Federal Court  Cour fédérale

Date: 20220221

Docket: IMM-2696-21

Citation: 2022 FC 222

Ottawa, Ontario, February 21, 2022

PRESENT: The Honourable Madam Justice Roussel

BETWEEN:

MOEZ HAMAMI

Applicant

and

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

Respondents

JUDGMENT AND REASONS

I. Introduction

[1] Paragraph 101(1)(*c.1*) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] precludes asylum claimants who have made refugee protection claims in certain countries, with which Canada has an information sharing agreement or arrangement, from having their claims heard and adjudicated by the Refugee Protection Division [RPD]. Claimants who

fall within this category have their claims determined by way of an enhanced pre-removal risk assessment [PRRA] process, which entitles them to a hearing. Canada has such agreements with the United States, the United Kingdom, Australia and New Zealand.

[2] On April 7, 2021, the Respondents determined that the Applicant's claim for refugee protection in Canada was ineligible to be referred to the RPD due to a prior claim for asylum in the United Kingdom in 1997.

[3] By way of his application for judicial review, the Applicant submits that the Respondents' determination that his claim is ineligible to be heard by the RPD pursuant to paragraph 101(1)(*c.1*) of the IRPA is both incorrect and unreasonable. He claims that paragraph 101(1)(*c.1*) of the IRPA does not apply to refugee claims made in other countries before April 8, 2019, the date on which the *Budget Implementation Act, 2019, No 1*, SC 2019, c 29 [BIA] was introduced. He also contends that the Respondents' exercise of statutory discretion to deem his refugee claim ineligible was unreasonable.

[4] For the reasons that follow, the application for judicial review is dismissed.

II. Background Facts

[5] The Applicant is a Palestinian born in Libya. In December 1996, he fled to the United Kingdom with his parents after being forced to leave Libya and being prevented by the Lebanese government from entering Lebanon. The Applicant was 19 years old.

[6] In 1997, the Applicant's father applied for asylum in the United Kingdom and included the Applicant as a child in the family application. The Applicant never himself submitted a refugee claim.

[7] In 1999, Lebanon removed the Palestinian ban. The Applicant's parents withdrew their refugee application and moved to Lebanon. The Applicant remained in the United Kingdom to complete his university studies, which he did in 2002. Since no action or interview request had occurred with respect to his claim in the United Kingdom, the Applicant decided to withdraw the application and go to Lebanon in October 2002.

[8] While in Lebanon, the Applicant suffered discrimination, physical attacks and threats because of his brother's political activities. As a result, the Applicant, his wife and their two (2) children came to Canada on June 21, 2019, on a visitor's visa. On August 2, 2019, they made a claim for refugee protection. The Applicant declared to Immigration, Refugees and Citizenship Canada [IRCC] that his father had previously made an asylum claim in the United Kingdom in 1997 that was never processed and was ultimately withdrawn. The Applicant was told to report back on August 20, 2019.

[9] On August 9, 2019, an IRCC officer requested confirmation from the United Kingdom as to whether the Applicant had made an asylum claim in that country. The Applicant's interview scheduled for August 20, 2019, was cancelled pending IRCC's verification.

[10] On October 15, 2019, in the absence of a response from the United Kingdom, the claims of the Applicant and his family were found eligible to be referred to the RPD. The same day, the Applicant was issued a Departure Order and a report was prepared pursuant to subsection 44(1) of the IRPA.

[11] On November 22, 2019, IRCC received a response from the United Kingdom, indicating that: (1) the Applicant made an application for asylum in the United Kingdom on March 25, 1997; (2) he withdrew his asylum claim on September 27, 2002; (3) there had been no contact with the Applicant and he was recorded as an absconder; and (4) his file was closed on October 31, 2012.

[12] On January 12, 2021, the RPD wrote to the Applicant requesting that he provide additional information and documents, including the reasons for the Applicant making and withdrawing his claim for asylum in the United Kingdom. The Applicant submitted the information requested and a hearing was scheduled for him and his family on May 28, 2021.

[13] On March 24, 2021, an IRCC officer sent the Applicant a letter entitled “Reasons for redetermination as per A104 for ineligibility A101(1)(*c.1*)” [Reasons for Redetermination]. The letter indicated that his refugee claim may be ineligible to be referred to the RPD pursuant to paragraph 101(1)(*c.1*) of the IRPA, as IRCC had received confirmation that he had made a refugee claim in the United Kingdom in 1997. The IRCC officer also requested that he attend an interview on April 7, 2021, to discuss the matter.

[14] The Applicant attended the interview on April 7, 2021. He was questioned on his claim for protection in the United Kingdom. He then signed a declaration form acknowledging the questions asked and the answers given during the interview. The IRCC officer verbally advised the Applicant that his claim was ineligible to be referred to the RPD, before taking away his Refugee Claimant Identification and issuing him a new Refugee Protection Claimant Document. This new document stated that the refugee protection claim was determined to be ineligible for decision by the RPD and that the Applicant was entitled to apply for a PRRA. The IRCC officer prepared another report under subsection 44(1) of the IRPA and issued an Exclusion Order against the Applicant.

