Federal Court  Cour fédérale

Date: 20160314

Docket: IMM-2227-15

Citation: 2016 FC 315

Ottawa, Ontario, March 14, 2016

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

SILVIA MYRIAN MOYA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant seeks judicial review of the decision of the Refugee Appeal Division of the Immigration and Refugee Board [RAD] dated April 27, 2015 which dismissed her appeal of the decision of the Refugee Protection Division [RPD]. The RAD confirmed that the applicant is neither a Convention refugee nor a person in need of protection. The RAD found that the applicant would have been a Convention refugee in the past and considered the "compelling

reasons" exception pursuant to subsection 108(4) of *the Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act], but found that the exception did not apply in the circumstances.

[2] On judicial review, the applicant submits that the RAD erred in its review of the RPD decision with respect to: the application of the Chairperson's Gender Guidelines [Guidelines]; the assessment of the psychological report; the assessment of the applicant's credibility; and, the state protection analysis. The applicant also submits that the RAD erred in its approach to the appeal and its assessment of the evidence and applied the wrong test for the compelling reasons exception.

[3] I find that the RPD performed its appellate role and conducted an independent assessment of the evidence, including the RPD's credibility findings, and reasonably found that the RPD did not err. The RAD interpreted subsection 108(4) based on the jurisprudence, considered all the evidence and reasonably found that the applicant had not established compelling reasons for refusing to avail herself of the protection of her country of origin. Deference is owed to the RAD's determination and it is not for the Court to re-weigh the evidence.

I. Background

[4] The applicant is a citizen of Argentina. She recounts that she filed a refugee claim based on her political opinion when she first arrived in Canada in December 1988, but is unaware of what happened to this claim. The record indicates that her claim was not evaluated, but received an approval-in-principle by the Canadian Immigration Backlog Office in 1996. She did not pursue her application for permanent residence, which was deemed abandoned in 2005.

[5] She filed a second refugee claim in September 2014 based on allegations that her former husband, Juan Francisco Gil [Juan], who she joined in Canada in 1988, was abusive and violent both while they were together in Argentina and in Canada and that he continues to threaten her. Prior to the RPD hearing, the applicant submitted an updated Basis of Claim form [BOC] with a detailed narrative of her account of severe abuse by Juan.

[6] The applicant left Juan in 1989 and the two were eventually divorced in 2002. Juan was convicted in Canada of sexual assault with respect to another person and was incarcerated. Following his release, he was deported to Argentina in 1992. The applicant alleges that she has received threats from people calling on Juan's behalf. The applicant also alleges that Juan's sister advised the applicant's father that Juan had died around 2003 or 2004, in order to lure the applicant to return to Argentina. She further alleges that Juan's friends visited her family's home looking for her in 2009. The applicant claims that Juan is dangerous, the police will not help her and that she fears returning to Argentina.

II. The RPD Decision

[7] The RPD found that the applicant is not a Convention refugee or person in need of protection.

[8] The RPD accepted that the applicant may have suffered abuse, but did not find her account or the supporting evidence of recent threats from Juan to be credible. The applicant's statements regarding her interactions with the police in Argentina and her explanation of her efforts to obtain permanent resident status in Canada were also found to be not credible.

[9] The determinative issue for the RPD was state protection. The RPD found that state protection would be available if the applicant were to return to Argentina and that she had not rebutted the presumption of state protection.

[10] The RPD also found that the applicant would not have been a Convention refugee in the past and, therefore, the compelling reasons exception did not apply. The RAD noted that the applicant had embellished her claim, which called into question all of her evidence, including the abuse she suffered.

III. The RAD Decision

[11] The RAD confirmed the decision of the RPD and found that the applicant is not a Convention refugee or a person in need of protection. The RAD also found that there were no compelling reasons to exempt the applicant from this finding.

[12] The RAD cited the decision in *Huruglica v Canada (Minister of Citizenship and Immigration)*, 2014 FC 799, [2014] 4 FCR 811 [*Huruglica*] and indicated it would conduct a full fact-based appeal.

[13] The RAD noted that credibility is an issue in every claim, although, as the RPD found, it was not the determinative issue. The RAD assessed the credibility findings and deferred to several, but not all, of the RPD's findings.

[14] The RAD agreed with the RPD's findings regarding the credibility of the supporting evidence from the applicant's sisters, that aspects of her account of her interactions with the police in Argentina were not plausible, and that her explanation of her efforts to obtain permanent resident status in Canada was not credible.

[15] The RAD found that the RPD erred by offering the applicant an opportunity to submit additional documents, but not reconvening after receiving those documents. However, given that the determinative issue was state protection, the RAD found that this error was not fatal.

[16] The RAD found that the RPD had applied the Gender Guidelines and was sensitive to the needs of the applicant. The RAD also found that the RPD had considered the psychologist's report. The RAD noted that the RPD did not dispute the diagnosis of PTSD, but this did not overcome the credibility concerns or establish that the applicant's depression or diagnosis of PTSD was caused by persecution in Argentina. The RAD added, "[T]here is no persuasive evidence that the doctor is in any position to state categorically that the claimant before it is a victim of domestic abuse."

[17] The RAD assessed the country condition documents and, based on a forward looking assessment, agreed with the RPD and found that there would now be adequate state protection in Argentina if the applicant were to return.

[18] However, the RAD disagreed with the RPD's finding that the applicant was not a Convention refugee or a person in need of protection in the past. The RAD found that the RPD's

findings that the applicant had suffered abuse and that state protection measures between 1984 and 1988 would have been less effective than today were inconsistent with its finding that the applicant had not rebutted the presumption of state protection in the past.

[19] As a result of finding that the applicant would have been a Convention refugee in the past, the RAD considered whether to apply the compelling reasons exception.

[20] The RAD acknowledged the applicant's argument that it should adopt the approach in *Suleiman v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1125, [2004] FCJ No 1354 (QL) [*Suleiman*], which provides that a variety of circumstances can trigger a compelling reasons finding. The applicant also argued that the RAD should find that the RPD erred in not finding that the repeated violent assaults rose to the level of "atrocious and appalling" persecution, if that standard must be met, and in not explaining why it did not find compelling reasons.

[21] The RAD referred to several cases, some of which were decided long before *Suleiman* and others more recently, and found that although *Suleiman* addresses the issue of subjective fear, it does not obviate the need to assess the level of past persecution.

[22] The RAD noted that persecution, by definition, involves death, physical harm or other penalties and that the compelling reasons exception applies to a very limited group of refugee claimants and to cases of exceptional persecution. The RAD identified its task as to determine whether the applicant's circumstances could be distinguished from cases of persecution that do

not fall within subsection 108(4), which is a question of fact. The RAD noted that the level of atrocity must be considered and that several cases have used the term "atrocious and appalling", adding that the applicant's experience of persecution did not rise to that level.

