Federal Court of Appeal | Cour d'appel fédérale

Date: 20130925

Docket: A-372-12

Citation: 2013 FCA 226

CORAM: **PELLETIER J.A.**
GAUTHIER J.A.
TRUDEL J.A.

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION
AND
THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Appellants

and

ENRIQUE ANDRES TOBAR TOLEDO

Respondent

Heard at Montréal, Quebec, on April 10, 2013.

Judgment delivered at Ottawa, Ontario, on September 25, 2013.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: GAUTHIER J.A.
TRUDEL J.A.

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REASONS FOR JUDGMENT

PELLETIER J.A.

[1] Enrique Andres Tobar Toledo was only 11 years old in 1995 when he accompanied his father and the other members of his family to Canada, where his father made a claim for refugee

protection on his own behalf and on behalf of his minor children. The claims for refugee protection were rejected. The family therefore returned to Chile, its country of origin.

[2] In 2011, Mr. Tobar Toledo, accompanied by his spouse, returned to Canada, where each made a claim for refugee protection. His spouse's claim was considered eligible and was referred to the Refugee Protection Division (RPD). However, Mr. Tobar Toledo's claim for protection was considered ineligible because of the rejection of the claim for refugee protection made on his behalf in 1995, as provided for at paragraph 101(1)(*b*) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("the Act"):

101. (1) A claim is ineligible to be referred to the Refugee Protection Division if	101. (1) La demande est irrecevable dans les cas suivants :
…	…
(*b*) a claim for refugee protection by the claimant has been rejected by the Board;	*b*) rejet antérieur de la demande d'asile par la Commission;

[3] Mr. Tobar Toledo was granted leave to file an application for judicial review of that decision, which application was ruled on by Mr. Justice de Montigny of the Federal Court ("the judge" or "the Federal Court judge"). The latter held that the border services officer who considered Mr. Tobar Toledo's claim erred in concluding that he had made an earlier claim for refugee protection that had been rejected by the RPD. The judge was of the view that the application for judicial review raised the following serious question of general importance:

> Does the rejection of a refugee claim submitted by parents accompanied by minor children necessarily render ineligible a later claim submitted by one of those children, having now reached the age of majority, on their own behalf, pursuant to paragraph 101(1)(*b*) of the IRPA, regardless of whether the facts on which the second claim is based are different from those on which the original claim submitted by the parents was based?

The judge's reasons are reported in *Toledo v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 764, [2012] F.C.J. No. 925 (Reasons).

[4] For the reasons provided below, I am of the view that the appeal must be allowed, the Federal Court decision set aside and the decision of the border services officer confirmed.

FACTS AND PROCEDURAL HISTORY

[5] The relevant facts are very simple and have been broadly outlined in the preceding paragraphs. A few points are worth noting.

[6] In the course of the claim for refugee protection in 1995, the Minister of Citizenship and Immigration (the Minister) delivered to the respondent, Mr. Tobar Toledo, a document addressed to him that read as follows:

> [TRANSLATION]
>
> **Determination of eligibility under subsection 45(1) of the *Immigration Act* and referral of the claim to the Convention Refugee Determination Division of the Immigration and Refugee Board under section 46.02**
>
> Pursuant to section 45 of the *Immigration Act*, your claim to be a Convention Refugee has been found eligible by the Immigration and Refugee Board.
>
> Accordingly, and under section 46.02 of the *Immigration Act*, your claim has been referred to the Convention Refugee Determination Division.
>
> Appeal Book (A.B.), at page 42

[7] The Appeal Book contains data obtained from the Department of Citizenship and Immigration's computer system indicating that Mr. Tobar Toledo's claim for refugee protection was rejected by the Convention Refugee Determination Division on March 17, 1997.

[8] Mr. Tobar Toledo says that he knows nothing about the claim filed by his father in 1995. He is unaware of the reasons for the claim as well as of the reasons for which it was rejected. Nor does he know anything about the claim for refugee protection filed on his behalf at the same time. It should be noted, however, that Mr. Tobar Toledo's father is still alive: A.B., at page 200.

[9] The claims for refugee protection filed by Mr. Tobar Toledo and his spouse in 2011 are based on their persecution by powerful businesspeople who tried to burn down their house and impair their physical integrity. The civil authorities were aware of the misdeeds of these powerful individuals, but they refused to intervene. Mr. Tobar Toledo and his spouse therefore decided that they had to flee Chile.