[15] On April 19, 2021, the RPD wrote to the Applicant stating that it had received notification from IRCC that his refugee claim was ineligible to be determined by the RPD and therefore, the pending proceedings before the RPD regarding the Applicant's claim were terminated in accordance with paragraph 104(2)(*a.1*) of the IRPA.

[16] On April 21, 2021, the Applicant filed an application for leave and for judicial review, for which leave was granted on September 13, 2021.

[17] On June 3, 2021, the RPD determined that the Applicant's wife and two (2) children were Convention refugees and accepted their claims for protection.

[18] By letter dated September 14, 2021, the Applicant received a document entitled "Notification of Ineligible Refugee Claim pursuant to 104(1) and 104(2) of the *Immigration and Refugee Protection Act*" [Notification of Ineligible Refugee Claim].

[19] While framed differently by the Applicant, the determinative issue in this proceeding is whether the IRCC officer reasonably determined that the Applicant's refugee claim was ineligible to be referred to the RPD pursuant to paragraph 101(1)(*c.1*) of the IRPA. The Applicant argues that paragraph 101(1)(*c.1*) of the IRPA does not have retroactive application, and therefore does not apply to his 1997 United Kingdom refugee claim. He also claims that the IRCC officer's subsequent and unilateral exercise of statutory discretion to deem his refugee claim ineligible was unreasonable.

III. Analysis

A. *Standard of Review*

[20] In *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], the Supreme Court of Canada held that reasonableness is the presumptive standard of review for decisions made by administrative decision makers (*Vavilov* at paras 10, 16-17). In my view, none of the exceptions described in *Vavilov* apply here. Contrary to the Applicant's argument, the IRCC officer's decision does not engage "questions of law of central importance to the legal system as a whole", nor does it engage "an issue of jurisdictional boundaries between the RPD and the PRRA". Rather, it involves the IRCC officer's interpretation and application of paragraph 101(1)(*c.1*) of the IRPA, its home statute. It is well established that the reasonableness

standard of review applies to a decision maker's interpretation of its enabling statute and to the examination of a refugee claim's eligibility (*Vavilov* at para 25; *Antakli v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 356 at para 14).

[21] When reviewing a decision under the reasonableness standard, the Court shall examine "the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome" (*Vavilov* at para 83). It must ask itself "whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para 99). The burden is on the party challenging the decision to show that it is unreasonable (*Vavilov* at para 100).

B. *Preliminary Issues*

(1) Decision Subject to Judicial Review

[22] After reviewing the material submitted by the parties, the Court issued a direction on November 12, 2021, bringing to their attention the following:

a. In his notice of application filed on April 21, 2021, the Applicant is seeking judicial review against: (1) the Reasons for Redetermination by IRCC, dated March 24, 2021; (2) the report under subsection 44(1) of the IRPA dated April 7, 2021; and (3) the Exclusion Order of the same date;

b. In his memorandum of argument, the Applicant is also seeking relief against the decision of the RPD, dated April 19, 2021, to terminate the proceedings;

c. Leave was granted against "the decision of the [IRCC] dated March 24, 2021", which in fact is the letter advising the Applicant of his possible ineligibility and convoking him to the April 7, 2021, interview;

d. Pursuant to Rule 302 of the *Federal Courts Rules*, SOR/98-106, an application for judicial review shall be limited to a single order in respect of which relief is sought.

[23] After considering the submissions of the parties at the hearing, I agree with the Respondents that the decision that is to be the focus of the application for judicial review is the April 7, 2021 decision, finding the Applicant's claim ineligible to be referred to the RPD and entered in the Global Case Management System [GCMS]. This is apparent from the Applicant's memorandum of argument, where his submissions are essentially directed at disputing the IRCC officer's finding of ineligibility pursuant to paragraph 101(1)(*c.1*) of the IRPA. As it is in the interest of the parties that the proceedings be regularized, I am granting the Applicant leave to judicially review the April 7, 2021, decision *nunc pro tunc*.

(2) Absence of a Formal Written Decision

[24] The Applicant notes at the outset of his submissions that there is no formal written decision confirming what section of the IRPA the IRCC officer relied on to conclude that his claim was ineligible. He argues that this constitutes a breach of procedural fairness.

[25] The Respondents submit that the oral ineligibility decision made on April 7, 2021, meets the requirement for formality of decisions. When the IRCC officer informed the Applicant of the

decision at the interview, the decision was formal. It was also formulated and communicated to the Applicant in a definitive manner.