[23] The RAD also noted the applicant's arguments that the RPD had erred in its compelling reasons analysis by not considering the psychologist's report and the psychological after-effects of her abuse.

[24] The RAD acknowledged that evidence of continuing psychological after-effects is relevant to the compelling reasons determination, but found that it is not a separate test to be met.

[25] Although the RAD disagreed with the RPD and accepted that the applicant would have been a Convention refugee in the past, the RAD found, based on its independent assessment of all the evidence, including the psychological report, the applicant's background, the passage of time and the sustainable credibility findings, that there was insufficient persuasive evidence to conclude that she had met the high threshold for compelling reasons.

IV. The Issues

[26] The applicant raises the same issues on judicial review with respect to the RAD decision as she did before the RAD with respect to the RPD decision:

(1) The RAD erred in finding that the RPD considered and applied the Gender Guidelines;

(2) The RAD erred in its assessment of the RPD's credibility findings and in confirming the RPD's credibility findings without a sufficiently independent assessment;

(3) The RAD erred in its assessment of the expert evidence, i.e. the psychologist's report;

(4) The RAD applied the wrong test for state protection and erred in its assessment of state protection;

(5) The RAD erred by applying the wrong test for compelling reasons, and erred in not finding that compelling reasons existed.

[27] The applicant also raises additional arguments relating to these issues, all of which have been addressed, resulting in a lengthy decision.

V. The Standard of Review

[28] The RAD conducted an appeal of the RPD's decision. The Court conducts a judicial review of the RAD's decision.

[29] With respect to the approach to be applied by the RAD to the RPD decision, the jurisprudence has been consistent in establishing that the RAD should perform its appellate function: *Huruglica* at para 54. With respect to questions of credibility, although there are some nuances, the jurisprudence has established that the RAD may defer to the RPD where the RPD has heard the witnesses directly, has had an opportunity to probe their testimony or has had some advantage not enjoyed by the RAD (see, for example, *Huruglica* at para 55; *Nahal v Canada*

(Minister of Citizenship and Immigration), 2014 FC 1208 at para 25, [2014] FCJ No 1254 (QL)). However, the Court has also noted that such deference should follow from an independent assessment of the evidence, given that the RAD is performing an appellate function (see, for example, *Khachatourian v Canada (Minister of Citizenship and Immigration)*, 2015 FC 182 at para 31, [2015] FCJ No 156 (QL) [*Khachatourian*]; *Balde v Canada (Minister of Citizenship and Immigration)*, 2015 FC 624 at para 23, [2015] FCJ No 641 (QL)).

[30] With respect to the Court's review of the RAD's decision, the applicant argues that the RAD applied the wrong legal test for both state protection and compelling reasons.

[31] There is a distinction between whether the correct legal test was applied, which is reviewed on the standard of correctness, and for which no deference is owed, and whether the decision maker applied the correct test to the particular facts, which is a question of mixed fact and law reviewed on the reasonableness standard, and for which deference is owed.

[32] The RAD's state protection and compelling reasons analyses, which involve the application of the law to the facts, and the RAD's decision regarding the RPD's credibility findings are reviewed on the standard of reasonableness.

[33] The reasonableness standard focuses on "the existence of justification, transparency and intelligibility within the decision-making process" and considers "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and

law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190 [*Dunsmuir*]). The Court will not re-weigh the evidence or re-make the decision.

VI. The RAD did not err in finding that the RPD had considered and applied the Gender Guidelines

[34] The applicant acknowledges that the RPD offered procedural protections to her in accordance with the Guidelines, but argues that the RAD did not go far enough in its independent assessment of the evidence, including the psychological report, to determine whether the RPD had considered the applicant's evidence through the lens of a victim of domestic violence. Similarly, the applicant argues that the RAD did not adequately apply the Guidelines in assessing the content of her testimony.

[35] I do not agree. It is apparent that the RAD assessed the evidence, including reviewing the audio recording of the RPD hearing, to conclude that the RPD had applied the Guidelines and was sensitive to the applicant's needs as a victim of domestic violence. The RAD did not ignore or misapply the Guidelines in its assessment of the applicant's evidence or the psychologist's report.

[36] The Guidelines are not the law but, as the name implies, are intended to guide the decision maker. In *Diallo v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1450 at paras 32-33, 259 FTR 273 [*Diallo*], Justice Mactavish noted that the Guidelines alert the decision maker "to the effect that social, cultural, traditional and religious norms can have on the testimony of those claiming to fear gender-based persecution."

[37] In *Karanja v Canada (Minister of Citizenship and Immigration)*, 2006 FC 574 at paras 5-7, [2006] FCJ No 717 (QL), Justice Pinard referred to the principles that the Guidelines are not intended to serve as a "cure" for deficiencies in the applicant's claim or evidence; cannot be treated as corroborating any evidence of gender-based persecution; do not create new grounds to find persecution; and, do not need to be specifically mentioned when they are considered.

[38] The Guidelines encourage the decision maker to consider the applicant's testimony in accordance with her circumstances as a domestic abuse victim in a society that differs from Canada. They do not cure the reasonable credibility findings, which include the applicant's claims of recent threats, and cannot buttress the state protection analysis.

[39] The RAD conducted its independent assessment of the evidence with the Guidelines in mind and reasonably found that the RPD applied the Guidelines.

VII. The RAD did not err in its assessment of the RPD's credibility findings

[40] The applicant argues that the RAD erred by not conducting a sufficiently independent assessment of the evidence and in confirming the RPD's credibility findings.

[41] The applicant also submits that neither the RPD nor the RAD made clear credibility findings regarding her account of persecution which is highly relevant to the establishment of compelling reasons.

[42] I find that the RAD followed the guidance of *Huruglica* and conducted an independent assessment of the evidence, including the evidence upon which the credibility findings were based. The RAD is entitled to defer to some or all of those findings and clearly indicated whether it did so.

[43] The RAD acknowledged that the RPD found that state protection was the determinative issue, although the RPD also found that the applicant was not a credible witness. The RAD reasonably found that this was not an error given that the credibility findings were made within the context of the state protection analysis, i.e., the abuse alleged by the applicant and her efforts to seek state protection and the evidence of recent threats. The RAD noted that credibility is always an issue and that this had been clearly stated at the outset of the RPD hearing.

[44] The RAD considered all the plausibility and credibility findings made by the RPD. The RAD reasonably found that the implausibility finding relating to the lack of police action in Argentina was not an error, noting the inconsistency in the applicant's statements.

[45] With respect to the applicant's efforts to pursue permanent resident status in Canada, the RAD noted that it listened to the recording of the hearing which confirmed that the applicant was given ample opportunity to explain her delay and lack of action and that the RPD probed those explanations. The RAD reasonably concluded, based on its assessment, that her explanations did not make sense.