[10] In his application for judicial review, Mr. Tobar Toledo alleged that the officer had misinterpreted paragraph 101(1)(*b*) of the Act and that this incorrect interpretation is inconsistent with Canada's obligations as a signatory of the *Convention on the Rights of the Child*, [1992] Can. T.S. No. 3 (the *Convention*). Mr. Tobar Toledo also alleges that this faulty interpretation violates his rights under sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982*, (U.K.), 1982, c. 11 (the *Charter*).

[11] The Federal Court judge began his analysis by addressing the standard of review. The judge noted that decisions regarding the eligibility of a claim for refugee protection often raised questions of fact or questions of mixed fact and law. Such questions are reviewable on a standard of reasonableness, but the judge was of the opinion that the issues raised in Mr. Tobar Toledo's case were not of that kind.

[12] According to the judge, the issue of whether the officer has properly interpreted the Act is one of statutory interpretation that raises a jurisdictional issue because the officer's decision determines whether the RPD has the jurisdiction to examine and decide a claim. The submissions that the officer's interpretation of the Act violates sections 7 and 15 of the Charter raise constitutional issues. Citying paragraphs 58 to 61 of *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 (*Dunsmuir*), the judge held that both questions were reviewable on a standard of correctness.

[13] The judge then referred to a case cited by the defendants (the appellants before this Court), the Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness ("the Ministers"): *Charalampis v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 1002, [2009] F.C.J. No. 1246. This is the authority that led him to consider the consequences that ensue when the facts underlying two successive claims for refugee protection are similar.

[14] The claimants in *Charalampis* were two sisters who had accompanied their father to Canada, where he had filed claims for refugee protection on his own behalf and on theirs. These

claims were accepted, and the father and two daughters were granted refugee status. The father later admitted to the RPD that the account of persecution provided in support of the claim for refugee protection was a complete fabrication. The RPD revoked its previous decision and held that the claims for refugee protection of the family members were deemed to have been rejected. This resulted in the issuance of a removal order against all of them.

[15] The two sisters then attempted to file a new claim for refugee protection, alleging that forcing them to suffer the consequences of their father's dishonesty violated their right to equality under section 15 of the Charter. The immigration officer was of the view that the sisters' claims for refugee protection were ineligible because of the removal order against them, as provided for in subsection 99(3) of the Act.

[16] The officer's decision was challenged through an application for judicial review. In its reasons, the Federal Court accepted the Minister's argument that several provisions of the Act subjected children to the consequences of a parent's dishonesty and that having the courts intervene in such cases may "create something different in nature from what Parliament intended": *Charalampis*, at paragraph 39. Accordingly, the application for judicial review was dismissed.

[17] The Ministers cited *Charalampis* in support of their submission that the officer had very limited discretion once he had determined that a prior claim for refugee protection by Mr. Tobar Toledo had been rejected. The judge concluded that *Charalampis* was irrelevant because the Charalampis sisters had not left Canada after the rejection of their initial claim for refugee protection. Accordingly, any new claim for refugee protection necessarily had to be based on the

same facts as the first, since they could not have been persecuted in Canada. Mr. Tobar Toledo, however, left Canada for a period of more than 15 years after the initial claim for refugee protection was rejected.

[18] The judge noted that paragraph 101(1)(*b*) of the Act did not distinguish between a claim for refugee protection based on facts that had already supported a prior claim and one based on different facts. Once a claimant for refugee protection has had a claim rejected, subsequent claims for refugee protection are ineligible, even if they are based on a completely different set of facts from those underlying the original claim for refugee protection. That led the judge to inquire as to whether the same principle applies in cases where a claim for refugee protection is later filed by a child who has accompanied a claimant whose claim waspreviously rejected.

[19] Bearing in mind that minor children are an integral part of claims for refugee protection filed by their parents, the judge inquired whether children should, therefore, be subject to the same treatment as their parents, particularly with respect to the ineligibility of any subsequent claims for refugee protection under paragraph 101(1)(*b*) of the Act.