[26] In support of their argument, the Respondents submitted a further affidavit from the IRCC officer assigned to the Applicant's case. The IRCC officer states that he advised the Applicant during the interview on April 7, 2021, that IRCC had received information from its partners in the United Kingdom confirming that the Applicant had made a refugee claim there on March 25, 1997, and that the claim was withdrawn on September 27, 2002. He explained to the Applicant that because IRCC had received confirmation about his previous refugee claim in the United Kingdom, he was obligated to render a negative eligibility decision. He notified the Applicant of his ineligible claim and quoted both paragraphs 101(1)(*c.1*) and 104(1)(*a.1*) of the IRPA from the Department of Justice website. After advising the Applicant of his ineligibility, the IRCC officer asked him whether he had any questions, to which he replied he did not. The IRCC officer then asked the Applicant's counsel whether he had any questions about the Applicant's ineligibility due to his previous claim in the United Kingdom and the counsel stated that he did not. The Respondents submit that although the decision was communicated orally at the interview, it was entered in the GCMS and meets procedural fairness requirements. The GCMS notes, which form part of the decision, read as follows:

> Refugee eligibility redetermination at Windsor IRCC on 07APR202l: Following a redetermination under paragraph 104(l) of the Immigration and Refugee Protection Act, I have found the claimant, Moez HAMAMI, ineligible under Section 101(l)(c.l) to have his claim referred to the Refugee Protection Division of the Immigration and Refugee Board. The basis for the determination is Moez HAMAMI has made an application for asylum in the UK on 25Marl997. His claim for asylum in the UK and been confirmed by UK info sharing received on 22NOV2019. Mr. HAMAMI also

> indicated on his Schedule A that he made a claim for asylum in the UK in 1996 and that it was withdrawn.

[27] Generally, new evidence is not admissible on judicial review. The recognized exceptions to the general rule include new evidence that: (1) provides general background information; (2) addresses procedural fairness issues; or (3) highlights the complete absence of evidence before the administrative decision maker (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras 19-20). It is also a well-established principle that a decision maker may not supplement the reasons in his decision (*Pompey v Canada (Citizenship and Immigration)*, 2016 FC 862 at para 26; *Qin v Canada (Citizenship and Immigration)*, 2013 FC 147 at para 18).

[28] I am satisfied that the affidavit of the IRCC officer is not improper. It provides background information, such as how the Applicant's claim was handled and why the Notification of Ineligible Refugee Claim was not provided to the Applicant before September 14, 2021. The affidavit also addresses the Applicant's allegations and inferences of procedural unfairness regarding the conduct of the interview, as well as his counsel's treatment (*Leahy v Canada (Citizenship and Immigration)*, 2012 FCA 227 at para 145). It is not being used to bolster the reasons for decision. I also note that during the hearing, the Applicant's counsel agreed that the affidavit's use was proper.

[29] It is not necessary for me to decide whether the oral ineligibility decision meets the requirements for formality of decisions, as I find that the lack of a formal written decision does not amount to a breach of procedural fairness in this case.

[30] The March 24, 2021, letter calling the Applicant in for an interview explicitly states that the claim may be ineligible pursuant to paragraph 101(1)(*c.1*) of the IRPA and cites the provision. In addition, the declaration signed by the Applicant on April 7, 2021, after his interview, clearly demonstrates that the focus of the interview was on the claim made in the United Kingdom. Moreover, while the Refugee Protection Claimant Document provided to the Applicant after the interview does not explicitly refer to the exact paragraph relied upon, it does mention that the Applicant's claim has been deemed ineligible for decision by the RPD. Finally, when the Applicant filed his application for leave and for judicial review on April 21, 2021, it was open to him, through his counsel, to request the reasons for decision pursuant to Rule 9 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22. The Applicant would have likely received a copy of the GCMS notes (*Ziaei v Canada (Citizenship and Immigration)*, 2007 FC 1169 at paras 21-25).

[31] I find that the Applicant has not shown any prejudice from the lack of a formal written decision since, as I stated above, the Applicant's memorandum of argument focuses on the IRCC officer's decision that his claim for protection is ineligible to be determined by the RPD pursuant to paragraph 101(1)(*c.1*) of the IRPA.

C. *Statutory Framework*

[32] Subsection 101(1) of the IRPA precludes several categories of asylum claimants from accessing the RPD. Until the introduction of paragraph 101(1)(*c.1*) of the IRPA by the operation of the BIA, those categories included:

i. those who have already been conferred refugee protection under the IRPA (paragraph 101(1)(*a*));

ii. those whose claims for protection have already been rejected by the RPD (paragraph 101(1)(*b*));

iii. those whose prior claims have already been determined to be ineligible to be referred to the RPD, or were withdrawn or abandoned (paragraph 101(1)(*c*));

iv. those who have been recognized as Convention refugees by another country and who can be returned to that country (paragraph 101(1)(*d*));

v. those who have entered Canada from the United States through a land border port of entry, in application of the Safe Third Country Agreement between Canada and the United States (paragraph 101(1)(*e*)); and

vi. except for persons who are inadmissible solely on the grounds of paragraph 35(1)(*c*) of the IRPA, those who have been determined to be inadmissible to Canada on grounds of security, violating human or international rights, serious criminality or organized criminality (paragraph 101(1)(*f*)).

(*Seklani v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 778 at para 10 [*Seklani*]; *Shahid v Canada (Citizenship and Immigration)*, 2021 FC 1335 at para 18 [*Shahid*]).

[33] On April 8, 2019, the BIA was introduced in the House of Commons. It received Royal Assent on June 21, 2019.