[46] Based on its own assessment of the evidence, the RAD confirmed the RPD's finding that the events recounted in the letters from the applicant's sisters, alleging recent threats from Juan, did not occur, as the letters were contradictory and lacked specific details. The applicant's submission that these credibility findings should not be attributed to her overlooks that the letters were submitted to support her assertion that Juan continues to threaten her. The letters did not do so. The RAD's findings are reasonable.

[47] It cannot be said that the RAD simply deferred to the RPD's credibility findings. For example, the RAD did not defer to the RPD's findings regarding a letter from a friend suggesting that Juan planned revenge. In addition, despite the RAD's deference to the RPD's findings about the applicant's attempts to engage the police in Argentina, the RAD found that the applicant would have been a Convention refugee at that time because state protection was not sufficient.

VIII. The RAD did not err in its assessment of the psychologist's report

[48] The applicant submits that the RAD failed to properly consider the psychologist's report which is relevant to her account of the persecution she suffered, including the subjective trauma she would experience upon return to Argentina, and which, in turn, is relevant to the application of the compelling reasons exception.

[49] The applicant notes that the psychologist, Dr. Browne, stated that her PTSD resulted from the stressors associated with domestic violence. She argues that because neither the RAD nor the RPD made explicit negative credibility findings regarding her testimony, there is no reason to

doubt Dr. Browne's conclusions. The applicant also notes that Dr. Browne stated that she did not exaggerate and, therefore, there is no reason for the RAD to give this report little weight.

[50] The applicant argues that the RAD erred by relying on *Csesak v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1149, 235 ACWS (3d) 1054 [*Csesak*], which the applicant characterizes as an outlier in the jurisprudence, for the proposition that expert evidence should be accorded little weight by administrative tribunals. If the RAD had concerns about the report it could have exercised its powers under the *Inquiries Act*, RSC, 1985, c I-11, to question the psychologist.

[51] The applicant also submits that the RAD erred in deferring to the RPD's finding that there could have been other causes for her depression because such a finding goes beyond the knowledge of the RPD and the RPD does not enjoy any particular advantage in making this determination.

[52] I do not agree that the RAD erred in its treatment of the psychologist's report.

[53] Contrary to the applicant's submission, the RPD and RAD did not accept that the applicant's allegations of persecution were completely credible. The RAD found that it was open to the RPD to "cast aspersions" on the credibility of the applicant. However, unlike the RPD, the RAD found that the applicant would have been a Convention refugee in the past.

[54] Dr. Browne's report states that the applicant was referred for psychological screening to assess her psychological functioning and to assist her claim for refugee protection. Dr. Browne clearly notes that the events were recounted to her by the applicant. Dr. Browne describes the results of four tests administered to the applicant noting that: the applicant's scores on these tests were consistent with severe anxiety, severe depression and a severe level of post-traumatic distress; and, the results did not indicate signs of symptom exaggeration. Dr. Browne concludes that the applicant "presents with Post Traumatic Stress Disorder … resulting from the stressors associated with years of domestic violence and the lack of confidence concerning her future prospects."

[55] The RAD noted that the RPD did not dispute the diagnosis, but could not conclude that the applicant's depression was the result of persecution in Argentina. Although the applicant takes issue with the RAD's deference to the RPD, the RAD's comments must be read in the context of its consideration of Dr. Browne's report. In addition, the RAD's deference to the RPD is not the basis of its finding that "there is no persuasive evidence that the doctor is in any position to state categorically that the claimant before it is a victim of domestic abuse." That finding is based on the RAD's own assessment of the evidence, its deference to the RPD's credibility findings, and its understanding of the jurisprudence.

[56] Although the applicant submits that the RAD erred in relying on *Csesak* to find that the psychologist's report is not persuasive evidence that the applicant is a victim of domestic abuse, this mischaracterizes both the RAD's findings and the decision in *Csesak*.

[57] Other jurisprudence has also cautioned that the recounting of events to a psychologist or a psychiatrist does not make these events more credible and that an expert report cannot confirm allegations of abuse. For example, the RAD referred to *Rokni v Canada (Minister of Citizenship and Immigration)*, [1995] FCJ No 182 (QL), 53 ACWS (3d) 371 (FCTD), and *Danailov v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 1019 (QL), 44 ACWS (3d) 766 (FCTD), which note that opinion evidence is only as valid as the truth of the facts upon which it is based. The same caution was noted by Justice Phelan in *Saha v Canada (Minister of Citizenship and Immigration)*, 2009 FC 304 at para 16, 176 ACWS (3d) 499: "It is within the RPD's mandate to discount psychological evidence when the doctor merely regurgitates what the patient says are the reasons for his stress and then reaches a medical conclusion that the patient suffers stress because of those reasons."

[58] In *Molefe v Canada (Minister of Citizenship and Immigration)*, 2015 FC 317, [2015] FCJ No 304 (QL), Justice Mosley addressed the applicant's argument that her psychological report had not been considered by the RPD in evaluating her testimony. Justice Mosley endorsed the comments of Justice Annis in *Csesak*, noting:

> [31] Expert opinion reports should not be given exalted status in administrative proceedings simply because they are prepared by a licensed professional. That is particularly true, when as here, the report is not relevant to the Board's key credibility findings and determination on state protection. In *Czesak v Canada (Citizenship and Immigration)*, 2013 FC 1149 at paras 37-40, Justice Annis warned of the dangers posed by expert reports submitted to administrative tribunals.
>
> > Moreover, I am of the view that decision-makers should be wary of reliance upon forensic expert evidence obtained for the purpose of litigation, unless it is subject to some form of validation. This remark would apply to the report of Dr. Koczorowska which went as far as to advocate on

> the applicant's behalf in the guise of an opinion on the very issue before the panel.
>
> Our legal system has a long experience in dealing with forensic experts testifying on matters relating to technical evidence for the purpose of assisting courts in their determinations. From that experience, the courts have developed what I would describe as a guarded and cautionary view on conclusions of forensic experts which have not undergone a rigorous validation process under court procedures.
>
> […]
>
> This is not to say that every expert report prepared for litigation should be dismissed as having no, or little, weight. But what the court's experience with forensic experts does suggest in relation to these reports being proffered before administrative tribunals where there exists no defined procedure to allow for their validation, is that caution should be exercised in accepting them at face value, particularly when they propose to settle important issues to be decided by the tribunal. In my view therefore, unless there is some means to corroborate either the neutrality or lack of self-interest of the expert in relation to the litigation process, they generally should be accorded little weight.

[Emphasis added] (by Mosley J)

[59] As noted above, the applicant pointed to excerpts of *Csesak*, but the relevant passages reveal that Justice Annis' concern focused on psychological reports that advocate in the guise of an opinion and "propose to settle important issues to be decided by the tribunal." Justice Annis found that in such cases, without some way to probe the opinion, little weight should be attached to it.