[20] The judge noted that a comparison of the two official versions of the Act led to a negative conclusion. The judge's reasoning on this point is reproduced below:

> The very words of paragraph 101(1)(*b*) raises a first doubt. While the French version declares a claim ineligible in the case of a "rejet antérieur de la demande d'asile" (« prior rejection of a claim for refugee protection ») by the Board, the English version seems to be slightly more specific by providing that a claim is ineligible if "a claim for refugee protection by the claimant" has been rejected by the RPD [emphasis added]. Even if the minor children are included in their parents' application, one cannot accurately state that it is

> the children who are making the claim. In fact, they often do not have the capacity to make such a claim, and that is the reason their interests are represented by either parent. While a minor can certainly make a claim for refugee protection on his or her own behalf, that is not the case here.
>
> Reasons, at paragraph 21. [Emphasis added.]

[21] The judge also noted Mr. Tobar Toledo's argument that Parliament does not always subject minor children to the same treatment as their parents. For example, section 226 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, provides that a child accompanying a parent who is inadmissible and subject to a deportation order is exempt from the requirement the he or she obtain prior authorization before returning to Canada, unlike the parent, who must obtain such an authorization.

[22] The judge then considered the legislative history of the provision at issue. He noted that section 46.01 of the former statute, the *Immigration Act*, R.S.C. 1985 c. I-2, allowed a failed claimant to file a new claim for refugee protection on the condition that the claimant leave Canada for at least 90 days. This resulted in abuse of the system by some failed claimants, who would file successive claims separated by 90-day stays in the United States. It was to put an end to this type of abusive practice that the Act was amended and paragraph 101(1)(*b*) introduced.

[23] The judge was of the view that Mr. Tobar Toledo was not abusing the system in this fashion. While acknowledging that the circumstances of the father's claim for refugee protection remained unknown, the judge took the view, most likely because of the passage of time, that Mr. Tobar Toledo's claim for refugee protection was unrelated to that filed by his father.

[24] The judge held that the border services officer had erred in deciding that Mr. Tobar Toledo's claim for refugee protection was ineligible "simply because his father's claim for refugee protection, in which he was included, was rejected in 1997": Reasons at paragraph 27. The judge continued by stating that the situation would be otherwise if Mr. Tobar Toledo's claim had been based on the same facts as that of his father. According to the judge, in order to make the necessary assessment, Mr. Tobar Toledo's claim would have to be examined on its face: if the claim did not appear to be based on the same circumstances as those in his father's claim, it would have to be referred to the RPD for the purposes of determining whether refugee status could be granted to Mr. Tobar Toledo.

[25] In the light of this ruling, the judge did not have to address the issues relating to the Convention or the Charter.

ISSUES

[26] Since I am of the view that the appeal must be allowed, I will examine the issues raised by Mr. Tobar Toledo :

1- The validity of the certified question.

2- The standard of review.

3- The interpretation of paragraph 101(1)(*b*).

4- The connection between Mr. Tobar Toledo's claim and his father's.

5- The reasonableness of the border services officer's decision.

ANALYSIS

The certified question

[27] Mr. Tobar Toledo raises the preliminary issue of whether the question certified by the judge is consistent with the standards established by this Court. The case law of this Court holds that a certified question must be not only a serious question of general importance, but also a question that has been dealt with by the judge in his or her reasons and one that would be dispositive of the appeal: see *Zazai v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 89, [2004] F.C.J. No. 368, at paragraphs 11-12; *Varela v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 145, [2010] 1 F.C.R. 129, at paragraphs 27-29.

[28] In this case, Mr. Tobar Toledo argues that the certified question cannot be dispositive of the appeal because it assumes that there is a difference between the facts underlying the first and second claims. Because the facts alleged by Mr. Tobar Toledo's father in his claim for refugee protection are unknown, it is impossible to know whether the facts alleged by Tobar Toledo are the same or not. Furthermore, the Ministers have never alleged that the facts underlying the two claims were the same. According to Mr. Tobar Toledo, the Court should therefore refuse to hear this appeal on the merits.

[29] I disagree with Mr. Tobar Toledo's reasoning. In his reasons, the judge concluded that paragraph 101(1)(*b*) applies, on the basis of its wording, to cases of successive claims for refugee protection by an adult, regardless of whether the facts underlying the claims are the same or not:

Reasons, at paragraph 18. Further in his reasons, the judge held that a subsequent claim for refugee protection is ineligible if it is based on the same facts as a prior claim even if that claim is made by a minor child or on behalf of a minor child by his or her parent: Reasons, at paragraph 27. Therefore, in the judge's mind, a subsequent claim for refugee protection may be eligible if the prior claim was made by, or on behalf of, a minor child and if the two claims are based on different facts.