[34] Section 306 of the BIA amended subsection 101(1) of the IRPA by adding paragraph 101(1)(*c.1*) as a new ineligibility category. This new provision bars the referral of refugee claims to the RPD when a claimant has previously made a claim for refugee protection in certain countries with which Canada has an agreement or arrangement for the purpose of information sharing to assist in the administration and enforcement of immigration and citizenship laws. As indicated in the introduction above, Canada has such agreements or arrangements with the United States, the United Kingdom, Australia and New Zealand.

[35] Paragraph 101(1)(*c.1*) of the IRPA reads as follows:

Ineligibility	**Irrecevabilité**
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 :
…	[…]
(*c.1*) the claimant has, before making a claim for refugee protection in Canada, made a claim for refugee protection to a country other than Canada, and the fact of its having been made has been confirmed in accordance with an agreement or arrangement entered into by Canada and that country for the purpose of facilitating information sharing to assist in the administration and enforcement of their immigration and citizenship laws;	*c.1*) confirmation, en conformité avec un accord ou une entente conclus par le Canada et un autre pays permettant l'échange de renseignements pour l'administration et le contrôle d'application des lois de ces pays en matière de citoyenneté et d'immigration, d'une demande d'asile antérieure faite par la personne à cet autre pays avant sa demande d'asile faite au Canada;

[36] Section 307 of the BIA also amended subsection 104(1) of the IRPA to account for the introduction of paragraph 101(1)(*c.1*) of the IRPA:

Notice of ineligible claim	**Avis sur la recevabilité de la demande d'asile**
104 (1) An officer may, with respect to a claim that is before the Refugee Protection Division or, in the case of paragraph (*a.1*) or (*d*), that is before or has been determined by the Refugee Protection Division or the Refugee Appeal Division, give notice that an officer has determined that	**104 (1)** L'agent donne un avis portant, en ce qui touche une demande d'asile dont la Section de la protection des réfugiés est saisie ou dans le cas visé aux alinéas *a.1*) ou *d*) dont la Section de la protection des réfugiés ou la Section d'appel des réfugiés sont ou ont été saisies, que :
…	[…]
(*a.1*) the claim is ineligible under paragraph 101(1)(*c.1*);	***a.1*)** il y a eu constat d'irrecevabilité au titre de l'alinéa 101(1)*c.1*);
…	[…]
Termination and nullification	**Classement et nullité**
(2) A notice given under the following provisions has the following effects:	**(2)** L'avis a pour effet, s'il est donné au titre :
…	[…]
(*a.1*) if given under paragraph (1)(*a.1*), it terminates pending proceedings in the Refugee Protection Division or, in the case of an appeal made by the claimant, the Refugee Appeal Division, respecting the claim;	***a.1*)** de l'alinéa (1)*a.1*), de mettre fin à l'affaire en cours devant la Section de la protection des réfugiés ou, s'agissant d'un appel du demandeur d'asile, la Section d'appel des réfugiés;

[37] Finally, section 308.1 of the BIA introduced section 113.01 of the IRPA as part of the amendments to complement the new ineligibility provision. It provides that all claimants determined to be ineligible pursuant to paragraph 101(1)(*c.1*) of the IRPA and who apply for a PRRA are entitled to a hearing. Section 113.01 of the IRPA reads:

Mandatory hearing	**Audience obligatoire**
113.01 Unless the application is allowed without a hearing, a hearing must, despite paragraph 113(*b*), be held in the case of an applicant for protection whose claim for refugee protection has been determined to be ineligible solely under paragraph 101(1)(*c.1*).	**113.01** À moins que la demande de protection ne soit accueillie sans la tenue d'une audience, une audience est obligatoire, malgré l'alinéa 113*b*), dans le cas où le demandeur a fait une demande d'asile qui a été jugée irrecevable au seul titre de l'alinéa 101(1)*c.1*).

D. *Paragraph 101(1)(*c.1*) of the IRPA*

[38] The Applicant concedes that his refugee claim is undoubtedly captured by paragraph 101(1)(*c.1*) of the IRPA, as his claim was made after the BIA received Royal Assent on June 21, 2019. However, he argues that the ineligibility provision does not apply to any refugee claims made before April 8, 2019, the day on which the BIA was introduced, whether the claim for protection was made in Canada or in a different country. He relies upon the BIA's transitional provision – subsection 309(a) – to argue that paragraph 101(1)(*c.1*) of the IRPA does not have "retroactive" effect so as to apply to his asylum claim of 1997 in the United Kingdom. The Applicant claims that equity favours this conclusion. Prior to April 2019, prospective refugee claimants around the world were unaware that if they made a claim for protection in one country, they would be thereafter barred from making a subsequent claim in Canada. The effect of the

Respondents' interpretation is to extend the reach of the provision to retroactively govern an individual's behaviour twenty (20) years ago and unfairly overturn decades of settled expectations of refugee claimants.

