizenship and Immigration), [1995] F.C.J. No. 988, at para. 7 (T.D.); *Corrales v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 1283, at paras. 6-7 (T.D.); *Kudar v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 648, at para. 10; *Brovina v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 635, at paras. 6-9; *Decka*, above, at paras. 15-16; *Thiaw v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 965, at para. 24; and *Cardenas v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 537, at para. 37).

[32] The facts in the case at bar are similar in many respects to those in *Kamara v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 785. There, the principal Applicant and her children fled Sierra Leone in 1999 and applied for permanent residence as members of the convention refugees abroad class or the humanitarian-protected persons abroad class. Among other things, the visa officer concluded that the applicants could repatriate to Seirra Leone, without a well-founded fear of persecution, because the circumstances that led to their departure had ceased to exist. Therefore, one of the grounds upon which the officer rejected the Applicants' application was that the requirements of paragraph 139(1)(d) had not been met. In response to the Applicants' claim that the officer should have considered whether there were any "compelling reasons," as contemplated by subsection 108(4) of the IRPA, for granting their application, the Court concluded (at para. 19) that "the threshold for applying subsection 108(4) has not been met", as the visa officer had made no positive finding of past persecution.

[33] The Applicants submit that *Kamara*, above, is distinguishable on the basis that there was an affirmative finding that the applicant had not suffered past persecution. I disagree that this is a basis for distinguishing that case. In *Kamara*, the applicant's submission with respect to subsection

108(4) was a separate and distinct error alleged to have been committed by the RPD. The Court's rejection of that submission had nothing to do with its findings in respect of the other alleged errors.

[34] The Applicants further submit that *Kudar*, above, is distinguishable on the basis that the RPD found that police protection was available to the applicant and that he was not a refugee at any time. I do not read anything in that case as suggesting that the Court did not intend to embrace, as a general principle, that "in cases where there is no finding that at one time the applicant was a Convention refugee (or a person in need of protection), the cessation protection does not come into play and consequently, the exception allowing compelling reasons arising out of past persecution cannot be triggered" (*Kudar*, above, at para. 10).

[35] In any event, *Hassan*, above, and *Decka*, above, are squarely on point, as it does not appear that any finding was ever made in those cases that the applicant had not suffered past persecution.

[36] The Applicants further submit in *Yamba v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 457, at para. 4 (C.A.), the Federal Court of Appeal held that the RPD is under an obligation to consider the applicability of what is now subsection 108(4) once it is satisfied that refugee status cannot be claimed because of a change in country conditions. However, what the Applicants fail to point out, and as was noted by Justice Mosely in *Decka*, above, the Court of Appeal in *Yamba* went on to clarify that this obligation only arises once the RPD "concludes that a claimant has suffered past persecution" (*Yamba*, above, at para. 6). As reflected in the cases cited at paragraph 31 above, this requirement that an explicit or implicit finding of past persecution by the relevant decision-maker is a precondition to the potential application of subsection 108(4) has been consistently affirmed.

[37] The Applicants then submit that there was an actual positive determination that the applicants were refugees and that, but for the changed country conditions, they would still be refugees. In support of this submission, they assert that their applications for permanent residence were approved in principle, subject to medical and security checks. They state that this assertion is supported by the notation in the Computer Assisted Immigration Processing System (CAIPS) notes, which states "will come on Friday to collect meds and sign IMM 500***meds collected on 2-2-2001***Loan form no".

[38] The Applicants state that IMM 500 refers to the form for an immigration travel loan, and that section 3.1 of Citizenship and Immigration Canada's Operational Manual OP5, entitled *Overseas Selection and Processing of Convention Refugees Abroad Class and Members of the Humanitarian-protected Persons Abroad Classes* ("OP5"), states that the purpose of such loans is "[t]o authorize transportation loans, right of permanent residence loan and loan for medical examination and related costs." The Applicants add that "Meds" refers to medical assessments, and that section 23.8 of OP5 states that "[t]he medical assessments will be initiated and coordinated by the visa office immediately following a positive decision to process the application." The Applicants infer from this that a positive decision must have been made to process their applications, and that there must have been positive determination, at least on an interim basis, that they were refugees, and therefore victims of persecution, at some time in the past.

[39] I disagree, for two reasons. First, the fact that a positive decision may have been made to process the Applicants' applications does not mean that a positive decision had been made to approve those applications. The processing of applications requires multiple steps and does not

result in an approval or rejection until all of those steps have been completed. Second, as the Federal Court of Appeal confirmed in *Dass v. Canada (Minister of Employment and Immigration)*, [1996] 2 F.C. 410, at para. 23, "a decision is taken to have been made when notice of that decision is given to the parties affected with some measure of formality. Judicial review cannot be sought of decisions until they have been formulated and communicated to the parties affected."

[40] The Applicants further assert that one of the responses provided by Officer Blouin on cross-examination reflect that she did consider the potential application of subsection 108(4). They maintain that it was a breach of procedural fairness for the Officer to have failed to provide notice that she was considering this provision. The relevant excerpt from the transcript of Officer Blouin's cross-examination is the following:

> 20 Q Okay. And in this case, did you consider whether there were compelling reasons?
>
> A I wasn't, I was, I had read the application. Okay. And the declaration in which they claim that they were victim [sic] of abuses, and discrimination, and violent behavior. And they, one of the brother [sic] mentioned that also at the interview. But I did not consider that this was sufficient, you know to, to how can I say, to consider them as refugee [sic]. Even though, you know, while the circumstances have changed, this was one fact, but I did not consider that what they had suffered make them, impossible for them to return to their home country.

[41] I am unable to agree that the passage in question reflects that the Officer considered subsection 108(4). In my view, the above passage suggests that she was directing her mind to paragraph 139(1)(d) of the IRPR, the provision upon which she based her decision to reject the applications, rather than to subsection 108(4) of the IRPA. After reviewing the transcript as a whole, I am not persuaded that the Officer considered, let alone reached a decision with respect to,

subsection 108(4). In any event, even if the Officer gave initial consideration to whether this might be a case in which subsection 108(4) should be considered, I do not believe that the Officer erred by failing to give notice to the Applicants on this issue, because that "it is for the claimant to establish under subsection [108(4)] that there are compelling reasons not to be returned" (*Brown*, above, at para. 7).

[42] Finally, the Applicants submitted in oral argument that the nature of the past persecution that they suffered was such that the Officer's failure to consider the potential application of subsection 108(4) amounted to a reviewable error. In support of this position, they referred to *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1425, at para. 17, where Justice Evans stated "the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact 'without regard to the evidence'."

[43] I do not agree that *Cepeda-Gutierrez* stands for the proposition that, in some cases, the nature of the past persecution alleged to have been suffered by an applicant for refugee protection may rise to the level that it imposes an obligation on the RPD or an Immigration Officer to consider the potential applicability of subsection 108(4). The above-quoted passage from that case, as well as the balance of paragraph 17 of that judgment, makes it clear that Justice Evans intended his statement to apply to findings of fact.

[44] That said, given the underlying spirit of subsection 108(4), I agree with the Applicants that there may be some situations in which the nature of past persecution is so severe that it would be contrary to that spirit and a reviewable error for anyone reviewing an application for refugee

protection in such situations to fail to consider the potential applicability of that provision, notwithstanding the settled law that the focus of the assessment to be made under sections 96 and 97 of the IRPA is forward-looking in nature.

[45] As recognized in *Canada (Minister of Employment and Immigration) v. Obstoj*, [1992] 2 F.C. 739, at 747-748 (C.A.), the inspiration for what is now subsection 108(4) is found in Article 1 C (5) of the 1951 *United Nations Convention Relating to the Status of Refugees* (the "Refugee Convention"). Article 1 C (5) states:

> C. This Convention shall cease to apply to any person falling under the terms of section A if:
>
> ….
>
> (5) He can no longer, because of the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;
>
> Provided that this paragraph shall not apply to a refugee falling under section A(1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality.

[46] With respect to the second paragraph of Article 1 C (5), the UN *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (the "Handbook") states:

> 136. 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.

[47] In discussing what is now subsection 108(4), the Federal Court of Appeal in *Canada (Minister of Employment and Immigration) v. Obstoj*, [1992] 2 F.C. 739, at 747-748 (C.A.) adopted a similar view, when it interpreted that provision 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." The Court then proceeded to observe: "The exceptional circumstances envisaged by subsection [108(4)] must surely apply to only a tiny minority of present day claimants."

[48] A similar view of the exceptional nature of subsection 108(4) was adopted in *Brown*, above, at para. 4; *Brovina*, above, at para. 5; *Shahid v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 251, at para. 25; and *Hassan v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 630, at para. 11, where Justice Rothstein expressly adopted the view expressed in Obstoj, and then added:

> While many refugee claimants might consider the persecution they have suffered to fit within the scope of subsection [108(4)], it must be remembered that the nature of all persecution, by definition, involves, death, physical harm or other penalties. Subsection [108(4)] as it has been interpreted, only applies to extraordinary cases in which the persecution is relatively so exceptional, that even in the wake of changed circumstances, it would be wrong to return refugee claimants.