[30] In his analysis, the judge seems to have concluded that, because Mr. Tobar Toledo's claim was filed 15 years after that of his father, the two claims were not based on the same facts: Reasons, at paragraph 26. This assumption is not unreasonable. Moreover, it is not at all detrimental to Mr. Tobar Toledo; any other conclusion would have made his claim ineligible. Mr. Tobar Toledo's attack on this inference by the judge is ill-advised, as it was the only basis on which the former's application for judicial review could be allowed.

The standard of review

[31] The parties do not agree on the applicable standard of review.

[32] It will be recalled that the judge decided that the standard of correctness was applicable to the issues before him because they either raised questions about the jurisdiction of the RPD or constitutional issues. Mr. Tobar Toledo agrees with this conclusion.

[33] The Ministers, on the other hand, are of the view that the standard of reasonableness should apply. They argue that the case law of the Federal Court supports their view.

[34] When this Court hears an appeal from the Federal Court's decision in a judicial review of a tribunal or of an administrative decision-maker, its role is to determine whether the Federal Court has chosen the appropriate standard of review and applied it correctly. The choice of standard of review is a question of law that is reviewable by this Court on a standard of correctness: *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, at paragraph 43.

[35] In *Dunsmuir*, at paragraphs 54 and 62, the Supreme Court of Canada states that before proceeding to the standard of review analysis, courts must ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. This requires a definition of the category of question at issue.

[36] In this case, the issue is whether Mr. Tobar Toledo is a person who has had a prior claim for refugee protection rejected by the RPD. The border services officer obviously decided that he was, while the judge, despite acknowledging that Mr. Tobar Toledo had been named in a claim for refugee protection, nevertheless found that he was not a person who had had a prior claim for refugee protection rejected.

[37] This issue seems to have two aspects: the first is determining whether Mr. Tobar Toledo filed a claim for refugee protection that was rejected. The second is determining whether this rejection is covered by paragraph 101(1)(*b*). To respond to the first question, the officer merely had to consult the archives or the computer system of the Department of Citizenship and Immigration. This is a question of fact.

[38] The answer to the second question calls for the interpretation of paragraph 101(1)(*b*) of the Act. When this provision is interpreted in the light of its wording, its context and Parliament's purpose for enacting it, do the words "a claim for refugee protection by the claimant has been rejected" include the rejection of a claim for refugee protection of a minor child whose claim is dependent his parents' claim for refugee protection, and if so, is there a distinction to be made between claims that are based on the same facts or different facts? These are questions of law.

[39] The issues of whether the interpretation given of paragraph 101(1)(*b*) is in accordance with the Convention and the Charter are indisputably also questions of law.

[40] Having defined the categories of question, has the standard of review already been determined in a satisfactory manner by the case law? For questions of fact, the standard of review can be found at paragraph 18.1(4)(*d*) of the *Federal Courts Act*, R.S.C. 1985 c. F-7:

18. (4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal	18. (4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :
…	…
(*d*) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;	*d*) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;

[41] In *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at paragraph 45, the Supreme Court of Canada held that the standard described at paragraph 18.1(4)(*d*) of the *Federal Court Act* corresponded to the standard of reasonableness.

[42] As for questions of law, it should be noted that the decision-maker, the border services officer, is an administrative decision-maker. He does not decide these issues on behalf of a tribunal. At the most, he decides questions of law as a delegate of the Minister of Public Safety and Emergency Preparedness: see subsections 4(2) and 6(1) of the Act.

[43] This Court, in a decision authored by Mr. Justice Mainville, has considered in depth the issue of the deference owed to an administrative decision-maker, including a ministerial delegate, in *Georgia Strait Alliance v. Canada (Minister of Fisheries and Oceans)*, 2012 FCA 40, [2012] F.C.J. No. 157 (*Georgia Strait*). In that case, this Court stated that the case law pertaining to the deference owed to an administrative tribunal that decides questions of law in the course of an adversarial proceeding does not apply to an administrative decision-maker "who is not acting as an adjudicator and who thus has no implicit power to decide questions of law": see *Georgia Strait*, at paragraphs 96 to 99.

[44] The Court went on to conduct the standard of review analysis. Given that *Georgia Strait* involved the *Species at Risk Act*, S.C. 2002, c. 29, and the *Fisheries Act*, R.S.C. 1985 c. F-14, this analysis does not apply to the to the interpretation of the Act by the Minister of Public Safety and Emergency Preparedness (or his delegate).

