Federal Court  Cour fédérale

Date: 20181129

Docket: IMM-1113-18

Citation: 2018 FC 1203

Ottawa, Ontario, November 29, 2018

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

BAL KRISHAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is a judicial review of a Refugee Protection Division [“RPD”] decision denying refugee status to Bal Krishan [the **“**Applicant”].

II. Background

[2] The Applicant was born in the province of Punjab in India in 1948. In or around 1966, the Applicant moved to Kargill, in the state of Jammu & Kashmir. The Applicant was married in

1981 to Neeru Attar (alternate spelling in Certified Tribunal Record [“CTR”] is Neru) and together they have three children: Shivalli, Ankur, and Rubal.

[3] In March 1994, the Applicant stated that he was attacked by terrorists during a riot and beaten severely because he was a Hindu. The Applicant stated that his leg was broken during these attacks, and that he suffered head trauma. In December 1994, he and his family were allegedly attacked again on the basis of religious identity. The Applicant asserts that as a result of the 1994 attacks, he suffered and continues to suffer from Post-Traumatic Stress disorder [“PTSD”], memory loss issues, and depression.

[4] The Applicant relocated back to Punjab in 1997 due to family pressure. The Applicant claims to have suffered from mistreatment and discrimination as a Hindu in the majority Sikh state of Punjab. He also claimed to have suffered financial hardship and emotional trauma at the hands of his family members. He stated that he eventually suffered from a brain hemorrhage as a result of this emotional trauma.

[5] On May 8, 2000, the Applicant went to the United States. The Applicant had visited the United States previously in 1999 and returned back to India in compliance with his visa status. On this occasion, the Applicant decided to illegally remain in the United States. He has not returned to India since.

[6] The Applicant resided thereafter in the United States, working odd cash jobs, including at a construction company and at a gas station. His evidence is that he fully supported himself for

the 17 years that he was in United States. His story is that when Trump ascended to the presidency, the Applicant feared that illegal aliens in the United States, like himself, would be found and deported.

[7] Therefore, in August 2017, the Applicant entered Canada at the Emerson Point of Entry in Manitoba by a taxi and he was released by Canada Border Services Agency [“CBSA”] to his daughter who lives in Manitoba. The Applicant claimed refugee protection pursuant to sections 96 and 97(1) of *Immigration and Refugee Protection Act*, SC 2001, c 27 [“IRPA”].

[8] The Applicant’s daughter, Rubal Attar, has valid permanent residency in Canada, and because the Applicant had entered at a port of entry, the Applicant qualified under one of the exceptions to the Safe Third Country Agreement.

[9] According to the examining officer’s notes dated September 3, 2017, while speaking to a superintendent on the telephone, the daughter stated that she did not know her father was coming to Canada. However, the Applicant stated during the interview that he had spoken to his daughter “maybe last month”. This contradicts a statement in a statutory declaration found in the CTR and mentioned by the examining officers in their notes where a cab driver testified that he spoke with the daughter after she talked to the Applicant by phone. The taxi driver said the daughter convinced him to drive her father all the way rather than letting him out to walk across the border.

[10] Further, as per the examining officers' notes, the Applicant claimed that he lost his cell phone one week before coming to the border. However, the port of entry officers had confiscated his phone by that point. The Applicant also purposefully obliterated his SIM card, and eventually admitted to breaking the SIM card and leaving it in the cab, where it was found by border security officials.

[11] CBSA officers, during the interview, were concerned about the Applicant's apparently confused state and sent him for an evaluation by a doctor at the Altona Hospital in Manitoba. He was released and found by Dr. Basta to be in a stable mental state.

[12] On December 4, 2017, an RPD panel ["Panel"] was convened to hear the Applicant's claim. Due to the Applicant experiencing significant distress in the midst of this first sitting, the Panel adjourned and rescheduled a second hearing for February 1, 2018. The decision of the Panel was released on February 12, 2018.

[13] The Panel was not satisfied that there was credible evidence to determine that there was a "serious possibility" that the Applicant would be persecuted on a Convention ground. As well, the Panel was not satisfied that, on a balance of probabilities, there were substantial grounds to believe that he would be tortured, or at risk of losing his life or being subjected to cruel and unusual treatment or punishment if he was deported to India.

[14] I am dismissing this application for the reasons that follow.

III. Issues

[15] The issues are:

A. Did the Panel make a reasonable decision in rejecting the Applicant's refugee protection claim?

B. Did the Panel err in failing to consider the evidence before it?

C. Did the Panel err in failing to raise the "compelling reasons" provision?

IV. Standard of Review

[16] In *Rahman v* Canada (Citizenship and Immigration), 2016 FC 1355, I examined a situation where the standard of review analysis was relatively similar to this one. There, the RPD's decision was impugned by a claimant who was barred by virtue of section 110(2) of the IRPA from seeking recourse to the Refugee Appeal Division ["RAD"]. At issue in the case was the RPD finding that the claimants' submissions not to be credible, and whether the RPD decision ignored evidence. In that decision, I held that the RPD's decision was reviewable on the standard of reasonableness and in this case it is the same.

V. Analysis

[17] The Applicant has three central arguments. First, the Applicant argues that the Panel erred by not considering the Applicant's overall cumulative circumstances that would result in it being cruel to return him to India. Second, the Applicant argues that the Presiding Member misapprehended the evidence before him by misstating evidence on the record. Finally, the Applicant argues the Panel did not raise the "compelling reasons" provision that it was required to do based on the facts in front of it.

A. Did the Panel make a reasonable decision in rejecting the Applicant's refugee protection claim?

[18] The Applicant submits that the Panel failed to consider intersectionality or cumulative grounds. The Applicant notes that this Court has held that failing to address the intersectionality of risk factors is a reviewable error, citing *Gorzsas v Canada (Citizenship and Immigration)*, 2009 FC 458, to support this proposition.

[19] The Applicant relies on *Abbar v* Canada (Citizenship and Immigration), 2017 FC 1101 [*Abbar*]. In that case, Justice Shore found that the RAD erred in its assessment of the applicant's credibility. Justice Shore held that an applicant may have been subjected to various measures not in themselves amounting to persecution, and in some cases those measures are combined with other adverse factors. In such situations, the various elements involved may, if taken together, reasonably justify a claim to a well-founded fear of persecution on "cumulative grounds".

[20] Justice Shore specifically noted at paragraph 47 that:

> …the RAD failed to give a complete assessment of the Applicant's fear of persecution in Somalia, including her profile as an elderly woman with disabilities and as an unaccompanied woman with no family support in Somalia, by considering the country conditions and the risk factors associated with the possibility of returning to areas controlled by Al-Shabaab.

[21] The Applicant submits that his situation is rather similar, in that he is elderly, has mental health issues, is an unaccompanied senior with no family support in India, and may be exposed to risk factors if he returns to India at this point, including ethnic tension and the risk of his son-in-law attacking him.

[22] The Applicant also highlights that based on the exhibits and affidavits of the academic expert witness, India lacks the ability to provide adequate public assistance to the elderly. The Applicant poses that this is not precluded by section 97(1)(iv) of the IRPA, which specifically precludes risk borne by the inability of a country to provide health or medical care as grounds for refugee status. Rather, because the Applicant is elderly with mental health issues, the Applicant argues that India's lack of state-sponsored care for the elderly is highly relevant and not barred by section 97(1)(iv).The Applicant further argued that the Panel minimized the evidence before it on the Applicant's mental health issues.

[23] I accept the Respondent's submission that the Panel came to a reasonable conclusion in rejecting the submission that the Applicant faced an individualized risk to his life or to a risk of cruel and unusual treatment or punishment if the Applicant is returned to India.

[24] I accept that the decision maker came to a reasonable conclusion in finding that the Applicant lacked credibility. There are significant inconsistencies in the Applicant's story.

[25] The Panel, in determining that the Applicant lacked credibility, had evidence to support that determination:

- The Panel found that the Applicant had made inconsistent remarks about his relationship with his family. The Applicant's BOC had initially stated, for example, that his "wife is worried all the time. She cannot live peacefully in Punjab either". The Panel found that this notation, amongst others, was indicative of an ongoing relationship between the Applicant and his wife. In the hearing, however, the Applicant testified that he has no

place to stay in India, and that he is estranged from his wife and son who are living there. The Panel further found that no credible evidence was led by the Applicant to demonstrate that the Applicant's spouse and children are unlikely to support him.

- The Panel accepted the Applicant's provided expert report from an academic who studies human rights in South Asia in demonstrating that elderly persons in India face various hardships. However, the Panel found that the report is not relevant in assessing the Applicant's specific relationships with his family members or his likely outcomes if deported back to India.
- While the Panel found that the Applicant has "significant mental health issues", the Panel held that his cognitive issues do not render the Applicant an invalid. The Panel relied on the medical report of a psychologist which stated that the Applicant's "insight and judgement [is] good" (edits inserted). The Panel also relied on the fact that the Applicant supported himself independently in the United States for the past 17 years.
- The Panel did not accept as credible the claims that the Applicant would be in danger from his daughter's estranged ex-husband and from the Applicant's own brother if the Applicant was denied refugee status. The Panel found that the Applicant did not support these allegations with sufficient credible evidence. For example, the Applicant provided a letter from his daughter in Australia stating that her ex-husband beat her mother and brother when they were in Australia and that the ex-husband "won't spare...[her] family in India." However, the Panel found that based on the evidence led during the hearing, the wife and son have returned to Amritsar and have not been threatened or harmed by the ex-husband in India while the ex-husband continues to reside in Australia.

- Finally, the Panel did not find that there was credible evidence to demonstrate that the Applicant faces or faced persecution in Punjab in the past as a Hindu. As Hindus comprise 80.5% of India's population, the Panel found that such widespread discrimination would be likely well-documented. The Panel found then that the Applicant does not face anything more than a mere possibility of persecution in Punjab because he is Hindu.

[26] The Applicant argues that the cumulative weighing of the following factors was not made by the Panel, and if it was made, than an unreasonable inference was made:

- The Applicant's old age and mental health issues;
- The general inability of the state of India to care for him at his advanced age;
- The fact that he would not have family support in India;
- His minority religious and ethnic status;
- The fact that his ex-son-in-law may attempt to harm him; and
- Compelling reasons arising out of previous persecution.

[27] These factors were cumulatively assessed (contrary to the Applicant's argument) at paragraph 32 of the Panel's decision. The Panel reasonably held that these factors do not rise, cumulatively, to the level of persecution.

[28] I accept the Respondent's submission that in paragraph 32 of the decision, the Panel expressly stated that the Applicant's "personal circumstances and vulnerabilities including age, health and finances" were considered on a "cumulative" basis. Therefore, I do not accept the

Applicant's submission that the Panel erred in not considering the cumulative intersection of these factors at all.

[29] The following question, of course, is whether the Panel came to a reasonable conclusion based on the cumulative intersection of these factors on the question of whether the Applicant could qualify under sections 96 or 97(1).

[30] In this matter, I will draw on the ruling of Chief Justice Crampton in *Paz Guifarro v Canada (Citizenship and Immigration),* 2011 FC 182. In that case, Crampton CJ held that it is not an error for the RPD to reject an application where it finds that a personalized risk that would be faced by the applicant is shared by a sub-group of the population that is sufficiently large that the risk can reasonably be characterized as being widespread or prevalent in that country.

[31] The factors raised by the Applicant, cumulatively speaking, are similar risks faced by a large sub-group of India's population. As well, I find that the facts of this case - where Rubal Attar has been already caring for her father, and her sister in Australia has cared and supported her family in the past- leads to a reasonable conclusion that they would likely continue to do so in the future. It is a reasonable decision to find that the Applicant would not be, as per his submission, indigent and begging on the streets in India.

[32] Nor do I agree with the Applicant's submissions comparing this matter to the case in *Abbar*.

[33] In *Abbar*, above, the 80-year old applicant was part of a minority clan, and her son and husband had been killed by the terrorist group Al Shabaab in a targeted attack. Given the relevant control that Al Shabaab has in Somalia, and a cumulative assessment of the factors, Justice Shore held that the RAD erred in its decision.

[34] This is clearly different than this matter. The Applicant faces no particularly individualized persecution. As the Panel notes, Hindus make up 80.5% of the population in India, which leads to the reasonable conclusion that the Applicant is not reasonably likely to face discrimination on the basis of his religious belief or ethnic background if he returned to India.

[35] In terms of the Applicant's cognitive issues, I do not accept the Applicant's argument that the Panel made light of his issues. The Applicant correctly points to the Applicant's initial physician finding that the Applicant has "passive suicidal thoughts" arising from his PTSD. The Applicant extrapolated from this finding to argue that the Panel erred in finding his evidence non-credible and further erred in denying a mentally ill elderly individual refugee status.

[36] However, I do not think that the cognitive issues of the Applicant can fully justify the inconsistencies reasonably found by the Panel. The Applicant alleges that the decision maker "cherry picked" what they wanted out of the report, but I find that it is the Applicant who is now "cherry picking" from the report.

[37] The report by Dr. Munir Ahmed, on a mental status examination, found that the Applicant was, however, "properly groomed, co-operative, makes good eye contact, speech

normal in rate and rhythm, thought process coherent, no delusion or hallucinations, not responding to internal stimuli, no psychomotor agitation, insight and judgement good." (*sic*)

[38] He had a follow-up referral to a psychologist, Dr. Derksen, on December 21, 2017. The report generated from this referral was barely over one page in length. The report held that it was likely that the Applicant suffered from PTSD, and that he has mood-related symptoms. A finding of PTSD does not however justify the inconsistent statements made by the Applicant.

[39] I do not want to diminish the impact that PTSD may have on a person's life, but this Court has rejected refugee judicial review applications for reasons even where PTSD was alleged and supported by a report (*Asif v Canada (Citizenship and Immigration)*, 2016 FC 1323). It is not conclusive in itself.

[40] I note that in this situation the Applicant had a one-time appointment with the Doctor specifically for immigration purposes, and that no medical evidence was led to show that the Applicant's PTSD may worsen if the Applicant had to return to India nor was there any evidence of a treatment plan or a referral. The entire report was two pages, and without the letterhead, would have been one page.

[41] I do not find that the Panel made light of the Applicant's issues with PTSD. Rather, the Panel did everything it could to ensure that the Applicant's mental health issues were properly addressed. It must also be considered that throughout the hearings a lawyer represented the Applicant.

[42] Despite finding that the Applicant appreciated the stakes inherent in a refugee hearing, the Panel still appointed a Designated Representative [“DR”] to assist if the Applicant erred in a memory related issue. The decision maker allowed for the first hearing to end and reconvene when he found that the Applicant had become overly stressed, and did not draw a negative inference from this delay. As well, the decision maker gave the DR leniency, and allowed her to even answer some of the questions posed to her father. I do not find that the appointment of the DR, to assist in a hearing on questions of law and fact, results in an inference the Applicant is not capable of living in India.

[43] Further, I accept the Respondent’s argument that the decision maker made a reasonable conclusion about the presence of the ex-son-in-law. According to the Applicant’s own evidence, the ex-son-in-law resides in Australia and though his wife and daughter had been in Australia, they were back in India and there was no evidence of any contact with the daughter’s ex-husband since their return to India. This does not lead to anything less than a minimal risk of harm to the Applicant.

[44] I agree with the Respondent that the Panel came to a reasonable conclusion on the facts. A cumulative assessment of the factors does not lead me to conclude that the Panel came to an unreasonable decision.

[45] I also find that the decision maker reasonably considered the Applicant’s cognitive state and credibility, and did not make an unreasonable decision in this regard.

A. *Did the Panel err in failing to consider the evidence before it?*

[46] The Applicant argues that the Panel misstated evidence that was before it as to whether or not the Applicant stated that the relationships with his wife and son in India had broken down, and that the ex-son-in-law was a threat, during the hearings.

[47] The Applicant submits that the Panel's discussion on what happened at the hearing diverges from what actually occurred at the hearing. The Applicant did not file a further memorandum of argument, so his arguments and materials were not based on the transcript of the hearing. The Applicant did present that he had good notes of the hearing and could make the submissions without a transcript.

[48] While the Panel found that there was no mention of the alleged breakdown between the Applicant's wife and the Applicant in the hearing, the Respondent concedes that there was reference to this issue when the DR did indeed state on the record during the first hearing that the Applicant and his wife had separated. Thus, the Panel erred in stating that no evidence was led that the Applicant and his wife were separated.

[49] The question remains: is the decision of the Panel rendered unreasonable based on the singular misapprehension of the evidence raised above?

[50] In *Castillo Mendoza v Canada (Citizenship and Immigration)*, 2010 FC 648 ["*Castillo Mendoza*"], Justice Zinn held at paragraph 24 that, "The error is immaterial to the result since the Board stated that it would have reached the same determination even if the same police had been

the agents of persecution in each incident. Not every error committed by the Board constitutes a reviewable error. The error must go to the heart of the decision".

[51] This Court has held that an "error that goes to the heart of the decision" must be one that, had the error not been committed, the Board could have reached a different result. This reflects the holding in *Tran v Canada (Citizenship and Immigration),* 2018 FC 210 ["*Tran*"], where, in citing the relevant paragraph in *Castillo Mendoza,* Justice Grammond held that, "A decision is still reasonable if it contains an error that would not have changed the outcome" (para 13 of *Tran*).

[52] The majority of the evidence led did not support that the husband and wife were separated. The first and only reference at the first hearing that the Applicant and his spouse were separated is from the DR when she says:

> …There was another thing that he forgot to mention or he just missed. My mother and my father is, like, were really separated. He was not in India for a long time. They haven't gone through paperwork but they have been separated. "
>
> Presiding Member: Okay, thank you.

[53] At another portion of the transcript, further evidence was elicited:

> Presiding Member: Are you married?
>
> Claimant: Yes, I am married?
>
> Presiding Member: How many years?
>
> (Short Pause)
>
> Presiding Member: Are you married a long time, or?
>
> Claimant: Yes. 1981. I am married in 1981.

> Presiding Member: How many children do you have?
>
> Claimant: I have three childrens.
>
> …
>
> Presiding Member: Did your wife and son get visitor visas to go to Australia?
>
> Claimant: Yes, they're on visitor visa.
>
> Presiding Member: How long have they been in Australia?
>
> Claimant: I couldn't tell you exactly how long but it's been over a month that they've been there.
>
> Presiding Member: How old is your son?
>
> Claimant: 34 years.

[54] I find that this error does not go to the heart of the decision, and that the overall assessment was reasonable. Although the decision maker did make a mistake that the separation was never mentioned during the hearing, there were several instances where the Applicant provided evidence about his wife that would lead to a reasonable inference that he and his wife were not separated. This included the Applicant calling Neeru his "wife", and not referring to them as being separated at numerous instances in the record. For example, in the BOC, the Applicant stated, "My wife is also worried all the time."

[55] Not until the second hearing when counsel questioned him did the Applicant clearly say without the aid of the DR that his relationship with his wife is as good as non-existent as of today.

[56] He was asked by the member why he had not provided any information, until recently that he was estranged from his wife, and that she refuses to support him in India until that day.

The Applicant's response was that he forgets things. The separation seems to have only have been raised when support for the Applicant became an issue, which seems rather self-serving, but in any event the Respondent conceded it was an error to not say that it had been raised.

[57] The error, though regrettable, is not determinative as on the totality of the evidence it was still reasonable for the decision maker to assume that if the Applicant was returned to India, he would be cared for by family members.

[58] The Applicant further submits that the Panel erred in holding that the Applicant`s wife and son returned to Amritsar in India. The Applicant submits in the memorandum, on the contrary, that during the hearing the DR testified that her mother and her brother are not in India and if they returned the ex-son-in-law would kill them. Based on this, the Applicant argues that that the insistence of the Panel on a "counter-factual version of what happened at the hearing" should lessen the deference that the Court would give to the decisions and reasons of the Panel.

[59] But the Applicant is wrong that any error occurred as in the second hearing, when discussing the possibility of harm to his wife and son from the Australian based ex-son-in-law, the evidence was that the wife and son had returned to India and were living there:

> Member: And your wife and your son live with your daughter in Australia, is that right?
>
> Claimant: As of now, they're back in India. They visit and get back. I came to know about their return to India from daughter sitting next to me. I, however, haven't had a conversation either with my wife or with my son for a while."
>
> …

> Claimant: My daughter informed me that they are in Amritsar, however, I have no conversation with them. “

[60] This was after it was determined that the ex-son- in law resides in Australia and his daughter has to comply with taking their child to meet the father every Sunday. The Applicant stated during the second hearing that the ex-husband lives in Australia, and does not reside in India, contrary to the submissions by Applicant’s counsel in paragraph 32 of the Applicant’s Memorandum.

[61] The Panel did not misapprehend the evidence and it was the Applicant’s argument that was confused.

[62] The Applicant argues that it was an error to find that the ex-son-in-law would not harm the wife and son. This argument seemed to be regarding the fact the wife and son had been in Australian visiting the daughter, and her ex-husband in Australia threatened to hurt them. It is also clear that the Applicant stated during the second hearing that the ex-husband lives in Australia, and does not reside in India. They had since returned to India and had not encountered any incidents with the ex-son-in-law who remained in Australia. I do not find that the Panel made any factual error as this was a reasonable conclusion. The arguments relating to a misapprehension on the question of evidence about the question of the potential harm posed by the Applicant’s ex-son-in-law in India, are not persuasive.

[63] The Panel did not misapprehend the evidence and it was the Applicant's argument that was confused. The Applicant argued that the Panel erred in its determination that the son and father still had a relationship so that if returned to India he would be cared for by family.

[64] A reading of the transcript demonstrates that there was no evidence led regarding a breakdown of the relationship between the Applicant and his son.

[65] The evidence was the divorced 34 year old son living with his mother and he had owned his own cab company. His father testified that "…he is able to work. He is able to go back to work".

[66] Further the Australian daughter was assisting them as was his daughter in Canada though she claimed not to able financially able to. The DR gave evidence that her father was not at the wedding because he had not paid a dowry because he was out of money. He had earlier gave evidence he could not go to his daughter's wedding in 2008 in India because he was illegally in the US and would not be able to return. It was reasonable given all of this information for the member to determine that the Applicant upon return to India would be supported by one of the members of his family which includes a wife and three adult children.

[67] In conclusion, I submit that even if the Panel had accepted that the Applicant had led evidence during the first hearing regarding the separation of the Applicant and his wife, this would not have changed the outcome. The Applicant's BOC seemed to note that the Applicant and his wife had a continuing relationship, as he discussed the situation of his wife and son in

India in some detail. No mention of any estrangement or abandonment was in the Applicant's BOC, supplementary narrative, or other written documentation on file.

[68] Indeed, when the Applicant testified that he was estranged from his wife and son during the second sitting of the hearing, the Presiding Member found this testimony unconvincing and without sufficient credibility.

[69] On the basis of the above, I do not think that the Presiding Member's error rises to the level of a reviewable error, as it clearly does not go to the heart of the matter.

B. *Did the Panel err in failing to raise the "compelling reasons" provision?*

[70] Section 108 of the IRPA reads:

Cessation of Refugee Protection	**Perte de l'asile**
Rejection	**Rejet**
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 :
(a) the person has voluntarily reavailed themself of the protection of their country of nationality;	a) il se réclame de nouveau et volontairement de la protection du pays dont il a la nationalité;
(b) the person has voluntarily reacquired their nationality;	b) il recouvre volontairement sa nationalité;
(c) the person has acquired a new nationality and enjoys the protection of the country of that new nationality;	c) il acquiert une nouvelle nationalité et jouit de la protection du pays de sa nouvelle nationalité;
(d) the person has voluntarily become re-established in the country that the person left or remained outside of and in respect of	d) il retourne volontairement s'établir dans le pays qu'il a quitté ou hors duquel il est demeuré et en raison duquel il a demandé

which the person claimed refugee protection in Canada; or	l'asile au Canada;
(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.
Cessation of refugee protection	**Perte de l'asile**
(2) On application by the Minister, the Refugee Protection Division may determine that refugee protection referred to in subsection 95(1) has ceased for any of the reasons described in subsection (1).	(2) L'asile visé au paragraphe 95(1) est perdu, à la demande du ministre, sur constat par la Section de protection des réfugiés, de tels des faits mentionnés au paragraphe (1).
Effect of decision	**Effet de la décision**
(3) If the application is allowed, the claim of the person is deemed to be rejected.	(3) Le constat est assimilé au rejet de la demande d'asile.
Exception	**Exception**
(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.

[71] The Applicant argues that the Panel came to an unreasonable decision in not undertaking an analysis of whether there are compelling reasons to exempt the Applicant under section 108(4). The Applicant argues that there does not need to be a "condition precedent" in that an applicant must first be found to be a convention refugee before proceeding to the analysis.

[72] The Applicant argues then that the Panel did not consider the compelling reasons provision at all, in contravention of the finding in *Yamba v Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 15191 (FCA) ["*Yamba*"]. The Applicant argues that as per the ruling

by the Federal Court of Appeal, when compelling reasons are relevant to the determination of a refugee protection claim, the compelling reasons provision must be explicitly considered, whether raised by the refugee protection applicant or not.

[73] I agree with the Respondent's argument that the compelling reasons provision does not apply in this situation.

[74] In *Canada (Minister of Employment and Immigration) v Obstoj*, [1992] 2 FC 739 (FCA), it was held that the compelling reasons provision is designed to give recognition of refugee status for those who suffered such appalling persecution that their experience alone is a compelling reason not to return them, even though they may no longer have any reason to fear further persecution.

[75] In *Moya v Canada (Citizenship and Immigration),* 2016 FC 315, it was affirmed that for a compelling reasons analysis to take place, there must be a finding that the applicant would have been a refugee in the past for the compelling reasons provision to apply. This was also the case in *Castillo Mendoza* where Justice Zinn followed the FCA in *Yamba*.

[76] As the Respondent notes, it is further well established that for the RPD 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 RPD 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, as per the holding in *Brovina v Canada (Minister of Citizenship and Immigration),* 2004 FC 635 at paragraph 5.

[77] Justice Zinn in *Castillo Mendoza* at paragraphs 27-29, makes it clear that there must be an establishment of a condition precedent and that the "claimant would have once qualified as either a Convention refugee or person in need of protection." In *Castillo Mendoza*, the applicants did not qualify as convention refugees, and were also not found to be persons in need of protection. At paragraph 40 of *Nyiramajyambere v Canada (Citizenship and Immigration)*, 2015 FC 678, Justice O'Keefe noted, after a review of the jurisprudence, that there needed to be "…a clear statement conferring the prior existence of refugee status on the claimant, together with an acknowledgement that the person is no longer a refugee because circumstances have changed."

[78] Similarly, on these facts, there was no finding that the Applicant had qualified as a convention refugee or as a person in need of protection. Given that there is no condition precedent, there was no need for the Panel to engage in a section 108(4) analysis.

[79] The Applicant further argues that the Panel accepted the Applicant's assertions about the 1994 attacks as a matter of fact. Based on this purported acceptance, the Applicant argues that the Panel was obliged to raise and consider the compelling reasons provision.

[80] I do not agree with this reading of the Panel's decision. The Panel decision very clearly notes that the Applicant's narrative is simply "alleged", stating, "In brief, the claimant alleges the following…" (para 2 of the Decision). This cannot be read as an acceptance by the Panel of the

alleged facts. Indeed, a reading of the decision makes it clear that the Panel did not find the Applicant's narrative credible on questions of fact.

[81] I further agree with the Respondent that even if we accept that the Applicant's narrative was accepted by the Panel, the Panel did not err in not raising the cumulative provision question.

[82] The compelling reasons provision in section 108(4) is inspired by Article 1C(5) of the *United Nations Convention Relating to the Status of Refugees*, July 28, 1951, [1969] Can. T.S. No. 6. Article 1C(5), provides for the exemption based on change of circumstances for pre-1951 refugees (the statutory refugees) who are able to make a case for not returning home based on "compelling reasons arising out of previous persecution" (*Suleiman v Canada (Minister of Citizenship and Immigration*), 2004 FC 1125 ["*Suleiman*"] at para 12).

[83] The purpose of the compelling reasons provision is to ensure that a person who has suffered under severe forms of persecution should not be expected to return back to the state. While there may have been a shift in government, or different social conditions, the compelling reasons provision recognizes that such a shift may not have occurred in the "attitude of the population" or in the "mind of the refugee" (*Suleiman* at para 13).

[84] Chief Justice Crampton in *Alfaka Alharazim v Canada (Citizenship and Immigration)*, 2010 FC 1044 ["*Alharazim*"] further held:

> [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."

[85] I agree with Chief Justice Crampton, and on these facts, the allegations made by the Applicant do not reach the truly exceptional or extraordinary situations that rose to the level of appalling or atrocious, and I find the Panel was not in a situation where they had to consider the applicability of subsection 108(4).

[86] Therefore, given that this finding was not made, the condition precedent did not exist that would have required the Panel to consider the compelling reasons provision.

VI. Conclusion

[87] Despite the error made by the Panel in its misapprehension of the evidence put to it during the first hearing regarding his separation, the decision of the Panel falls into the range of reasonable, intelligible, and justifiable outcomes as per *Dunsmuir*. The Panel came to a reasonable assessment of the credibility of the Applicant and a reasonable cumulative assessment around the factors put forward by the Applicant. The Panel did not err in not raising the compelling reasons provision. Given the reasons above, the decision of the Panel should be upheld and the application for judicial review should be dismissed.

VII. Certified Question

[88] The Applicant proposed the following certified question.

> Is the test for determining whether there is a duty to consider whether there are compelling reasons arising out of previous

> persecution for granting refugee protection under the *Immigration and Refugee Protection Act* section 108(4) different from or the same as the test whether there are compelling reasons arising out of previous persecution for granting refugee protection? ["Question 1"]
>
> If the tests are different, what is the test for determining whether there is a duty to consider whether there are compelling reasons arising out of previous persecution for granting refugee protection under the *Immigration and Refugee Protection Act* section 108(4)? ["Question 2"]

[89] Section 74(d) of the IRPA states that an appeal can only occur if the judge "certifies that a serious question of general importance and states the question". A certified question must satisfy a number of requirements. As per the holding of the Federal Court of Appeal in *Liyanagamage v Canada (Minister of Citizenship and Immigration)*, (1994) 176 NR 4, [1994] FCJ No 1637 ["*Liyanagamage*"], a certified question must be of general importance and dispositive of the appeal. To be of general importance, the question must be of such a nature that it "transcends the interests of the immediate parties to the litigation and contemplates issues of broad significance or general application".

[90] The section of the IRPA at issue is section 108.

A. *Question 1*

[91] This question seems to be somewhat tautological on the face of it. Asking whether two legal questions are the same or different requires us to establish clearly what the two legal tests that the Applicant proposes might be. Such a clear delineation has not been proffered by the Applicant in written submissions, although the Applicant made oral submissions to supplement his written submissions.

[92] The Applicant proposed in oral submissions that to meet the compelling reasons provision, two questions must be dealt with:

> Should the compelling reasons provision be raised by the Board under section 108(4)?
>
> When raised, what should the determination be?

[93] The Applicant submits that by arguing that the condition precedent was not met, and that the compelling reasons provision should not have been raised as such, the Respondent is making the test for the first bar the same the same as the second bar.

[94] The Respondent's written submissions indicate that the answer to the first question will not dispose of that issue or the application generally, so it is not proper for certification. The Respondent further submitted that the first question asks whether two legal tests are the same or different with the issue being whether the Panel had an obligation to consider compelling reasons.

[95] Regarding the second question, the Respondent submits that is wholly dependent on the outcome of the first question, and in any case would not be dispositive of this matter.

[96] Further the Respondent submits that this matter has not been fully argued before the Court, as it was only initially brought up in reply, and only started to be fully submitted for the first time at the hearing. As the Court has not had the full benefit of a full record, the Respondent submits that this should not be argued on appeal for the first time.

[97] To begin this analysis, I must ask whether this question transcends "the interests of the immediate parties to the litigation and contemplates issues of broad significance or general application" (*Liyanagamage*). Firstly, I find that the question put forward by the Applicant contemplates issues of broad significance or general application.

[98] While the "compelling reasons provision" is certainly of general significance to parties engaged in the refugee application process, I find that the Applicant's position is not a serious question of general importance. That is because the law around the compelling reasons provision is generally well laid out at this point, in that the compelling reason provision can only be raised if the condition precedent has been met. As per *Ogunfowora v Canada (Minister of Citizenship and Immigration)*, 1997 CanLII 5493 (FC), if the "proposed question is already answered in the caselaw" then the question need not be certified under the broad significance test. A question of general importance must be a question that has not been previously settled: "all properly certified questions lack decided binding authority" (*Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at para 36).

[99] The law around the question put forward by the Applicant on the interpretation of the compelling reasons provisn has been made clear in *Brovina v Canada (Minister of Citizenship and Immigration)*, 2004 FC 635 at paragraph 5:

> [5] The difficulty with this argument is that the RPD did not find that Mrs. Brovina had suffered past persecution. 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.

[100] *Brovina* and its finding have since been positively or neutrally cited 93 times. In my assessment, this goes towards the practical implausibility of the Applicant's position as this is a well-decided area of the law where there is binding authority (see, for example, *Yamba*). That is to say that if section 108(4) was read in the way that the Applicant proposes - that is, that the compelling reasons provision must be considered by the decision maker- even if the decision maker has not found credible claims of past persecution- the compelling reasons provision would have to be considered on virtually every refugee appeal.

[101] Even the case law handed to me in loose leaf at the hearing by the Applicant does not make the case that the Applicant (presumably, as neither the Court nor the Respondent has the benefit of written submissions) thinks they make.

[102] In *Umwizerwa v Canada (Immigration, Refugees and Citizenship),* 2017 FC 564, which the Applicant put forward in support of the certified questions, Justice Shore noted:

> [33] There is some suggestion in the jurisprudence that a clear statement conferring the prior existence of refugee status on the claimant is required to trigger the compelling reasons exception in subsection 108(4) (for example JNJ v Canada (Minister of Public Safety and Emergency Preparedness), 2010 FC 1088 (CanLII) para 41, 194 ACWS (3d) 1225). There is no clear statement in this case. However, there is also jurisprudence establishing that the finding can occur through implication arising from the reasoning set out in the decision (Decka v. Canada (Minister of Citizenship and Immigration), 2005 FC 822 (CanLII) paras 11–15, 140 ACWS (3d) 354; Alharazim at para 36; Kumarasamy at para 10).

[103] However, whether by implication or clear statement, a finding of the condition precedent is still made out based on the case cited by the Applicant. This is not persuasive as to certifying a question around a reformulation of the test.

[104] Similarly, another case put forward by the Applicant, *Rose v Canada (Minister of Citizenship and Immigration)*, 2004 FC 537, similarly stands against the same principle. In that case, there was a finding that established the condition precedent, and that the RPD thus failed by not considering the compelling reasons provision.

[105] In my analysis, the remaining cases cited by the Applicant (*Escamilla Marroquin v Canada (Citizenship and Immigration)*, 2012 FC 1114; *Rajadurai v Canada (Citizenship and Immigration)*, 2013 FC 532; *Velez v Canada (Citizenship and Immigration)*, 2018 FC 290; *Jairo v Canada (Citizenship and Immigration)*, 2014 FC 622) support the proposition that the condition precedent must be established for the "first bar" under section 108(4) to be met.

[106] It is acknowledged that there are certainly subtleties to how the case law is approached; for example, Chief Justice Crampton has held in *Alharazim* that there must be *prima facie* evidence of past persecution that rises to the level of being appalling or atrocious to meet the condition precedent. Whereas others, like Justice Hughes in *Kumarasamy v Canada (Citizenship and Immigration)*, 2012 FC 290, hold that the condition precedent is established if the claimant is "seriously and personally affected by past persecution". These are subtly different tests to be sure, but both of these still hold that the condition precedent must be met- which is the exact proposition that the Applicant attempts to shift in the proposed question for certification.

[107] I do not find that the first question is meets the test of certification.

B. *Question 2*

[108] If the tests are different, what is the test for determining whether there is a duty to consider whether there are compelling reasons arising out of previous persecution for granting refugee protection under the *Immigration and Refugee Protection Act* section 108(4)?

[109] I find Question 2 wholly dependent on Question 1. As in my assessment Question 1 should not be properly certified, Question 2 should also not be certified.

JUDGMENT in IMM-1113-18

THIS COURT'S JUDGMENT is that:

1. The application is dismissed;

2. No question will be certified.

"Glennys L. McVeigh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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