[60] In the present case, Dr. Browne did not go so far as to advocate that the applicant should be found to be a Convention refugee or person in need of protection. Dr. Browne conducted a series of tests to reach the diagnosis of PTSD. That diagnosis is not in dispute. However, the applicant seeks to rely on the events reported to Dr. Browne and Dr. Browne's reference to the "stressors caused by domestic abuse" as evidence of the nature of the abuse she experienced in Argentina or as corroboration of her allegations.

[61] The RAD did not err in finding, based on its assessment of the evidence, that the RPD had considered Dr. Browne's report, did not dispute the diagnosis of PTSD but could not conclude that this was the result of the alleged persecution. Moreover, Dr. Browne's report did not and could not address the credibility issues regarding the recent threats or the state protection issues, which the RPD had found to be determinative.

[62] The RAD also made its own findings. Contrary to the applicant's argument, the RAD did not state that it attached little weight to the report. Rather, the RAD considered the report and found that it did not overcome the credibility concerns noted by the RPD nor did it support that the cause of the applicant's PTSD was the alleged abuse by Juan.

[63] With respect to the applicant's submission that the RAD displaced the role of the expert, it must be recalled that Dr. Browne's role was to assess the applicant's psychological functioning, an assessment which the RAD accepted.

[64] The RAD did not err in referring to *Csesak*, which reiterates and elaborates on the caution noted in other jurisprudence. Moreover, the RAD did not base its assessment of Dr. Browne's report on *Csesak*. The RAD considered the appropriate weight to attach to it and it is not the role of the Court to re-weigh the evidence.

[65] Although the applicant points to the conclusions of the test that indicated that she did not exaggerate, that test referred to exaggeration of her symptoms and not of her account of persecution.

[66] Dr. Browne's report was also taken into account by the RAD in the context of its consideration of the compelling reasons exception, but as noted below, psychological after-effects do not automatically lead to the application of the compelling reasons exception.

[67] The applicant's submission that the RAD could have relied on its powers under the *Inquiries Act* to probe Dr. Browne's report does not respond to the issue noted by the RAD and in the jurisprudence that recounting events of abuse to an expert does not buttress the account of the abuse. Dr. Browne, even if summoned to appear before the RAD, could only address the tests she administered, the results and the diagnosis, none of which are in dispute.

IX. The RAD did not err in its state protection analysis

[68] The applicant argues that the RAD erred in its findings with respect to the RPD's forward looking state protection findings. In addition, the applicant argues that the RAD applied the wrong test for state protection by failing to acknowledge that state protection must be adequate at

the operational level and by relying on the fact that Argentina is a democracy, which does not necessarily mean that state protection is available.

[69] The applicant adds that the RAD erred by relying on *Mudrak v Canada (Minister of Citizenship and Immigration)*, 2015 FC 188, [2015] FCJ No 180 (QL) [*Mudrak*], which she submits is inconsistent with other jurisprudence, is contrary to the UNHCR principles and is currently under appeal. In *Mudrak*, the Court found that governments should not be required to demonstrate operational adequacy.

[70] The applicant also argues that there should not be a heavy evidentiary burden on refugee claimants to establish a lack of state protection as this puts vulnerable claimants, particularly victims of gendered violence, at a disadvantage.

[71] I do not agree. Both the RPD and the RAD understood the principles governing state protection, applied the correct test, and reasonably found that state protection in Argentina is adequate, including at the operational level, although not perfect, and that the applicant had not met her onus to rebut the presumption of adequate state protection.

[72] These principles start from the premise that refugee protection is considered to be surrogate or substitute protection in the event of a failure of national protection (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at 709, 103 DLR (4th) 1). There is a presumption that a state is capable of protecting its citizens which is only rebutted by clear and convincing evidence that state protection is inadequate or non-existent; the evidence adduced must be

"relevant, reliable and convincing evidence which satisfies the trier of fact on a balance of probabilities that the state protection is inadequate" (*Carrillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94 at para 30, [2008] 4 FCR 636).

[73] To be adequate, perfection is not the standard, but state protection must be effective to a certain degree and the state must be both willing and able to protect (*Bledy v Canada (Minister of Citizenship and Immigration)*, 2011 FC 210 at para 47, [2011] FCJ No 358 (QL)). State protection must be adequate at the operational level (*Henguva v Canada (Minister of Citizenship and Immigration)*, 2013 FC 483 at para 18, [2013] FCJ No 510 (QL); *Meza Varela v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1364 at para 16, [2011] FCJ No 1663 (QL)).

[74] As noted by the applicant, democracy alone does not ensure effective state protection; the quality of the institutions providing protection must be considered (*Sow v Canada (Minister of Citizenship and Immigration)*, 2011 FC 646 at para 11, [2011] FCJ No 824 (QL) [*Sow*]).

[75] The onus on an applicant to seek state protection varies with the nature of the democracy and is commensurate with the state's ability and willingness to provide protection (*Sow* at para 10; *Kadenko v Canada (Minister of Citizenship and Immigration)*, [1996] FCJ No 1376 (QL) at para 5, 143 DLR (4th) 532 (FCA)). However, an applicant cannot simply rely on their own belief that state protection will not be forthcoming (*Ruszo v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1004 at para 33, [2013] FCJ No 1099 (QL)).

[76] Contrary to the applicant's argument, the RAD and the RPD did not rely on the fact that Argentina is a democracy as a "proxy" for state protection, but thoroughly considered the country condition documents.

[77] The applicant has made no recent efforts to seek protection in Argentina because she has been in Canada for almost 30 years. The RPD and RAD could only consider the objective country condition evidence to determine whether her unwillingness or inability to engage state protection upon her return is justified.

[78] The RPD extensively analyzed the documentary evidence demonstrating action to address domestic violence at both legislatively and at the operational level. The RPD noted the criminal offences, including prohibitions on domestic violence and sexual violence, the Femicide Law and the penalties for gender-based violence. The RPD also noted the implementation of the Domestic Violence Office of the Supreme Court of Argentina, which offers an interdisciplinary approach, including the provision of services, referrals to shelters, risk assessments, protection orders and training for the police, and noted other services and organizations to assist victims. The RPD acknowledged that problems remained in responding to domestic and gender-based violence, including the lack of financial resources for victims and the need for attitudinal change.

[79] There was no new evidence presented to the RAD. The state protection analysis was based on its assessment of the same evidence on the record before the RPD. The RAD noted that the assessment was forward looking and did not err in finding that the RPD had conducted a thorough state protection analysis.

[80] The RAD referred to *Mudrak*, however, the RAD's finding that adequate state protection would be available was not based on the proposition in *Mudrak*. The RAD reasonably found, based on its review of the country condition documents and based on the well-established jurisprudence, that there was adequate state protection at the operational level. The RAD also confirmed the RPD's finding, based on the RPD's thorough analysis, which highlighted several specific operational measures for domestic violence victims, and found that the applicant would have adequate state protection if she were to return to Argentina, acknowledging that some obstacles remained, but perfection is not the standard.