[45] It is therefore necessary to undertake the standard of review analysis by examining the factors identified at paragraph 64 of *Dunsmuir*. The factor that best reveals Parliament's intention is, in my view, the fact that the Act does not contain a privative clause; furthermore, it allows for the possibility of judicial review "with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act": see section 72 of the Act. This is an unequivocal indication of Parliament's intention not to shield the Minister's interpretation of the Act from judicial oversight.

[46] Although the Act establishes a comprehensive scheme for dealing with immigration and refugee protection applications, in comparison with the courts, the Minister and his agents do not have any greater expertise on questions pertaining to the interpretion of the part of the Act that deals with the examination of claims at the border. The fact that it is different for the Immigration and Refugee Board and the RPD is not determinative, because they are not involved in this case.

[47] The nature of the question, i.e., the scope of paragraph 101(1)(*b*), does not call upon the decision-maker's specialized expertise either. This provision reflects the objectives of the Act, particularly paragraph 3(2)(*e*):

3. (2) The objectives of this Act with respect to refugees are	3. (2) S'agissant des réfugiés, la présente loi a pour objet :
…	…
(*e*) to establish fair and efficient procedures that will maintain the integrity of the Canadian refugee protection system, while upholding Canada's respect for the human rights and fundamental freedoms of all human beings;	*e*) de mettre en place une procédure équitable et efficace qui soit respectueuse, d'une part, de l'intégrité du processus canadien d'asile et, d'autre part, des droits et des libertés fondamentales reconnus à tout être humain;

It is clear on its face that paragraph 101(1)(*b*) is intended to protect the integrity of Canada's refugee protection process by limiting repeated access to the RPD. The challenge of interpreting this provision in the light of fundamental rights and freedoms is one that the courts are better equipped to handle than administrative decision-makers, which suggests that Parliament did not intend to impose an obligation of deference on the courts.

[48] All of these factors lead me to conclude that the findings of law reached by the border services officer in the context of paragraph 101(1)(*b*) are reviewable on the standard of correctness.

The connection between Mr. Tobar Toledo's claim and his father's

[49] For the purposes of this analysis, I will address this issue before moving on to the interpretation of paragraph 101(1)(*b*), contrary to the order of analysis followed by Mr. Tobar Toledo.

[50] As noted previously, the Federal Court judge accepted the fact that Mr. Tobar Toledo was the subject of a claim for refugee protection in 1995, but appears to have questioned the legal status of that claim. It appears from a reading of his reasons that the judge did not consider Mr. Tobar Toledo's claim for refugee protection to be on the same footing as his father's claim. From the judge's perspective, Mr. Tobar Toledo's claim depended on his father's; it was not examined independently. Its outcome depended entirely on the outcome of his father's claim for refugee protection.

[51] It is important not to confuse the factual basis of Mr. Tobar Toledo's claim for refugee protection with the claim's legal character. The material of record clearly establishes that the RPD had before it a claim for refugee protection with respect to Mr. Tobar Toledo. This claim was joined with his father's in accordance with the regulations in force at the time:

10(1) An Assistant Deputy Chairperson or coordinating member may order that two or more claims or applications be processed jointly where the Assistant Deputy Chairperson or coordinating member believes that no injustice is thereby likely to be caused to any party.	10(1) Un vice-président adjoint ou un membre co-ordonnateur peut ordonner que deux ou plusieurs revendications ou demandes soient traitées conjointement, s'il estime qu'une telle mesure ne risque pas de causer d'injustice aux parties.
(2)Subject to subsection (3), claims or applications of the legal or de *facto* spouse, dependant children, father, mother, brothers or sisters of the person concerned shall be processed jointly.	(2) Sous réserve du paragraphe (3), les revendications ou les demandes du conjoint de droit ou de fait, des enfants à charge, du père, de la mère, des frères ou des sœurs de l'intéressé sont traitées conjointement.
(3) On application by a party, or on the members' own motion at the time of the hearing, the members may order that the claims or applications be heard separately, where the members believe that hearing the claims or applications jointly is likely to cause an injustice to any party.	(3) Les membres peuvent, à la demande d'une partie, ou de leur propre initiative au moment de l'audience, ordonner qu'une revendication ou une demande soit entendue séparément d'une autre revendication ou demande, s'ils estiment que le fait d'entendre conjointement les revendications ou les demandes risque de causer une injustice à l'une ou l'autre des parties.

Convention Refugee Determination Division Rules, SOR/93-45.

[52] It is clear from reading these regulations that each member of a family unit claiming refugee protection makes his or her own claim, otherwise it would not be possible to hear them jointly or separately. When the claims are all based on the same facts, hearing them jointly is a cost-saving measure that avoids the need to hear the same evidence multiple times with the risk of contradictory outcomes. In the circumstances, it is inaccurate to say that the son's claim is dependent on the father's: the treatment of both depends on the RPD's assessment of a single version of the facts. However, this does not mean that all members of the family are not claimants for refugee protection on the same basis.

[53] It occasionally happens that one of a group of jointly heard claims is accepted while others are rejected, a result that is only possible if all the applications are independent of one another. In *P.D.B. v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 1042, [2011] F.C.J. No. 1335 (*P.D.B.*), the RPD rejected the claim for refugee protection of a father and his seven-year-old son. The father, mother and son had come to Canada on a temporary visa. The mother was so abusive to the son that he was placed with his aunt and uncle (in Canada), who became his guardians. When the visa expired, the father and mother returned to their country of origin. The mother, furious that the son had been left behind in Canada, uttered death threats against her husband. The father returned to Canada and filed a claim for refugee protection on his own behalf and on behalf of his son. Both claims for refugee protection were rejected because the father had not sought state protection in his country of origin.

[54] The Federal Court overturned the RPD's decision with respect to the son's claim for refugee protection. The Court was of the view that the RPD had not been sufficiently alive to the son's

specific vulnerabilities as an abused child. The Court allowed the son's application for judicial review and referred the matter back to the RPD, instructing it to grant him refugee status. However, the Court dismissed the father's application for judicial review.

[55] Such a result can be explained by the fact that each claim for refugee protection is independent of other claims made by members of a single family unit, regardless of the similarity of the facts underlying the claims. This does not mean that the similarity of the facts has no impact on the outcome of these claims. When the facts supporting several claims are the same, it is not surprising that all of the claims have the same outcome. When the facts underlying the claims are not the same, it is also to be expected that each claim will be judged on the basis of its own facts.

[56] I find that the Federal Court judge erred in holding that the claim for refugee protection filed on Mr. Tobar Toledo's behalf in 1995 was not his own claim for refugee protection. The fact that it was heard jointly with his father's claim does not affect its individual nature. The border services officer clearly concluded that Mr. Tobar Toledo had made a claim for refugee protection on his own behalf in 1995. This conclusion was not unreasonable. The judged erred in questioning it.

The interpretation of paragraph 101(1)(*b*)

[57] I will now move on to the interpretation of paragraph 101(1)(*b*).

[58] Let us recall that there is today but one rule of statutory interpretation:

> Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation (1997)*; Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter *"Construction of Statutes"*); Pierre-André Côté, *The Interpretation of Laws* (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> *Rizzo & Rizzo Shoes (Re)*, [1998] 1 S.C.R. 27, at paragraph 21.

[59] To this single principle of interpretation, one must add the qualification set out by the Supreme Court of Canada in *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at paragraph 10:

> It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

[60] The starting point is always the text of the statute that is being interpreted. I will repeat the text of the provision at issue for ease of reference:

101. (1) A claim is ineligible to be referred to the Refugee Protection Division if	101. (1) La demande est irrecevable dans les cas suivants :
(*a*) refugee protection has been	*a*) l'asile a été conféré au

conferred on the claimant under this Act;	demandeur au titre de la présente loi;
(*b*) a claim for refugee protection by the claimant has been rejected by the Board;	*b*) rejet antérieur de la demande d'asile par la Commission;
(*c*) a prior claim by the claimant was determined to be ineligible to be referred to the Refugee Protection Division, or to have been withdrawn or abandoned;	*c*) décision prononçant l'irrecevabilité, le désistement ou le retrait d'une demande antérieure;
(*d*) the claimant has been recognized as a Convention refugee by a country other than Canada and can be sent or returned to that country;	*d*) reconnaissance de la qualité de réfugié par un pays vers lequel il peut être renvoyé;
(*e*) the claimant came directly or indirectly to Canada from a country designated by the regulations, other than a country of their nationality or their former habitual residence; or	*e*) arrivée, directement ou indirectement, d'un pays désigné par règlement autre que celui dont il a la nationalité ou dans lequel il avait sa résidence habituelle;
(*f*) the claimant has been determined to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality, except for persons who are inadmissible solely on the grounds of paragraph 35(1)(*c*).	*f*) prononcé d'interdiction de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux — exception faite des personnes interdites de territoire au seul titre de l'alinéa 35(1)*c*) — , grande criminalité ou criminalité organisée.