[39] While the Applicant's submissions refer to the "retroactive" effect of paragraph 101(1)(*c.1*) of the IRPA, I believe that it is more accurate in this case to refer to the "retrospective" application of the provision. In *Zeng v Canada (Citizenship and Immigration)*, 2019 FC 1586, the Court examined the difference between the concepts:

> [25] While the terms are at times conflated, the difference between "retroactive" and "retrospective" legislation can be explained by reference to Professor Driedger's article "Statutes: Retroactive Retrospective Reflections" (1978), 56 Can Bar Rev 264 at pp 268-269:
>
> > A retroactive statue [*sic*] is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past event. A retroactive statute *operates backwards*. A retrospective statute *operates forwards*, but it looks backwards in that it attaches new consequences *for the future* to an event that took place before the statute was enacted. A retroactive statute changes the law from what it was; a retrospective statute changes the law from what it otherwise would be with respect to a prior event.
> >
> > [Emphasis in original.]

[40] As the Applicant's claim for protection in Canada was filed after the enactment of paragraph 101(1)(*c.1*) of the IRPA, the issue to be determined is really whether new consequences attach to an event that took place before the enactment of the provision, which in

the case before me, is the prior refugee claim. That being said, and regardless of the language used by the Applicant, I find that his argument cannot be sustained.

[41] On a principled reading of section 309 of the BIA, it is clear that paragraph 101(1)(*c.1*) of the IRPA was intended to apply to refugee claims presented in Canada after April 8, 2019, regardless of when the prior refugee claim was made.

[42] Section 309 of the BIA states the following:

Transitional Provisions	**Dispositions transitoires**
Prior claim for refugee protection made to another country	**Demandes d'asile faites à un autre pays**
309 If a Bill introduced in the 1st session of the 42nd Parliament and entitled the Budget Implementation Act, 2019, No. 1 receives royal assent, paragraph 101(1)(*c.1*) of the Immigration and Refugee Protection Act	**309** Si le projet de loi intitulé Loi no 1 d'exécution du budget de 2019 et déposé au cours de la 1re session de la 42e législature reçoit la sanction royale, l'alinéa 101(1)*c.1*) de la Loi sur l'immigration et la protection des réfugiés :
(a) does not apply to a claim for refugee protection made before the day on which the Bill is introduced; and	*a)* ne s'applique pas aux demandes d'asile faites avant la date du dépôt de ce projet de loi;
(b) applies to a claim for refugee protection made during the period beginning on the day on which the Bill is introduced and ending on the day on which it receives royal assent, unless, as of the day on which it receives royal assent, substantive evidence has been	*b)* s'applique aux demandes d'asile faites au cours de la période commençant à cette date et se terminant à la date de la sanction de ce projet de loi, sauf celles à l'égard desquelles, à cette dernière date, la Section de la protection des réfugiés a

heard by the Refugee Protection Division in respect of the claim or that Division has allowed the claim without a hearing.	entendu des éléments de preuve testimoniale de fond et celles qu'elle a acceptées sans la tenue d'une audience.

[Emphasis added.]

[43] The Applicant's interpretation unduly focuses on subsection 309(*a*) of the BIA and fails to consider the subsections together. When the section is read as a whole, it is apparent that it is not reasonable nor possible that the words "a claim for refugee protection" in subsection 309(*a*) of the BIA refer to a claim made outside Canada. Subsection 309(*b*) of the BIA uses the same words – a claim for refugee protection – and in the last part, states that "substantive evidence has been heard by the Refugee Protection Division in respect of the claim or that the Division has allowed the claim without a hearing". The words "the claim" in subsection 309*(b*) of the BIA refer to "a claim for refugee protection", previously stated in the section, and to claims before the RPD. Since the RPD can only hear refugee claims made in Canada, the words "a claim for refugee protection" in both subsections can only refer to claims made in Canada.

[44] One cannot draw an interpretation from only one subsection without regard to the other. If Parliament had intended for the words "a claim for refugee protection" to have different meanings in the two (2) subsections – subsection 309(*a*) of the BIA referring to a refugee claim made outside of Canada – it would have clearly spelled out the difference. It did so in paragraph 101(1)(*c.1*) of the IRPA, where the provision distinguishes between "a claim for refugee protection in Canada" and "a claim for refugee protection to a country other than Canada". There is no such differentiation in section 309 of the BIA.

[45] In my view, section 309 of the BIA is sufficiently clear that paragraph 101(1)(*c.1*) of the IRPA applies to refugee claims made in other countries, regardless of how far back they were made.

[46] This interpretation is consistent with the modern approach to statutory interpretation adopted by the Supreme Court of Canada. The words of a statute are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the statute, its object and the intention of Parliament (*Tran v Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50 at para 23 [*Tran*], quoting Elmer A Driedger, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) at 87; *Canada Trustco Mortgage Co v Canada*, 2005 SCC 54 at para 10; *Rizzo & Rizzo (Re)*, [1998] 1 SCR 27 at para 21).

[47] It is also consistent with the general principles regarding legislative retrospectivity and retroactivity. With the exception of criminal offences and sanctions, there is no requirement for legislation to be prospective, even though retrospective and retroactive legislation can overturn settled expectations and be perceived as unjust. If the retrospective or retroactive effect is clearly expressed or cannot reasonably be interpreted otherwise, then the statute must be effective according to its terms (*Tran* at para 43; *British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49 at paras 69-72; *Tabingo v Canada (Citizenship and Immigration)*, 2013 FC 377 at paras 22-23; aff'd *Austria v Canada(Citizenship and Immigration)*, 2014 FCA 191 at para 77).

[48] In the present case, Parliament clearly indicated, by the operation of section 309 of the BIA, that paragraph 101(1)(*c.1*) of the IRPA would apply to all claimants seeking refugee

protection in Canada after April 8, 2019. The only stated exceptions are when the claimant applied for refugee protection between April 8, 2019 and June 21, 2019, and the RPD has heard substantive evidence in respect of the claim before June 21, 2019, or when the RPD has allowed the claim without a hearing. It does not preclude a finding of ineligibility in respect of refugee claims made outside of Canada, which predate the introduction of the BIA or the date of its Royal Assent.

[49] I agree with the Applicant that this issue was not raised in *Seklani* or *Shahid*, as those cases dealt with the constitutional validity of paragraph 101(1)(*c.1*) of the IRPA. Nevertheless, both cases had similar fact situations and corroborate the IRCC officer's interpretation and application of the provision.

[50] In *Seklani*, the applicant entered Canada on June 8, 2019, using an unofficial point of entry and sought refugee protection. On June 12, 2019, his asylum claim was deemed eligible and was referred to the RPD for assessment. However, on August 12, 2019, after a review of his file, an officer determined that he had filed an application for refugee protection in the United States in 2016. The officer found Mr. Seklani's claim ineligible pursuant to paragraph 101(1)(*c.1*) of the IRPA.

[51] In *Shahid*, the applicants had made asylum claims in New Zealand in 2017. After several months, they left New Zealand and returned to Pakistan. Their claims were deemed to be withdrawn. In December 2019, they left Pakistan and came to Canada. They submitted refugee

claims in Canada in January 2020. Since they had made prior refugee claims in New Zealand, their respective claims were found not to be eligible for referral to the RPD.

[52] Regarding the alleged unfairness of the provision, I note that in *Seklani*, the Court held that "the general purpose of paragraph 101(1)(c.1) of the IRPA is to provide an additional tool to manage and discourage asylum claims in Canada by those who have made claims for refugee protection in information-sharing countries, while maintaining an asylum system that is fair and compassionate to those who seek protection" (*Seklani* at para 60). The Court also stated that "the object of the new provisions is to ensure that refugee claimants do not make claims for refugee protection in multiple countries to improve efficiency at the RPD while providing a proper risk assessment process for these claimants through an enhanced PRRA application process" (*Seklani* at para 61).

[53] In his memorandum of argument, the Applicant claims that "a review of the Hansard records further establish that Parliament did not intend for the legislation to have retroactive effect". Although he has referred the Court to a parliamentary website containing the debates that led to the adoption of the BIA, the Applicant has failed to point out the specific passages upon which he relies to support his argument.

[54] For the above reasons, I am satisfied that paragraph 101(1)(*c.1*) of the IRPA applies to the Applicant's claim and that the IRCC officer's interpretation and application of the provision was reasonable.

E. *The Decision is Reasonable*

[55] The Applicant submits that the IRCC officer exercised his statutory discretion in an arbitrary and capricious manner by overturning the eligibility determination made on October 15, 2019, without any material change in the circumstances. He argues that the statutory scheme contemplates that, once a refugee claim has been referred to the RPD, if the IRCC subsequently discovers a violation of paragraph 101(1)(*c.1*) of the IRPA, it is not required, under subsection 104(1) of the IRPA, to give notice and terminate the RPD proceedings. The introductory portion of subsection 104(1) of the IRPA states that "[a]n officer may, with respect to a claim that is before the [RPD], or, in the case of paragraph (a.1) or (d), that is before or has been determined by the [RPD] or the Refugee Appeal Division, give notice […]" [emphasis added.] The use of the word "may" imports permissive language and, therefore, a right to exercise discretion.

[56] According to the Applicant, the intended purpose of the section is to capture those instances where IRCC officials discover new information that was not disclosed at the time the refugee claim was made. The Applicant submits that he mentioned the prior claim to the IRCC officer on August 2, 2019. The first IRCC officer made a determination that the claim was eligible under subsection 100(1) of the IRPA, in full knowledge of the United Kingdom claim, and referred the matter to the RPD. The RPD then asked for further documents, and a hearing date was scheduled. However, the IRCC officer capriciously reconsidered the Applicant's eligibility, before determining he was ineligible, all following the same set of material circumstances, and without explaining the complete reversal of the decision. The Applicant

submits that the decision to exercise discretion and terminate the proceedings before the RPD is therefore unreasonable.

[57] I agree that the word “may” normally entails discretion (*Interpretation Act*, RSC 1985, c I-2, s 11). However, the English and the French versions differ. The French version of subsection 104(1) of the IRPA instead uses imperative language (“L’agent donne un avis”), which supports the conclusion that there is no discretion on the part of the officer not to give notice in the circumstances set out in paragraphs 104(1)(*a*) to (*d*) of the IRPA, including paragraph (*a.1*), where the claim is ineligible under paragraph 101(1)(*c.1*) of the IRPA.

[58] A similar argument was rejected where notice of ineligibility was given under paragraph 104(1)(*b*) of the IRPA. The Court found that once a claimant has been found inadmissible to Canada on security grounds, there is no discretion on the part of the Canada Border Services Agency officers not to give notice of the termination of a refugee claim (*Haqi v Canada (Public Safety and Emergency Preparedness)*, 2014 FC 1246 at paras 4, 74-83; aff’d 2015 FCA 256).

[59] Likewise, once the Applicant was found to be ineligible upon confirmation of his prior claim in the United Kingdom, the IRCC officer had no discretion not to give notice under paragraph 104(1)(*a.1*) of the IRPA that the claim was ineligible.

[60] Even if the Applicant is correct in submitting that the IRCC officer had the discretion not to reconsider the claim’s eligibility, he has failed to persuade me that such discretion was exercised in an arbitrary or capricious manner.

[61] Contrary to the Applicant's submissions, there was a material change in circumstances between the time of referral of his claim to the RPD and the finding of ineligibility.

[62] When the Applicant's claim was referred to the RPD, IRCC had not received confirmation from its information sharing partners that the Applicant had made a claim for refugee protection in the United Kingdom. Such confirmation came only after the referral. The Applicant was subsequently given notice that his claim may be ineligible, and he was interviewed. By straightforward application of paragraph 101(1)(*c.1*) of the IRPA, the IRCC officer determined that the Applicant's claim was ineligible to be referred to the RPD. Paragraph 101(1)(*c.1*) of the IRPA is a mandatory provision and does not allow any room for interpretation or discretion by the IRCC officer. I also note that the case in *Seklani* involved the same process of redetermination (*Seklani* at para 6).

[63] The fact that the Applicant was only listed as a dependent in the United Kingdom refugee claim or that the claim was withdrawn may appear to be unfair, but it is not relevant to the assessment. The determinative issue remains whether the Applicant "made" ("*faite*") a claim in a country with which Canada has an information sharing agreement or arrangement, and whether the claim has been confirmed by that country. The wording of paragraph 101(1)(*c.1*) of the IRPA does not support the distinctions argued by the Applicant. The IRCC officer's conclusion was therefore reasonable.

[64] The Applicant further argues that the result of the redetermination is severe. His claim will not be considered on its merits by the RPD and may ultimately result in his removal from

Canada to a country where he has experienced significant discrimination, physical assaults and threats to his life. It may also amount to a separation from his wife and children.

[65] This argument is unfounded as the Applicant will not be barred from claiming protection in Canada. As the Court noted in *Seklani*, in paragraphs 46 to 49:

> [46] It is important to emphasize that the IRPA expressly contemplates different avenues to consider claims for refugee protection and establishes three broad categories of refugee protection (*Saint Paul v Canada (Citizenship and Immigration)*, 2020 FC 493 at paras 47-48). Part 2 of the IRPA deals with refugee protection and is divided into three divisions. Division 1 deals with "Refugee Protection, Convention Refugees and Persons in Need of Protection", Division 2 deals with "Convention Refugees and Persons in Need of Protection", and Division 3 deals with "Pre-removal Risk Assessment". Subsection 95(1) of the IRPA expressly states that refugee protection is conferred on a person who falls in one of the three enumerated categories, namely: 1) Convention refugee (section 96); 2) a person in need of protection (section 97); or 3) a person whose application for protection is allowed by the Minister (section 112). The third option refers to the PRRA application process. Pursuant to subsection 112(1) of the IRPA, individuals rendered ineligible to have their claims referred to the RPD (such as Mr. Seklani) generally have access to a PRRA.
>
> [47] It is therefore plainly incorrect for Mr. Seklani to state that the process before the RPD and the IRB is the only procedure in Canada designed to assess claims for refugee protection. True, the process before the IRB is the standard, usual refugee determination process. But, it is not the only one. And the IRPA expressly provides that the PRRA process can result in refugee protection being granted. Subsection 114(1) of the IRPA establishes that PRRA officers may also confer refugee protection, except for individuals found to be inadmissible or excluded for reasons such as terrorism or crimes against humanity. This provision reads as follows:
>
> …
>
> [48] The refugee protection granted as a result of the PRRA process is not a second-class category of refugee protection. It is simply a different channel offered to asylum claimants to obtain refugee protection. The PRRA process provides the same objective

> as the refugee process at the IRB. It is based on similar grounds and confers the same degree of refugee protection to the asylum claimants. In other words, the same approach will be applied to assess whether someone is in need of protection or not. A successful PRRA applicant is granted refugee protection under paragraph 114(1)(a) of the IRPA, and such applicant may, subsequently, seek permanent resident status in the same manner as a claimant granted Convention refugee or protected person status by the IRB.
>
> [49] Even if the new paragraph 101(1)(*c.1*) of the IRPA prevents Mr. Seklani and other individuals in his situation from having access to the RPD, they will therefore not be barred from claiming asylum and refugee protection in Canada. They can still claim asylum in Canada but they will be moved to another channel, namely a PRRA application. It is not because these refugee protection claimants do not have access to both the RPD process and the PRRA process that the PRRA option suddenly becomes a lesser or a weakened one.

[66] Section 113.01 of the IRPA entitles all claimants who apply for a PRRA and whose claims are found ineligible solely pursuant to paragraph 101(1)(*c.1*) of the IRPA to a mandatory hearing. Introduced at the same time as paragraph 101(1)(*c.1*) of the IRPA by operation of section 308.1 of the BIA, section 113.01 of the IRPA was intended to complement the new ineligibility provision. Moreover, and contrary to the Applicant's submissions, paragraph 113(*a*) of the IRPA does not impose a limit on the amount of evidence he can present, as he would not be considered "an applicant whose claim for refugee protection has been rejected".

[67] Having considered all of the Applicant's submissions, I am not persuaded the IRCC officer's decision was unreasonable in light of the relevant facts and the law.

IV. Certification

[68] The Applicant has submitted five (5) questions for certification:

1) What is the standard of review for the retroactive application of section 309 of the BIA and paragraph 101(1)(*c.1*) of the IRPA?
2) Does the transitional provision in section 309 of the BIA retroactively apply to claims made outside of Canada?
3) Does section 309 of the BIA apply to claims that were withdrawn?
4) Does subsection 104(1) of the IRPA provide IRCC officials an unfettered right of review to arbitrarily overturn another IRCC officer's previous determination of eligibility on the same set of facts and circumstances?
5) Is it reasonable for paragraph 101(1)(*c.1*) of the IRPA to be applied to a claim for refugee protection made 20 years ago?

[69] The Applicant argued at the hearing that these issues are questions of general importance that transcend the facts in this case.

[70] The Respondents oppose certification on the ground that the proposed questions do not meet the test for certification.

[71] The criteria for certification are well established. The proposed question must be a serious question that is dispositive of the appeal. It must transcend the interests of the parties and raise an issue of broad significance or general importance. Furthermore, the question must have

been dealt with by the Federal Court and must arise from the case itself, rather than from the way in which the Federal Court may have disposed of the case. A question in the nature of a reference or whose answer turns on the unique facts of the case cannot ground a properly certified question (*Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22 at paras 46-47; *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at para 36; *Mudrak v Canada (Citizenship and Immigration)*, 2016 FCA 178 at paras 15-17; *Lai v Canada (Public Safety and Emergency Preparedness)*, 2015 FCA 21 at para 4; *Zhang v Canada (Citizenship and Immigration)*, 2013 FCA 168 at para 9; *Varela v Canada (Citizenship and Immigration)*, 2009 FCA 145 at paras 28-29; *Canada (Minister of Citizenship and Immigration) v Zazai*, 2004 FCA 89 at paras 11-12; *Canada (Minister of Citizenship and Immigration) v Liyanagamage*, [1994] FCJ No 1637 (FCA) (QL) at para 4).

[72] I agree with the Respondents that the first question does not meet the test for certification, as the issue of what standard of review applies to a decision maker's interpretation of its home statute or provisions that are closely linked to its mandate is well settled (*Vavilov* at para 25; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 30).

[73] The fourth question also does not meet the test for certification. It would not be determinative of the appeal. It is based on the incorrect premise that the previous determination of eligibility is made on the same set of facts and circumstances. It also rests on the assumption that the jurisdiction to redetermine a claimant's ineligibility arises from subsection 104(1) of the IRPA.

[74] As for the second, third and fifth questions, they are just different subsets of the same question. I agree with the Applicant that the interpretation of paragraph 101(1)(*c.1*) of the IRPA and section 309 of the BIA raises an important question that transcends the interests of the parties in this case and would be determinative in an appeal. Paragraph 101(1)(*c.1*) was incorporated into the IRPA in 2019, and its application is likely to arise in the future. However, I would rephrase and certify these questions as follows:

> Does paragraph 101(1)(*c.1*) of the IRPA, by way of the operation of section 309 of the BIA, bar the referral of refugee protection claims to the RPD when the refugee claimant has, before making a claim for refugee protection in Canada, made a claim for refugee protection in a country other than Canada, with which Canada has an agreement or arrangement for the purpose of information sharing to assist in the administration and enforcement of immigration and citizenship laws, if the prior claim outside Canada was made before the introduction of the BIA on April 8, 2019?

JUDGMENT in IMM-2696-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed; and

2. The following question of general importance is certified:

   Does paragraph 101(1)(*c.1*) of the IRPA, by way of the operation of section 309 of the BIA, bar the referral of refugee protection claims to the RPD when the refugee claimant has, before making a claim for refugee protection in Canada, made a claim for refugee protection in a country other than Canada, with which Canada has an agreement or arrangement for the purpose of information sharing to assist in the administration and enforcement of immigration and citizenship laws, if the prior claim outside Canada was made before the introduction of the BIA on April 8, 2019?

"Sylvie E. Roussel"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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