[81] Although the onus on the applicant to rebut the presumption of state protection varies with the level of democracy, including the quality of the institutions providing protection, the applicant did not point to any country condition evidence which the RAD or RPD ignored or misunderstood or which contradicted their findings that adequate, not perfect, state protection would be available to the applicant. The onus is not reduced because the applicant is a victim of domestic violence. The nature of the applicant's allegations and whether protection would be available to her as a victim of domestic violence were considered in the context of the state protection analysis.

[82] The RAD acknowledged that the RPD did not say why the applicant had not rebutted the presumption of state protection before 1988 while in Argentina, but found that this could be inferred from the credibility findings. Contrary to the applicant's arguments, this is not a reviewable error or an improper inference by the RAD. As noted above, the RAD did not even

agree with this finding and found that the applicant would have been a Convention refugee at that time.

[83] The RAD agreed with the RPD that state protection would be available to the applicant based on a forward looking assessment. This finding has nothing to do with inferences about why she had not rebutted the presumption in the past.

X. Did the RAD err in applying the wrong test for compelling reasons and in not finding that compelling reasons were established?

The Applicant's Submissions

[84] The applicant raises four arguments.

[85] First, the applicant argues that the RAD fettered its discretion by finding that her past persecution in Argentina was not appalling and atrocious and did not go on to consider whether compelling reasons existed to justify the exception. In other words, the RAD took the approach that atrocious and appalling persecution was a condition precedent to considering whether the applicant had established that there were compelling reasons.

[86] Second, or alternatively, the applicant argues that the RAD failed to analyse the jurisprudence, which reveals two different approaches to the determination of the compelling reasons exception. The applicant argues that the RAD applied the "wrong" test; it erred in law by requiring appalling and atrocious past persecution as the threshold to find that an applicant has established compelling reasons.

[87] The applicant argues that the focus in the subsection 108(4) analysis should be on the words "compelling reasons", which are not limited to atrocious and appalling persecution. The applicant submits that the RAD specifically found that she did not meet the "high threshold" required to apply the compelling reasons exception, which was based on the RAD's erroneous view that this high threshold requires appalling and atrocious past persecution.

[88] The applicant submits that the jurisprudence suggesting that the persecution must be atrocious and appalling, which is derived from *Canada (Minister of Employment and Immigration) v Obstoj*, [1992] 2 FC 739, [1992] FCJ No 422 (QL) (FCA) [*Obstoj*], should be rejected because this interpretation goes beyond the clear words of subsection 108(4) and has been found to be an error.

[89] The applicant points to *Suleiman*, where the Court found that compelling reasons are not limited to appalling and atrocious past persecution and should be interpreted with reference to all the circumstances, including the subjective trauma that would be experienced by the applicant upon return to her country. In *Kotorri v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1195, [2005] FCJ No 1457 (QL) [*Kotorri*], Justice Beaudry adopted *Suleiman* and found that it was an error in law to elevate the threshold of persecution to atrocious and appalling.

[90] Third, the applicant argues that the RAD failed to adequately consider the nature of her past persecution, which the applicant argues was, in any event, atrocious and appalling, and the psychological impact and trauma she would experience if she were to return to Argentina.

[91] Fourth, the applicant argues that the RAD erred by failing to explain the factors it considered both for and against the application of the compelling reasons exception, noting that in *Adjibi v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 525 at para 33, 219 FTR 54 (FCTD) [*Adjibi*], Justice Dawson found that this was required.

The Respondent's Submissions

[92] The respondent acknowledges that there are two lines of jurisprudence: one which is derived from *Obstoj* and focuses on past persecution of an atrocious and appalling nature and another which is derived from *Suleiman* and finds that compelling reasons include other circumstances, including the applicant's subjective trauma upon return, but still requires a high threshold.

[93] The respondent submits that the RAD considered all the jurisprudence and did not err in noting that the compelling reasons exception applies to a limited number of claimants and that the level of persecution is a factor.

[94] In its written argument, the respondent argued that the RAD reasonably found that the applicant's past persecution did not reach the appalling and atrocious level. The respondent clarified this argument in oral submissions and submits that the RAD did not find that only appalling and atrocious persecution would constitute compelling reasons, but reasonably found that the high threshold required had not been met, based on its consideration of all the evidence.

[95] The respondent also points to the jurisprudence that confirms that it is a reviewable error to fail to consider subsection 108(4) only where the past persecution is exceptionally severe and rises to the level of appalling or atrocious (*Alharazim v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1044 at paras 49, 52, [2010] FCJ No 1519 (QL) [*Alharazim*]).

The RAD did not err in interpreting the compelling reasons exception or in determining that compelling reasons had not been established

The RAD did not fetter its discretion

[96] In *Brovina v Canada (Minister of Citizenship and Immigration)*, 2004 FC 635, [2004] FCJ No 771 (QL) [*Brovina*], Justice Layden-Stevenson found:

> [5] […] For the board to embark on a compelling reasons analysis, it must first find that there was a valid refugee (or protected person) claim and that the reasons for the claim have ceased to exist (due to changed country conditions). It is only then that the Board should consider whether the nature of the claimant's experiences in the former country were so appalling that he or she should not be expected to return and put himself or herself under the protection of that state.

[97] At para 6, Justice Layden-Stevenson emphasized that: "In the absence of a finding of past persecution, subsection 108(4) has no application."

[98] In the present case, the RAD found that the applicant would have been a refugee in the past, but the reasons for refugee protection have ceased to exist because, among other reasons, state protection is now available and there is no credible evidence of an ongoing risk from Juan. The RAD then embarked on the compelling reasons analysis.

[99] The RAD did not fetter its discretion. The RAD did not regard the level of past persecution, or whether it was appalling and atrocious, as a condition precedent to undertaking the compelling reasons analysis. Once the RAD found that the applicant would have been a Convention refugee in the past, it readily embarked on its consideration of whether the compelling reasons exception should apply.

[100] The issue in the present case is whether the RAD correctly interpreted the compelling reasons exception, considered all the evidence and reached a reasonable decision that compelling reasons had not been established.

The interpretation and application of subsection 108(4)

[101] There is a significant amount of jurisprudence regarding the interpretation of subsection 108(4) and its predecessor. The statutory provision is set out in Annex A.

[102] Two approaches have emerged in the jurisprudence, along with additional distinctions and nuances within those approaches.

[103] The genesis of the reference to "appalling" persecution is in *Obstoj* at 748 with respect to the predecessor to subsection 108(4):

> […] It is hardly surprising, therefore, that it should also be read as requiring Canadian authorities to give recognition of refugee status on humanitarian grounds to this special and limited category of persons, i.e. <u>those who have suffered such appalling persecution that their experience alone is a compelling reason</u> not to return them, even though they may no longer have any reason to fear further persecution.

> The exceptional circumstances envisaged by subsection 2(3) must surely apply to only a tiny minority of present day claimants. I can think of no reason of principle, and counsel could suggest none, why the success or failure of claims by such persons should depend upon the purely fortuitous circumstance of whether they obtained recognition as a refugee before or after conditions had changed in their country of origin. […]
>
> [Emphasis added]

[104] Two principles emerge from *Obstoj*: first, the compelling reasons exception is directed at a special and limited category; and, second, those who have suffered appalling persecution would be within that category and should be given refugee protection. The emphasis is clear that the compelling reasons exception applies to only a "tiny minority of present day complainants."

[105] Some of the subsequent jurisprudence has found that *Obstoj* does not require that the past persecution be appalling, rather that appalling persecution constitutes a compelling reason and that the level of atrocity must be considered. Other jurisprudence has adopted appalling and atrocious past persecution as the threshold or level of persecution that should be established to find compelling reasons.

[106] The RAD referred to several cases which pre-date *Suleiman*, all of which refer to the exceptional nature of the provision and/or to appalling and atrocious persecution.

[107] For example, in *Brovina*, the Court referred to the need to consider whether the past experiences were "so appalling" that the person should not be expected to return.

[108] In *Shahid v Canada (Minister of Citizenship and Immigration)*, [1995] FCJ No 251 (QL), 89 FTR 106 (FCTD) [*Shahid*], the Court noted the duty to consider the level of atrocity, as well as the impact on the applicant's physical and mental state to determine whether an experience constituted compelling reasons:

> [25] It seems clear, having regard to *Obstoj* and *Hassan*, supra, that the Board erred in construing ss. 2(3) as requiring ongoing fear of persecution. The Board, once it embarked upon the assessment of the applicant's claim under ss. 2(3), had the duty to consider the level of atrocity of the acts inflicted upon the applicant, the repercussions upon his physical and mental state, and determine whether this experience alone constituted a compelling reason not to return him to his country of origin. That it failed to do. While I have serious doubt as to whether the claimant can, in this instance, meet the high threshold established by the case law, this is a matter for the Board to decide after consideration of the relevant factors. The decision will accordingly be quashed, and the matter will be returned for a new hearing before a differently constituted tribunal.
>
> [Emphasis added]

[109] In *Isacko v Canada (Minister of Citizenship and Immigration)*, 2004 FC 890, [2004] FCJ No 1128 (QL) the Court also directs the decision maker to consider the level of atrocity.

[110] In *Lawani v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 1061 (QL) (FCTD), the Court found that a decision that past persecution did not reach the appalling and atrocious level was not reasonable and in *Nwaozor v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 517, [2001] FCJ No 840 (QL) (FCTD), the Court cited *Obstoj* and noted the need to consider the level of atrocity.

[111] In *Suleiman* at paras 16-17, Justice Martineau rejected the notion that past persecution must be atrocious and appalling to establish compelling reasons, noting that a rigid test based on

the level of atrocity should be avoided and that establishing compelling reasons is a factual determination based on all the evidence:

> [16] It must not be forgotten that subsection 108(4) of the Act refers only to "compelling reasons arising out of previous persecution, torture, treatment or punishment". It does not require a determination that such acts or situation be "atrocious" and "appalling". Indeed, a variety of circumstances may trigger the application of the "compelling reasons" exception. The issue is whether, considering the totality of the situation, i.e. humanitarian grounds, unusual or exceptional circumstances, it would be wrong to reject a claim or make a declaration that refugee protection has ceased in the wake of a change of circumstances. "Compelling reasons" are examined on a case-by-case basis. Each case is a "cas d'espèce". In practice, this means that each case must be assessed and decided on its own merit, based on the totality of the evidence submitted by the claimants. As was decided by the Federal Court of Appeal in *Yamba v. Canada (Minister of Citizenship and Immigration)* (2000), 254 N.R. 388, at paragraph 6, in every case in which the Board concludes that a claimant has suffered past persecution, where there has been a change of country conditions to such an extent as to eliminate the source of the claimant's fear, the Board is obligated to consider whether the evidence presented establishes the existence of 'compelling reasons".

[112] The broader interpretation of the compelling reasons exception endorsed by Justice Martineau also includes consideration of the trauma caused by repatriation as a compelling reason (at paras 18-20); however, the determinative issue was set out in para 21:

> [21] […] In the case at bar, it is apparent that the Board erred in inferring that the test in *Obstoj* necessitates that the persecution reach a level to qualify it as "atrocious" and "appalling" for the "compelling reasons" exception to apply. This error of law vitiates the subsequent determination made by the Board that the applicants are not Convention refugees.

[113] In *Kotorri* at para 27, Justice Beaudry adopted *Suleiman* and found that the requirement of appalling and atrocious persecution "improperly elevated the threshold of persecution beyond

what is established by the case law." However, Justice Beaudry referred only to *Elemah v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 779, [2001] FCJ No 1123 (QL) (FCTD) and *Suleiman*. It appears that the other jurisprudence which had continued to interpret *Obstoj* as setting appalling and atrocious as the threshold was not raised.

[114] The RAD also noted jurisprudence post-*Suleiman*. In *Shpati v Canada (Minister of Citizenship and Immigration)*, 2007 FC 237, [2007] FCJ No 387 (QL), Justice Snider found that the decision maker reasonably found that the applicant's past experience did not reach the level of appalling and atrocious, noting that there was no basis to find that any evidence had been ignored and that the Court's role is not to re-weigh the evidence. Justice Snider declined to consider the new argument raised at the hearing that appalling and atrocious is too high a standard for subsection 108(4). However, Justice Snider commented that the test set out in *Obstoj* "has been consistently in use since [*Obstoj*]" (at para 13) and added, that apart from *Dini v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 217, [2001] FCJ No 389 (QL) (FCTD) and the question certified in that case, "there is no jurisprudence that raises a doubt about the correctness of this test." The RAD noted this finding. Although Justice Snider referred to *Kotorri* regarding the standard of review, it appears that it was not argued that *Kotorri*, like *Suleiman*, had taken a different approach.

[115] The RAD also cited *Lici v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1451 at para 21, [2011] FCJ No 1862 (QL), where Justice Near noted that compelling reasons only apply in exceptional circumstances and that the decision maker is entitled to weigh the evidence of an applicant's past persecution and determine whether past persecution reaches "the

threshold of 'atrocious and appalling.'" The RAD also referred to *Kostrzewa v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1449, [2012] FCJ No 1550 (QL), which noted the appalling and atrocious standard, although that reference related to the RPD's failure to consider the exception, not whether compelling reasons had been established.

[116] The respondent referred to *Alharazim* and other recent cases which reflect the view that persecution should reach the level of appalling and atrocious for a finding of compelling reasons.