[61] The meaning of paragraph 101(1)(*b*) seems fairly clear, although there appears to be a slight difference between the English and French versions. The Federal Court judge noted that the English version specifically referred to a prior claim by the claimant, while that point was absent from the French version. This difference led the judge to conclude that one could not hold that a claim had been made by a minor child who lacked the legal capacity to do so. Without saying so explicitly, the

judge implied that because a child cannot file a claim, a child's claim cannot be rejected. Paragraph 101(1)(*b*) would therefore not apply to cases in which a claimant's claim was heard jointly with that of his or her parent.

[62] The judged erred in distinguishing between a parent's claim for refugee protection and that of his or her child. If the same status is given to both claims, the judge's finding based on the two versions of the text no longer holds.

[63] Mr. Tobar Toledo also argues that the Act must be interpreted in a way that respects Canada's obligations under the treaties to which it is a signatory, in this case, the Convention. In particular, Mr. Tobar Toledo draws the Court's attention to paragraph 2 of Article 2 of the Convention:

> States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

[64] According to Mr. Tobar Toledo, paragraph 101(1)(*b*) must be interpreted in such a manner that he is not punished on the basis of the [TRANSLATION] "political opinions or activities of his father": Memorandum of the Respondent, at paragraph 93. The interpretation of paragraph 101(1)(*b*) that I am proposing does not subject Mr. Tobar Toledo to punishment or discrimination on the basis of his father's activities or political opinions. It is Mr. Tobar Toledo's prior claim for refugee protection that results in the ineligibility of his current claim, not his father's legal status or acts or opinions.

[65] Mr. Tobar Toledo pursues his argument as follows at paragraph 93 of his Memorandum of Fact and Law:

> [TRANSLATION]
> The respondent alleges that he neither participated in nor attended the hearing for his father's claim for refugee protection. He also alleges in his affidavit, filed before this Court, that he has no knowledge of the details of or reasons for his father's claim for refugee protection. It is for this very reason that he should now be entitled to file a claim for refugee protection on his own behalf.

[66] As to this argument, it would be useful to recall that we are in the process of interpreting paragraph 101(1)(*b*) of the Act in the light of the Convention. It is not a matter of deciding whether the Convention itself grants rights to Mr. Tobar Toledo, as he implies in the passage cited above.

[67] It is true that Mr. Tobar Toledo had little control over the presentation of his first claim for refugee protection and that its rejection did not result from any act on his part. He therefore finds himself disadvantaged as a consequence of decisions made by his parents. It is possible to agree with Mr. Tobar Toledo's statements without agreeing with the conclusion he draws from them. The Convention cannot protect children from all of the consequences of the choices made by their parents. The child of a criminal may well have to live apart from his or her parent during a period of detention. The child is not responsible for his or her parent's criminal acts but must suffer the consequences.

[68] The Act offers a child claimant for refugee protection the same protections that it offers his or her parents, but it also imposes the same consequences when the claim for refugee protection is rejected, unless the child's condition is different from that of his or her parent: see *P.D.B.* cited above. It is precisely this possibility of distinguishing between the condition of the child and that of

the parent that makes the Act consistent with the Convention. According to the interpretation of paragraph 101(1)(*b*) that I am proposing, the requirements of the Convention are met in the processing of the claim for refugee protection and do not apply to the consequences of a rejection of a child's claim for refugee protection. These consequences arise from the rejection of the child's claim, and are not a sanction imposed on the child because of the rejection of his or her parent's claim for refugee protection.

[69] Mr. Tobar Toledo also argues that the interpretation of 101(1)(*b*) proposed by the Ministers violates his rights under sections 7 and 15 of the Charter. The well settled case law holds that the interests protected by section 7 of the Charter do not come into play until a decision is made to remove the claimant: *Poshteh v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 85, [2005] 3 F.C.R. 487, at paragraph 63. In Mr. Tobar Toledo's case, the ineligibility of his claim will not necessarily result in his removal from Canada. He is entitled to a pre-removal risk assessment to ensure that he is not returned to a country where there would be a risk to his life or a risk of cruel and unusual treatment: see section 112 and paragraph 113(*c*) of the Act.