[49] Having regard to the foregoing, I am satisfied that the class of situations in respect of which it may be a reviewable error for decision-maker under the IRPA to fail to consider the potential applicability of subsection 108(4) ought to be narrowly circumscribed, to ensure that it only includes truly exceptional or extraordinary situations. These will be situations in which there is *prima facie* evidence of past persecution that is so exceptional in its severity as to rise to the level of "appalling" or "atrocious."

[50] I am mindful of the decisions in *Elemah v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 779, at para. 28, and *Suleiman v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1125, at paras. 16 - 21, which state that subsection 108(4) does not require a determination that the severity of the claimed past persecution rose to the level of being "atrocious" or "appalling," before a positive finding may be made under that subsection. Those cases both dealt with situations in which the RPD conducted assessments under subsection 108(4) or its predecessor.

[51] I acknowledge that there may be situations in which it may be possible to meet the requirements of subsection 108(4), without the need to demonstrate past persecution that rises to the level of having been "atrocious" or "appalling." In keeping with the settled jurisprudence

established in *Obstoj*, above, and its progeny discussed above, those situations must be truly exceptional or extraordinary, relative to other cases in which refugee protection has been granted.

[52] However, for the purposes of determining when it may be a reviewable error for a member of the RPD, an Immigration Officer or another decision-maker under the IRPA to fail to conduct an assessment under subsection 108(4), it is appropriate to define a narrow category of situations in respect of which such an assessment is required.

[53] Keeping in mind the insights provided by paragraph 136 of the UN Handbook and the difficulty that would be associated with attempting to identify, *ex ante*, exceptional situations that do not involve severe past persecution, it is appropriate to confine that category of situations to those that in which there *is prima facie* evidence of "appalling" or "atrocious" past persecution. In those cases, a decision-maker under the IRPA is required to perform an assessment under subsection 108(4) of the IRPA. In all other cases, a decision-maker may exercise discretion as to whether to perform such an assessment.

[54] Unfortunately for the Applicants in this case, the *prima facie* evidence regarding the past persecution that they claim to have suffered did not rise to the level described in the previous paragraph. While the evidence was disturbing and involved events that were no doubt very traumatic to the Applicants and their relatives, the persecution in question was not exceptional or extraordinary, relative to the range of other cases that come before this court, and it did not rise to the level of being "appalling" or "atrocious". Therefore, I am unable to conclude, on either a reasonableness or a correctness standard of review, that the Officer erred in failing to conduct an assessment under subsection 108(4).

VI. Conclusion

[55] The applications for judicial review are dismissed.

[56] The Applicants proposed two questions for certification. The first question involved situations in which a tribunal acting under the authority of the IRPA has made an interim finding that a claimant is a refugee, there is evidence of past persecution, and the reasons for which the person sought refugee protection have ceased to exist. The question was whether the tribunal in question must perform an assessment under subsection 108(4) in such situations. I am not prepared to certify this question, particularly given (i) the factual difficulties that would be associated with determining, in any given case, whether such an interim finding has been made, (ii) decision-makers do not typically make interim findings, and (iii) such findings do not have any legal status.

[57] The second question was whether the assessment contemplated by subsection 108(4) must be made as part of the assessment of whether an applicant is a Convention refugee. That is essentially the question that was proposed for certification in *Decka*, above, and rejected by Justice Mosley on the basis that the question had been resolved by the decision in *Yamba*, above. I agree and do not believe that the decision in *Decka* is inconsistent with the decision in *Yamba*.

[58] Accordingly, there is no question for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUGES THAT the parts of the decisions of Officer Blouin, dated February 9, 2009, in which she found that the Applicants were complicit in crimes against humanity committed by both the Civil Defense Unit in Sierra Leone and by the Economic Community of West African States Monitoring Group are quashed; and that the balance of these applications for judicial review is dismissed.

"Paul S. Crampton"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	IMM-1828-09 and IMM-2689-09
STYLE OF CAUSE:	SULEYMAN ALFAKA ALHARAZIM v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND BETWEEN ABDUL WAHID ALHARAZIM v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Winnipeg, Manitoba
DATE OF HEARING:	October 13, 2010
REASONS FOR JUDGMENT AND JUDGMENT:	Crampton J.
DATED:	October 22, 2010

APPEARANCES:

David Matas	FOR THE APPLICANTS
Aliyah Rahaman	FOR THE RESPONDENT

SOLICITORS OF RECORD:

David Matas Barrister & Solicitor Winnipeg, Manitoba	FOR THE APPLICANTS
Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT