Federal Court Cour fédérale

**Date: 20230606**

**Dockets: IMM-1594-20**
**IMM-4102-20**

**Citation: 2023 FC 798**

**Vancouver, British Columbia, June 6, 2023**

**PRESENT: Mr. Justice Sébastien Grammond**

**Docket: IMM-1594-20**

**BETWEEN:**

**CELENE VIVEROS GARCES**

**Applicant**

**and**

**THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS**

**Respondent**

**Docket: IMM-4102-20**

**AND BETWEEN:**

**FEBE VIVEROS GARCES**
**(BY HER LITIGATION GUARDIAN**
**SONIA GARCES CANGA)**

**Applicant**

**and**

**THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS**

**Respondent**

# JUDGMENT AND REASONS

[1] While they were unaccompanied minors, the applicants signed forms to claim refugee status in the United States. They have now been reunited with their mother in Canada, but a Minister's delegate found them ineligible to claim refugee status in Canada because of their prior claim in the United States. I am allowing their application for judicial review of this decision, because the Minister's delegate failed to consider the relevant legal constraints bearing on their decision, which led them to overlook the issue of whether the applicants' lack of capacity prevented them from making a claim in the United States.

## I. Background

[2] The applicants are citizens of Colombia. They were children when the facts giving rise to this application took place. Celene was born in 2003 and Febe, in 2006.

[3] Celene and Febe's mother, Sonia Garces Canga, came to Canada in 2016 and claimed refugee status, asserting that her life was at risk because she had assisted the police in arresting a notorious criminal. As she entered at a land border, however, she was found inadmissible to make such a claim and was offered the opportunity to ask for a pre-removal assessment [PRRA] instead.

[4] Ms. Garces had left Celene and Febe in the care of family members in Colombia. When her daughters alleged that they had been mistreated, she took steps to bring them to Canada. It is not necessary to recount every detail of their journey. What matters for the present application is

that in January 2017, a family member brought them from Mexico to a United States port of entry in El Paso, Texas. Celene and Febe were then separated from the family member who was accompanying them, and brought into the care of the US Department of Health and Human Services, who entrusted them to what I understand to be child welfare agencies.

[5] In December 2017, Celene and Febe each signed what is known as an “I-589 form”, which is an application for asylum in the United States. Celene and Febe were then 14 and 11 years of age, respectively. A lawyer working for the Catholic Charities Community Services in New York prepared the form on Celene’s and Febe’s behalf. There is no indication that Celene and Febe had a designated representative or that their mother participated in any way in the process.

[6] When she learned that her daughters had been apprehended by US authorities, Ms. Garces took steps to be reunited with them in Canada. Although there is little evidence of what those steps were and how the US and Canadian authorities reacted to them, it is not disputed that Celene and Febe withdrew their US application for asylum in November 2018. In October 2019, Celene and Febe were brought to the port of entry at Saint-Bernard-de-Lacolle, Quebec, and were reunited with their mother.

[7] Upon arriving in Canada, Celene and Febe claimed refugee status. A delegate of the Minister, however, found them ineligible to do so, based on paragraph 101(1)(c.1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act]. This provision, which came into force in June 2019, reads as follows:

| | |
|---|---|
| 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; |

[8] The Minister's delegate based their decision solely on the fact that the I-589 form proved that Celene and Febe had made a claim for refugee protection in the United States, which brought them under paragraph 101(1)(c.1). The decision did not mention the fact that Celene and Febe were unaccompanied minors when they signed the forms, nor did it explicitly state how it interprets paragraph 101(1)(c.1) or give reasons for such an interpretation.

[9] Celene and Febe each applied for judicial review of the decision of the Minister's delegate. Febe's application was allowed on consent and the matter was remitted for

redetermination of her eligibility to claim refugee status. Celene's application was held in abeyance in the meantime. On August 20, 2020, another Minister's delegate confirmed that Febe was ineligible to claim refugee status. The relevant portion of the reasons reads as follows:

> The response from the United States Department of Homeland Security to CBSA's information sharing request states as follows:
>
> > *"Based on available systems and subject's physical file, the subject filed an I-589 (Application for Asylum and for Withholding of Removal) on December 19, 2017. The application was withdrawn by the Immigration Judge, per request of the applicant, on November 29, 2018.*
> >
> > *A review of the file and/or available systems did not reveal any additional pertinent information.*
> >
> > *NOTE: This information is considered protected from disclosure under the asylum confidentiality regulation (...)"*
>
> Based on this information and supporting documents on file, I am satisfied on a balance of probabilities that Febe VIVEROS GARCES has made a claim for refugee protection to a country other than Canada prior to her claim here. This fact has been properly confirmed in accordance with the SMU between Canada and the United States for information sharing purposes.

[10] Febe brought an application for judicial review of this decision. This new application was consolidated with Celene's application. Both are the subject of this judgment.

[11] It should be noted that Ms. Garces's PRRA application was rejected, and this negative decision was confirmed by this Court: *Garces Canga v Canada (Citizenship and Immigration)*, 2020 FC 749.

## II. Analysis

[12] On judicial review, my task is to assess whether the decision of the Minister's delegate was reasonable. The deference inherent in reasonableness review extends to issues of statutory interpretation: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paragraph 115, [2019] 4 SCR 653 [*Vavilov*]. In spite of this, the applicants have essentially asked me to provide the correct interpretation of paragraph 101(1)(c.1) of the Act. I decline to adopt this approach, as it is contrary to *Vavilov*'s teachings. I understand that the applicants wish to obtain a decision stating general principles that could be useful in other cases. My primary role, however, is to render justice in the applicants' individual case.

[13] Thus, my analysis will focus on the decision of the Minister's delegate and the constraints that bore upon that decision. It will quickly become apparent that this decision is unreasonable, because the Minister's delegate failed to consider relevant evidence regarding Celene's and Febe's lack of legal capacity to make a claim for refugee status. As in *Canada (Citizenship and Immigration) v Galindo Camayo*, 2022 FCA 50 at paragraph 58 [*Galindo Camayo*], this failure was likely based on unstated and unexplained assumptions about the meaning or interpretation of paragraph 101(1)(c.1).

[14] The task of the Minister's delegate was to apply section 101 of the Act. Section 101 enumerates the situations where an applicant is ineligible to claim refugee status. In the vast majority of cases, the facts triggering these provisions are easily ascertainable and their application does not give rise to any controversy. For example, whether an applicant's claim was

previously rejected (paragraph 101(1)(b)) or withdrawn (paragraph 101(1)(c)) can be proved by official records. However, certain ineligibility provisions may require a more elaborate factual inquiry, for example whether an applicant can be returned to a country where they have been granted refugee status (paragraph 101(1)(d)).

[15] The same is true of paragraph 101(1)(c.1). In the vast majority of cases, whether an applicant made a claim in another country will be proved by a confirmation issued by that country's authorities. Nevertheless, deciding whether "the claimant . . . made a claim for refugee protection" (or, in French, whether there was a "*demande d'asile antérieure faite par la personne*") may sometimes require a look beyond the foreign authorities' confirmation.

[16] This is because the language of the Act must be read and applied against the backdrop of basic legal principles: *Vavilov*, at paragraph 111. One of these basic principles is that children lack legal capacity. Parliament acknowledged this principle at subsection 167(2) of the Act, which requires the designation of a representative where a person under 18 years of age is involved in proceedings before the Immigration and Refugee Board. There is no evidence that American law is markedly different from Canadian law with respect to the basic principle that children lack legal capacity.

[17] The Minister's delegate did not address the impact of this legal constraint on the exercise of their decision-making power. They failed to explain how an unaccompanied minor who lacks legal capacity can be considered to make a claim within the meaning of paragraph 101(1)(c.1).

This is similar to the reasoning process (or lack thereof) found to be unreasonable in *Galindo Camayo*.

[18] The applicants have also relied on international law. Paragraph 3(3)(f) of the Act states that the Act "is to be construed and applied in a manner that . . . complies with international human rights instruments to which Canada is signatory." These instruments would include the *Convention relating to the Status of Refugees* and the *Convention on the Rights of the Child*. In any event, the Supreme Court of Canada has recognized that binding rules of international law should be considered when interpreting legislation or assessing the reasonableness of administrative decisions: *Vavilov*, at paragraph 114; *Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association*, 2022 SCC 30 at paragraphs 43–49.

[19] I agree that international law is relevant to the present matter, insofar as it highlights the vulnerable position of unaccompanied minors and shows that the solution provided by Canadian law, namely, the appointment of a designated representative distinct from legal counsel, has gained wide acceptance. To the extent that this is relevant to the interpretation and application of paragraph 101(1)(c.1), it forms part of the legal landscape that constrains the decision-maker.

[20] Article 20 of the *Convention on the Rights of the Child* provides that children who are deprived of their family environment are entitled to "special protection and assistance". Likewise, article 22 states that child refugee claimants, including those unaccompanied by their parents, must receive "appropriate protection and humanitarian assistance". The United Nations Committee on the Rights of the Child issued General Comment No 6 to that Convention,

regarding the treatment of unaccompanied and separated children outside their country of origin, which provides an interpretation of these provisions. With regards to unaccompanied minor refugee claimants, the Committee stated, at paragraphs 21 and 33:

> Subsequent steps such as the appointment of a competent guardian as expeditiously as possible serves as a key procedural safeguard to ensure respect for the best interests of an unaccompanied or separated child and, therefore, such a child should only be referred to asylum or other procedures after the appointment of a guardian.
>
> . . . States should appoint a guardian or adviser as soon as the unaccompanied or separated child is identified . . .

[21] Moreover, the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* states, at paragraph 214:

> A child – and for that matter, an adolescent – not being legally independent should, if appropriate, have a guardian appointed whose task it would be to promote a decision that will be in the minor's best interests.

[22] The UNHCR also issued the *Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum* (1997). Relevant to our topic, these Guidelines state:

> A guardian or adviser should be appointed as soon as the unaccompanied child is identified. The guardian or adviser should have the necessary expertise in the field of childcaring, so as to ensure that the interests of the child are safeguarded and that his/her needs are appropriately met.
>
> . . .
>
> 5.5 There may be a situation where families are split between countries. If one of the child's parents is in another asylum country, every effort should be made to reunite the child with that parent at an early stage before status determination takes place.

> . . .
>
> 8.3 Not being legally independent, an asylum-seeking child should be represented by an adult who is familiar with the child's background and who would protect his/her interests. Access should also be given to a qualified legal representative.

[23] The Minister relies on *Shahid v Canada (Citizenship and Immigration)*, 2021 FC 1335 [*Shahid*], and *Hamami v Canada (Citizenship and Immigration)*, 2022 FC 222 [*Hamami*], for the proposition that no discretion is involved in the application of paragraph 101(1)(c.1) of the Act. In my view, nothing said in *Shahid* and *Hamami* bars the consideration of a child's lack of legal capacity when assessing whether the child can be said to have "made a claim".

[24] *Shahid* was a challenge to the constitutional validity of paragraph 101(1)(c.1) of the Act. While addressing the contention that PRRA officers would not adjudicate claims in an independent manner because they are part of the same organization as the Minister's delegates who make ineligibility decisions, my colleague Justice Cecily Y. Strickland made the following comments, at paragraph 52:

> If it has been confirmed by one of the other countries with whom Canada has entered into an information sharing agreement that the claimant has previously made a claim for refugee protection in that country, then the applicant must be found to be ineligible. There is no discretion.

[25] I have no doubt that this is true in the vast majority of cases. I also agree that paragraph 101(1)(c.1) does not vest a discretion in the Minister's delegate in the sense that the latter could decline to declare a claimant ineligible in spite of a finding that the claimant made a previous claim in another country. *Shahid*, however, did not deal with the exceptional situation of an

unaccompanied minor and I do not read it as foreclosing an inquiry into whether the person had the legal capacity to make a claim.

[26] In *Hamami*, the applicant was included as a dependent child in a claim made by his father in another country. Contrary to the present case, this was not a case involving an unaccompanied minor and capacity was not an issue. The applicant's argument in *Hamami* was that the Minister's delegate had a discretion to consider the fairness of the outcome before declaring a claim ineligible. In rejecting this submission, my colleague Justice Sylvie Roussel, then a member of this Court, noted, at paragraph 63, that "[t]he determinative issue remains whether the Applicant "made" ("*faite*") a claim." This is consistent with what I have explained so far.

[27] In this case, the Minister's delegate never turned their mind to the issue of Celene's and Febe's legal capacity to make a claim, despite the above-mentioned legal constraints bearing on their decision-making power. Given the circumstances of the case, however, it is clear that the issue was brought to their attention. There is no evidence that the Minister's delegate inquired into whether a designated representative was appointed to Celene and Febe in the US asylum proceedings. Rather, it seems they only considered the I-589 form when deciding if the applicants "made" a claim.

[28] Courts may look to the record to understand the reasons for an administrative decision: *Vavilov*, at paragraph 94. In this case, however, a review of the certified tribunal record [CTR] provides no additional insight. There is no mention anywhere of the appointment of a designated representative. In particular, Celene and Febe signed the I-589 form themselves, without any

mention of a representative. They checked a box indicating that the form was prepared by someone other than a family member. The vagueness of the information regarding their mother suggests that they had little, if any, contact with her at the time. The CTR also contains placement authorization forms that set out the terms under which Celene and Febe were entrusted to what appear to be child welfare agencies. These forms state that Celene and Febe are "in the legal custody of the Federal government". Nothing in these forms suggests that the agencies were to act as designated representative of Celene and Febe for the purpose of their claim for asylum.

[29] At the hearing of this application, the Minister relied upon an affidavit sworn by Ms. Garces, which relays information provided to her by her daughters. In that affidavit, Ms. Garces writes that Celene and Febe had several lawyers and that "a woman called Shaina . . . was involved in helping my daughters with their case." The Minister asks me to infer that this woman was the girls' designated representative. I decline to do so. The Minister's delegate did not rely on such an inference. It is not my role to find new arguments to buttress the Minister's delegate: *Vavilov*, at paragraph 96. Moreover, it is unclear whether this evidence was before the Minister's delegate. In any event, there is nothing in the record that supports such an inference. The woman in question may have been an employee of the child welfare agency. In any event, Ms. Garces states that her daughters told the lawyers that they wanted to be reunited with her, did what the lawyers told them to do and had but a limited understanding of the process.

[30] The Minister also argued that in Canada, the appointment of a designated representative may be made shortly after a minor initiates a claim for refugee status, and that the same may

have happened in the United States. However, there is no evidence that a representative for Celene and Febe was appointed at any time during their stay in the United States, thereby potentially remedying their initial lack of capacity.

[31] In sum, in deciding whether Celene and Febe "made a claim", the Minister's delegate relied on unexplained assumptions regarding the meaning and interpretation of paragraph 101(1)(c.1) of the Act. Like in *Galindo Camayo*, this renders the decision unreasonable. Moreover, the Minister's delegate failed to consider relevant evidence, instead focusing on a single document. This failure also renders the decision unreasonable: see, for example, *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at paragraphs 39, 45, [2015] 3 SCR 909; *Walker v Canada (Attorney General)*, 2020 FCA 44 at paragraph 10.

## III. Disposition

[32] For these reasons, the application for judicial review will be allowed, the decisions of the Minister's delegates are quashed and the matter is remitted to another Minister's delegate for reconsideration.

[33] The applicants asked me to certify one of the following questions for the consideration of the Federal Court of Appeal:

> Should the unique circumstances of unaccompanied children, in particular their legal capacity, be taken into consideration when determining whether they "made a claim for refugee protection to a country other than Canada" for the purposes of section 101(1)(c.1) of the *Immigration and Refugee Protection Act*?
>
> Or

> Should the legal capacity of an unaccompanied child be taken into account when determining whether the child "made a claim for refugee protection to a country other than Canada" for the purposes of section 101(1)(c.1) of the *Immigration and Refugee Protection Act*?

[34] I first note that these questions should be reframed to reflect the fact that reasonableness is the applicable standard of review: *Galindo Camayo*, at paragraph 44.

[35] There are two reasons why I decline to certify either of these questions. First, it is unclear that this matter is anything but an exceptional situation. As I mentioned above, in the vast majority of cases, children who claim refugee status in Canada are represented by their parents. Even though the situation is new, in the sense that it has not arisen before, the information before me does not suggest that it is likely to reoccur. Thus, I am not convinced that the question is a "serious question of general importance", as required by paragraph 74(d) of the Act.

[36] Second, the main ground for granting this application is the failure of the Minister's delegate to even consider the subject matter of the proposed questions. This situation is likely to impair the Federal Court of Appeal's ability to provide meaningful guidance for future cases. In contrast, if this matter is remitted for reconsideration, one hopes that the Minister's delegate will give more fulsome reasons, providing a more solid basis for further review, if needed. In addition, as noted above, the evidentiary record is thin. This could be remedied when the matter is remitted for reconsideration, which would provide a better factual foundation for the eventual review of certified questions.

**JUDGMENT in IMM-1594-20 and IMM-4102-20**

**THIS COURT'S JUDGMENT is that**:

1. The applications for judicial review are granted.

2. The decisions of the Minister's delegates in respect of the applicants are quashed.

3. The matter is remitted to a different Minister's delegate for redetermination.

4. No question is certified.

"Sébastien Grammond"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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|---|---|
| **DOCKETS:** | IMM-1594-20 AND IMM-4102-20 |
| **DOCKET:** | IMM-1594-20 |
| **STYLE OF CAUSE:** | CELENE VIVEROS GARCES v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS |
| **AND DOCKET:** | IMM-4102-20 |
| **STYLE OF CAUSE:** | FEBE VIVEROS GARCES (BY HER LITIGATION GUARDIAN SONIA GARCES CANGA) v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS |
| **PLACE OF HEARING:** | OTTAWA, ONTARIO |
| **DATE OF HEARING:** | MAY 15, 2023 |
| **JUDGMENT AND REASONS:** | GRAMMOND J. |
| **DATED:** | JUNE 6, 2023 |

**APPEARANCES:**

| | |
|---|---|
| Jamie Liew<br>Laïla Demirdache | FOR THE APPLICANTS |
| Yamen Fadel | FOR THE RESPONDENT |

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