[70] Mr. Tobar Toledo submits that he is disadvantaged by the fact that the acceptance rate is lower for pre-removal risk assessments than for claims for refugee protection. This argument is only meaningful if the candidates in each case face the same risks in the same proportions. If this is not the case, the comparison is not a fair one. However, there is nothing in the record suggesting that the candidates in the two cases face the same risks in the same proportions.

[71] Mr. Tobar Toledo further alleges that the interpretation of paragraph 101(1)(*b*) by which the rejection of his prior claim for refugee protection renders ineligible his present claim is discriminatory and infringes his rights under section 15 of the Charter. Mr. Tobar Toledo does not address these issues in his Memorandum of Fact and Law, beyond referring to the memorandum that he filed with the Federal Court. If we examine the arguments presented to the Federal Court, Mr. Tobar Toledo's claims relating to section 15 take up 10 paragraphs: see paragraphs 40-42 at pages 164-65 of the A.B. and paragraphs 71 to 81 at pages 418-20 of the A.B. This is not a serious argument, and it does not deserve more of the Court's time than Mr. Tobar Toledo himself has put into it. A party cannot rely on a constitutional argument by invoking the Charter and merely alleging that it has been violated.

[72] I, therefore, conclude that the Federal Court erred in law in interpreting paragraph 101(1)(*b*) in such a way that the claim for refugee protection filed on Mr. Tobar Toledo's behalf did not result in the ineligibility of any subsequent claim on his part, regardless of the facts underlying either of the claims.

The reasonableness of the border services officer's decision

[73] Mr. Tobar Toledo is of the view that the border services officer's decision is unreasonable, but he does not develop any reasoning in support of that conclusion. He merely refers to *Dunsmuir*, in which the characteristics of a reasonable decision are described.

[74] The question of reasonableness applies only to decisions for which the decision-maker has some form of discretion. If the Act imposes a legal consequence when certain facts are present, taking notice of these facts and declaring the consequence imposed by the Act is not a discretionary decision. The fact that it is a human actor who takes notice of these facts and communicates the legal consequence imposed by the Act to the affected party does not make that person a decision-maker with discretion.

[75] Mr. Tobar Toledo believes that a discretionary power arises from subsection 100(3) of the Act, according to which the claim for refugee protection is deemed to be referred to the RPD if the border services officer does not declare it ineligible within three days after its receipt. Mr. Tobar Toledo claims that this provision grants the border services officer the discretion to suspend the processing of a claim for refugee protection for three days so that the claim will be deemed referred. The officer could thus circumvent the effect of paragraph 101(1)(*b*).

[76] In my view, an officer who applied this strategy would be failing in his or her duty. This provision exists to ensure that claims for refugee protection filed at the border are processed quickly. If, for whatever reason, a claim cannot be processed within three days, it is deemed referred to the RPD, where the issue of eligibility may still be raised: see subsection 104(1) of the Act. Mr. Tobar Toledo's proposal distorts the Act and must be rejected.

CONCLUSION

[77] For these reasons, I am of the view that the appeal should be allowed, the judgement of the Federal Court should be set aside and the ineligibility of Mr. Tobar Toledo's claim for refugee protection should be confirmed.

[78] I would answer the certified question as follows:

> Question: Does the rejection of a refugee claim submitted by parents accompanied by minor children necessarily render ineligible a later claim submitted by one of those children, having now reached the age of majority, on their own behalf, pursuant to paragraph 101(1)(*b*) of the Act, regardless of whether the facts on which the second claim is based are different from those on which the original claim submitted by the parents was based?
>
> Answer: The rejection of a refugee claim submitted by a minor child, whether or not that claim has been filed in conjunction with claims by other family members, necessarily renders ineligible a later claim submitted by that child, having now reached the age of majority, pursuant to paragraph 101(1)(*b*) of the Act, regardless of whether the facts on which the second claim is based are different from those on which the original claim submitted by the child was based.

"J.D. Denis Pelletier"

J.A.

"I agree.
Johanne Gauthier, J.A."

"I agree.
Johanne Trudel, J.A."

Certified true translation
François Brunet, revisor

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-372-12
STYLE OF CAUSE:	THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS v. ENRIQUE ANDRES TOBAR TOLEDO
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