[117] In *Alharazim*, Justice Crampton considered the past jurisprudence and addressed two distinct issues: first, whether and in what circumstances the decision maker is required to even consider the compelling reasons exception; and, second, once the decision maker embarks on that assessment, what must be established to find compelling reasons:

> [49] Having regard to the foregoing, I am satisfied that the class of situations in respect of which it may be a reviewable error for decision-maker under the IRPA to fail to consider the potential applicability of subsection 108(4) ought to be narrowly circumscribed, to ensure that it only includes truly exceptional or extraordinary situations. These will be situations in which there is *prima facie* evidence of past persecution that is so exceptional in its severity as to rise to the level of "appalling" or "atrocious."
>
> [50] I am mindful of the decisions in *Elemah v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 779, at para. 28, and *Suleiman v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1125, at paras. 16 - 21, which state that subsection 108(4) does not require a determination that the severity of the claimed past persecution rose to the level of being "atrocious" or "appalling," before a positive finding may be made under that subsection. Those cases both dealt with situations in which the RPD conducted assessments under subsection 108(4) or its predecessor.
>
> [51] I acknowledge that <u>there may be situations in which it may be possible to meet the requirements of subsection 108(4), without the need to demonstrate past persecution that rises to the level of</u>

> having been "atrocious" or "appalling." In keeping with the settled jurisprudence established in *Obstoj*, above, and its progeny discussed above, those situations must be truly exceptional or extraordinary, relative to other cases in which refugee protection has been granted.
>
> [52] However, for the purposes of determining when it may be a reviewable error for a member of the RPD, an Immigration Officer or another decision-maker under the IRPA to fail to conduct an assessment under subsection 108(4), it is appropriate to define a narrow category of situations in respect of which such an assessment is required.
>
> [53] Keeping in mind the insights provided by paragraph 136 of the UN Handbook and the difficulty that would be associated with attempting to identify, *ex ante*, exceptional situations that do not involve severe past persecution, it is appropriate to confine that category of situations to those that in which there is *prima facie* evidence of "appalling" or "atrocious" past persecution. In those cases, a decision-maker under the IRPA is required to perform an assessment under subsection 108(4) of the IRPA. In all other cases, a decision-maker may exercise discretion as to whether to perform such an assessment.
>
> [Emphasis added]

[118] Justice Crampton distinguished the duty on the decision maker to proactively consider the compelling reasons exception from the discretion the decision maker has to consider the exception.

[119] With respect to whether the decision maker should even consider the exception, Justice Crampton found that the RPD or RAD must consider whether compelling reasons have been established only where there is *prima facie* evidence of appalling and atrocious past persecution. In other cases, the RPD or RPD may consider whether compelling reasons have been established.

[120] I note that this approach differs from that taken by the Federal Court of Appeal in *Yamba v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 457 (QL), 254 NR 388, where the Court found that the exception should be considered in every case where there is a finding that there was past persecution and the country conditions have changed. Justice Rennie noted this "tension" in *Sabaratnam v Canada (Minister of Citizenship and Immigration)*, 2012 FC 844 at para 18, [2012] FCJ No 959 (QL), but found that it did not affect that application. Similarly, the issue does not arise in the present case; the RAD did consider whether compelling reasons had been established.

[121] With respect to the threshold, if any, which applies to determine whether, on the facts, compelling reasons have been established, Justice Crampton acknowledged the interpretation in *Suleiman*. He noted (at para 51) that the requirements of subsection 108(4) may be met when past persecution is not demonstrated to be appalling or atrocious, but highlighted that these situations must be "truly exceptional or extraordinary" relative to other cases.

[122] This is consistent with the underlying principle that the exception applies to a "tiny minority" of refugee claimants. This interpretation also seeks to reconcile the *Obstoj* and *Suleiman* jurisprudence.

[123] Although the applicant would characterize *Suleiman* as the correct test, other jurisprudence has more narrowly interpreted the compelling reasons exception, highlighting that it is very exceptional and applies to a limited category of claimants and that appalling and atrocious is the appropriate threshold. Even *Suleiman* does not reject the principle that the

compelling reasons exception is for a "special and limited category" and a "tiny minority" of refugee claimants.

[124] *Suleiman* has been cited in other jurisprudence, including with respect to the standard of review and the consideration of the psychological impact, but I have not been directed to nor found cases, other than *Kotorri*, that specifically reject the appalling and atrocious level of persecution and find an error on the part of the decision maker in applying that standard.

[125] The applicant argues that, at least implicitly, the RAD applied the appalling and atrocious threshold given its references to the jurisprudence which notes this standard and its finding that her persecution did not meet that high threshold.

[126] I do not agree. The statutory provision requires that the applicant establish compelling reasons arising out of her previous persecution that justifies her refusal to avail herself of the state protection of her country of origin. The RAD's analysis took this into account.

[127] The RAD first identified its task as "to establish whether the claimant's particular case can be distinguished from cases of persecution that do not fall under s.108(4)," noting that this is a question of fact. The RAD then referred to the guidance from the case law that has established that the compelling reasons exception is applicable in exceptional circumstances. It also cited the jurisprudence that refers to appalling and atrocious persecution. The RAD did not, however, limit its consideration of compelling reasons to the narrower category of appalling and atrocious persecution; the RAD considered whether the past persecution described by the applicant, in

comparison to other cases, reached the threshold where the exception had and had not been established. Although several of those cases refer to appalling persecution as the threshold, there is no error in imposing a high threshold as all the jurisprudence consistently notes this requirement.

[128] The RAD reasonably concluded, based on the weight it attached to the evidence and in comparison to other cases where compelling reasons had not been found, that the applicant had not established compelling reasons.

[129] However, if the RAD had imposed the atrocious and appalling threshold, I would not find that it erred in law. The RAD cannot be faulted for relying on the jurisprudence that reflects that the level of atrocity of past persecution must be considered and the preponderance of the jurisprudence that reflects that appalling and/or atrocious past persecution is the high threshold required to establish compelling reasons. The RAD considered *Suleiman*; however, since *Suleiman* and *Kotorri* were decided in 2004 and 2005, other jurisprudence has continued to refer to appalling and atrocious past persecution to guide determinations of whether an applicant has established compelling reasons.

The Psychologist's Report

[130] The applicant also argues that the RAD failed to consider the relevance of the psychologist's report in its compelling reasons analysis, particularly to the trauma she would experience if she returned to Argentina.

[131] I do not agree. The RAD referred to the report and did not dispute the PTSD diagnosis. The RAD acknowledged that *Suleiman* speaks to the issue of subjective trauma, but found that this does not obviate the need to consider the level of the past persecution in assessing compelling reasons.

[132] Although the psychological impact of returning may be relevant to the determination of whether compelling reasons have been established, *Suleiman* does not establish that subjective trauma or the emotional impact on a refugee claimant upon return would constitute a compelling reason, only that it is a consideration.

[133] In *Mwaura v Canada (Minister of Citizenship and Immigration)*, 2015 FC 874, [2015] FCJ No 889 (QL), Justice Brown considered the corollary and noted that psychological harm is not necessary to establish compelling reasons but that, if raised, there is no requirement to provide a psychological report to establish compelling reasons, noting at para 17:

> [17] This Court has rejected the proposition that a precondition to a successful "compelling reasons" claim is psychological harm. In *Kotorri v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1195 at para 26 [*Kotorri*] the Court stated:
>
> > [26] I agree with the Board that the evidence of continuing psychological after-[e]ffects is relevant to a determination of the issue, but is not a separate test that has to be met (*Jiminez v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No.87 (F.C.T.D.) (QL) at paragraphs 32-34). Therefore, it is not because a claimant suffers from post-traumatic stress disorder that the "compelling reasons" exception will automatically apply. The Board must decide each case based on the totality of the evidence.
>
> [Emphasis added]

[134] In the present case, the RAD considered the psychologist's report and specifically cited the Immigration and Refugee Board's Convention Refugee Definition Handbook, which notes that evidence of continuing psychological after-effects, or the absence thereof, is relevant, but that such evidence is not a separate test to be met to find compelling reasons. The RAD considered the totality of the evidence. The weight attached to the evidence of psychological after-effects was for the RAD to determine.

The RAD's Reasons

[135] The applicant asks how her past persecution could not be found to be appalling and atrocious, if that is the standard to be met to establish compelling reasons. The Court cannot answer this question. The RAD is tasked with this determination and the Court cannot re-weigh the evidence or substitute another view where the RAD's decision is within the range of acceptable outcomes. The RAD considered the jurisprudence, interpreted the provision, considered all the evidence, including the applicant's BOC and Dr. Browne's report, and did not ignore or misconstrue any of it.

[136] The RAD did not dispute that the applicant was abused. Despite its deference to the RPD's credibility findings regarding the applicant's allegations of abuse, the RAD found that the abuse recounted was sufficient to find that the applicant would have been a Convention refugee in the past, yet found that the abuse did not meet the high threshold to establish compelling reasons.

[137] The applicant's argument that, based on *Adjibi*, the RAD erred in not setting out the factors for and against the finding that she had not established compelling reasons amounts to a request to the RAD to indicate the specific weight attached to the evidence considered.

[138] In *Adjibi*, Justice Dawson considered the applicant's allegations of inadequate reasons for a finding of no compelling reasons and found at para 33:

> [33] [...] Meaningful reasons require that a claimant and a reviewing court receive a sufficiently intelligible explanation as to why persecutory treatment does not constitute compelling reasons. This requires thorough consideration of the level of atrocity of the acts inflicted upon the applicant, the effect upon the applicant's physical and mental state, and whether the experiences and their sequela constitute a compelling reason not to return the applicant to his or her country of origin. See: *Shahid v. Canada (Minister of Citizenship and Immigration)* (1995), 89 F.T.R. 106 (T.D.).

[139] I do not agree that *Adjibi* establishes a requirement for the RPD or RAD to set out the factors for and against finding that compelling reasons exist. *Adjibi* addressed the adequacy of the reasons. It does not require the decision maker to tally the factors that support a finding of compelling reasons and those that do not. That determination is based on the totality of evidence.

[140] Moreover, as acknowledged by the applicant, the inadequacy of reasons is no longer an independent ground for judicial review, but is part of the determination of the reasonableness of the decision (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 [*Newfoundland Nurses*]).

[141] In accordance with *Newfoundland Nurses* at para 16 "if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met."

[142] In the present case, the Court is able to determine whether the RAD's finding that compelling reasons had not been established is reasonable. The RAD explained its understanding of the principles from the jurisprudence, that the provision was limited to exceptional circumstances, that it considered all the evidence and that it compared the applicant's persecution to other cases of persecution where compelling reasons were and were not found. The RAD found that, on the facts before it, compelling reasons had not been established. The RAD's decision is intelligible, transparent and justified on the facts and the law.

XI. Proposed Certified Question

[143] The applicant requests that the question proposed but not certified in *Kotorri* be certified in the present case to seek to clarify whether appalling and atrocious past persecution is the threshold to establish compelling reasons and how that threshold can be objectively measured.

[144] The test for certifying a question was established by the Federal Court of Appeal in *Canada (Minister of Citizenship and Immigration) v Liyanagamage*, [1994] FCJ No 1637, 51 ACWS (3d) 910 (FCA) at paragraph 4. The question must be one which transcends the interest of the immediate parties to the litigation and contemplates issues of broad significance of general application and must be determinative of the appeal.

[145] More simply put, as reflected in subsequent cases, in order to be a certified question the question must be a serious question of general importance which would be dispositive of the appeal.

[146] Although the proposed question would transcend the interests of the parties and clarity in the interpretation of subsection 108(4) would be beneficial, certifying the proposed question would not be dispositive of the appeal. As noted above, I do not find that the RAD imposed the threshold of appalling and atrocious persecution and found that it had not been met. Rather, it imposed a high threshold, as required by all the jurisprudence, and found that based on the totality of the evidence, the applicant had not established compelling reasons to exempt her from availing herself of the protection of Argentina. As a result, the question will not be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. No question is certified.

"Catherine M. Kane"
Judge

ANNEX A

The Statutory Provision

The relevant parts of section 108 of the Act provide:

108 (1) A claim for refugee protection shall be rejected, and a person is not a Convention refugee or a person in need of protection, in any of the following circumstances:	108 (1) Est rejetée la demande d'asile et le demandeur n'a pas qualité de réfugié ou de personne à protéger dans tel des cas suivants :
…	…
(e) the reasons for which the person sought refugee protection have ceased to exist.	e) les raisons qui lui ont fait demander l'asile n'existent plus.
…	…
(4) Paragraph (1)(e) does not apply to a person who establishes that there are compelling reasons arising out of previous persecution, torture, treatment or punishment for refusing to avail themselves of the protection of the country which they left, or outside of which they remained, due to such previous persecution, torture, treatment or punishment.	(4) L'alinéa (1)e) ne s'applique pas si le demandeur prouve qu'il y a des raisons impérieuses, tenant à des persécutions, à la torture ou à des traitements ou peines antérieurs, de refuser de se réclamer de la protection du pays qu'il a quitté ou hors duquel il est demeuré.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2227-15
STYLE OF CAUSE:	SILVIA MYRIAN MOYA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JANUARY 18, 2016
JUDGMENT AND REASONS:	KANE J.
DATED:	MARCH 15, 2016

APPEARANCES:

Prasanna Balasundaram Caitlin Maxwell	FOR THE APPLICANT
Kareena R. Wilding	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Downtown Legal Services Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT