Federal Court  Cour fédérale

Date: 20240604

Docket: IMM-12565-22

Citation: 2024 FC 840

[ENGLISH TRANSLATION]

Ottawa, Ontario, June 4, 2024

PRESENT: Mr. Justice Régimbald

BETWEEN:

JASMIN ADRIANA RIVERA CALAMBAS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant is a citizen of Colombia. She is seeking judicial review of a decision of the Canada Border Services Agency [CBSA] dated October 22, 2022 [Decision]. In that Decision, the CBSA determined that the applicant's refugee protection claim is ineligible under paragraph 101(1)(c) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] For the following reasons, the application for judicial review is dismissed. The CBSA's Decision is transparent, justified and intelligible in light of the evidence submitted (*Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 [*Mason*] at para 8; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 99). The applicant failed to discharge her burden of demonstrating that the CBSA Decision was unreasonable.

II. Factual background

[3] The applicant, Ms. Jasmin Adriana Rivera Calambas [applicant], is a citizen of Colombia. She is seeking refugee protection in Canada, claiming to fear for her life in Colombia because she received threats.

[4] On July 8, 2022, the applicant left Colombia for Mexico, arriving in the United States on July 19, 2022.

[5] On August 2, 2022, the applicant and her son presented themselves at the Peace Bridge port of entry to make a refugee protection claim in Canada. This first refugee protection claim in Canada was found to be ineligible under paragraph 101(1)(e) of the IRPA because of the Safe Third Country Agreement, since the applicant came directly from the United States. The applicant was issued an exclusion order for a period of one year, and her removal was confirmed on the same day.

[6] In its notes from August 2, 2022, the CBSA states that the applicant declared that she did not have a family member in Canada after answering “no” to the question “do you have any of the following family members in Canada: a grandmother or grandfather, a mother or father, a sister or brother, any other half-sister or half-brother, any aunts or uncles or a niece or nephew, any children[?]”.

[7] In the same Decision, the CBSA determined that, for the applicant’s son, one of the exceptions to the Safe Third Country Agreement applied, since he demonstrated that he had a paternal aunt who was a Canadian citizen residing in Quebec. The CBSA therefore recommended that he be eligible to have his refugee protection claim referred. Despite this, the applicant decided to leave Canada with her son.

[8] On October 19, 2022, the applicant, again accompanied by her son, claimed refugee protection in Canada a second time by entering Canada via Roxham Road. On October 22, 2022, the CBSA determined that the applicant’s refugee protection claim was ineligible under paragraph 101(1)(c) of the IRPA. The applicant filed an application for judicial review of that Decision.

III. Impugned decision

[9] In its Decision, the CBSA first ruled that, under section 159.4 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR], the Safe Third Country Agreement does

not apply to a location that is not a designated port of entry. The applicant is therefore not ineligible simply because she entered via Roxham Road, or because she has no family members in Canada.

[10] The CBSA then determined that the applicant's refugee protection claim is ineligible under paragraph 101(1)(c) of the IRPA because her first refugee protection claim was rejected on August 2, 2022, at the Peace Bridge port of entry under paragraph 101(1)(e) of the IRPA (Safe Third Country Agreement) and she was issued an exclusion order for a period of one year since her entry at the Peace Bridge was found to be ineligible.

[11] The CBSA explained that a deportation order was issued because the applicant returned without a re-entry authorization during her one-year exclusion period. The CBSA added, in its notes in the Global Case Management System dated October 22, 2022, that the applicant is inadmissible because she is seeking to settle in Canada without having first applied for and obtained a return authorization, contrary to section 52 of the IRPA.

[12] Following a report under subsection 44(1) of the IRPA, in which it was determined that the applicant was inadmissible under subsection 41, a deportation order and an exclusion order were also issued on October 22, 2022.

[13] The CBSA concluded that the claim made by the dependent, the applicant's son, was eligible and that it had been referred to the Immigration and Refugee Board.

IV. Standard of review and issues

[14] The only issue before the Court is whether the CBSA's Decision that the applicant's refugee protection claim is ineligible is reasonable.

[15] The applicable standard of review is that of reasonableness (*Vavilov*, at paras 10, 25; *Mason*, at paras 7, 39–44). A reasonable decision is "based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov*, at para 85; *Mason*, at para 8) and that is justified, transparent and intelligible (*Vavilov*, at para 99; *Mason*, at para 59). A review according to the standard of reasonableness is not a "rubber-stamping process"; it is a robust form of review (*Vavilov*, at para 13; *Mason*, at para 63). A decision may be unreasonable if the decision maker has fundamentally misunderstood or disregarded the evidence before him or her (*Vavilov*, at paras 125-26; *Mason*, at para 73). Finally, the burden is on the party challenging the decision to show that it is unreasonable (*Vavilov*, at para 100).

V. Analysis

A. *Applicable law*

[16] It is important to reproduce the sections of the IRPA and the IRPR that are relevant to this case. First, the version of subsection 101(1) of the IRPA in effect in 2022 reads as follows:

Ineligibility

101 (1) A claim is ineligible to be referred to the Refugee Protection Division if

(a) refugee protection has been conferred on the claimant under this Act;

(b) a claim for refugee protection by the claimant has been rejected by the Board;

(c) a prior claim by the claimant was determined to be ineligible to be referred to the Refugee Protection Division, or to have been withdrawn or abandoned;

(c.1) the claimant has, before making a claim for refugee protection in Canada, made a claim for refugee protection to a country other than Canada, and the fact of its having been made has been confirmed in accordance with an agreement or arrangement entered into by Canada and that country for the purpose of facilitating information sharing to assist in the administration and enforcement of their immigration and citizenship laws;

(d) the claimant has been recognized as a Convention refugee by a country other than Canada and can be sent or returned to that country;

(e) the claimant came directly or indirectly to Canada from a country designated by the regulations, other than a country of their nationality or their former habitual residence; or

(f) the claimant has been determined to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality, except for persons who are

Irrecevabilité

101 (1) La demande est irrecevable dans les cas suivants :

a) l'asile a été conféré au demandeur au titre de la présente loi;

b) rejet antérieur de la demande d'asile par la Commission;

c) décision prononçant l'irrecevabilité, le désistement ou le retrait d'une demande antérieure;

c.1) confirmation, en conformité avec un accord ou une entente conclus par le Canada et un autre pays permettant l'échange de renseignements pour l'administration et le contrôle d'application des lois de ces pays en matière de citoyenneté et d'immigration, d'une demande d'asile antérieure faite par la personne à cet autre pays avant sa demande d'asile faite au Canada;

d) reconnaissance de la qualité de réfugié par un pays vers lequel il peut être renvoyé;

e) arrivée, directement ou indirectement, d'un pays désigné par règlement autre que celui dont il a la nationalité ou dans lequel il avait sa résidence habituelle;

f) prononcé d'interdiction de territoire pour raison de sécurité, pour atteinte aux droits humains ou internationaux — exception faite des personnes interdites de territoire au seul titre de l'alinéa 35(1)c)

inadmissible solely on the grounds of paragraph 35(1)(c).	—, grande criminalité ou criminalité organisée.

[17] The version of section 159.4 of the IRPR in effect in 2022 reads as follows:

Non-application — ports of entry other than land ports of entry	**Non-application : points d'entrée autres que les points d'entrée par route**
159.4 (1) Paragraph 101(1)(e) of the Act does not apply to a claimant who seeks to enter Canada at	**159.4 (1)** L'alinéa 101(1)e) de la Loi ne s'applique pas au demandeur qui cherche à entrer au Canada à l'un ou l'autre des endroits suivants :
(a) a location that is not a port of entry;	**a)** un endroit autre qu'un point d'entrée;
(b) a port of entry that is a harbour port, including a ferry landing; or	**b)** un port, notamment un débarcadère de traversier, qui est un point d'entrée;
(c) subject to subsection (2), a port of entry that is an airport.	**c)** sous réserve du paragraphe (2), un aéroport qui est un point d'entrée.
In transit exception	**Exception — transit**
(2) Paragraph 101(1)(e) of the Act applies to a claimant who has been ordered removed from the United States and who seeks to enter Canada at a port of entry that is an airport while they are in transit through Canada from the United States in the course of the enforcement of that order.	**(2)** Dans le cas où le demandeur cherche à entrer au Canada à un aéroport qui est un point d'entrée, l'alinéa 101(1)e) de la Loi s'applique s'il est en transit au Canada en provenance des États-Unis suite à l'exécution d'une mesure prise par les États-Unis en vue de son renvoi de ce pays.

[18] Furthermore, as discussed in the following paragraphs, the applicant argues that the CBSA erred in failing to determine that she benefits from the same exception as her son under section 159.5 of the IRPR. It is therefore important to reproduce the version of this section in effect in 2022:

Non-application — claimants at land ports of entry

159.5 Paragraph 101(1)(e) of the Act does not apply if a claimant who seeks to enter Canada at a location other than one identified in paragraphs 159.4(1)(a) to (c) establishes, in accordance with subsection 100(4) of the Act, that

(a) a family member of the claimant is in Canada and is a Canadian citizen;

(b) a family member of the claimant is in Canada and is

(i) a protected person within the meaning of subsection 95(2) of the Act,

(ii) a permanent resident under the Act, or

(iii) a person in favour of whom a removal order has been stayed in accordance with section 233;

(c) a family member of the claimant who has attained the age of 18 years is in Canada and has made a claim for refugee protection that has been referred to the Board for determination, unless

(i) the claim has been withdrawn by the family member,

(ii) the claim has been abandoned by the family member,

(iii) the claim has been rejected, or

Non-application — demandeurs aux points d'entrée par route

159.5 L'alinéa 101(1)e) de la Loi ne s'applique pas si le demandeur qui cherche à entrer au Canada à un endroit autre que l'un de ceux visés aux alinéas 159.4(1)a) à c) démontre, conformément au paragraphe 100(4) de la Loi, qu'il se trouve dans l'une ou l'autre des situations suivantes :

a) un membre de sa famille qui est un citoyen canadien est au Canada;

b) un membre de sa famille est au Canada et est, selon le cas :

(i) une personne protégée au sens du paragraphe 95(2) de la Loi,

(ii) un résident permanent sous le régime de la Loi,

(iii) une personne à l'égard de laquelle la décision du ministre emporte sursis de la mesure de renvoi la visant conformément à l'article 233;

c) un membre de sa famille âgé d'au moins dix-huit ans est au Canada et a fait une demande d'asile qui a été déférée à la Commission sauf si, selon le cas :

(i) celui-ci a retiré sa demande,

(ii) celui-ci s'est désisté de sa demande,

(iii) sa demande a été rejetée,

(iv) any pending proceedings or proceedings respecting the claim have been terminated under subsection 104(2) of the Act or any decision respecting the claim has been nullified under that subsection;

(iv) il a été mis fin à l'affaire en cours ou la décision a été annulée aux termes du paragraphe 104(2) de la Loi;

(d) a family member of the claimant who has attained the age of 18 years is in Canada and is the holder of a work permit or study permit other than

d) un membre de sa famille âgé d'au moins dix-huit ans est au Canada et est titulaire d'un permis de travail ou d'un permis d'études autre que l'un des suivants :

(i) a work permit that was issued under paragraph 206(b) or that has become invalid as a result of the application of section 209, or

(i) un permis de travail qui a été délivré en vertu de l'alinéa 206b) ou qui est devenu invalide du fait de l'application de l'article 209,

(ii) a study permit that has become invalid as a result of the application of section 222;

(ii) un permis d'études qui est devenu invalide du fait de l'application de l'article 222;

(e) the claimant is a person who

e) le demandeur satisfait aux exigences suivantes :

(i) has not attained the age of 18 years and is not accompanied by their mother, father or legal guardian,

(i) il a moins de dix-huit ans et n'est pas accompagné par son père, sa mère ou son tuteur légal,

(ii) has neither a spouse nor a common-law partner, and

(ii) il n'a ni époux ni conjoint de fait,

(iii) has neither a mother or father nor a legal guardian in Canada or the United States;

(iii) il n'a ni père, ni mère, ni tuteur légal au Canada ou aux États-Unis;

(f) the claimant is the holder of any of the following documents, excluding any document issued for the sole purpose of transit through Canada, namely,

f) le demandeur est titulaire de l'un ou l'autre des documents ci-après, à l'exclusion d'un document délivré aux seules fins de transit au Canada :

(i) a permanent resident visa or a temporary resident visa referred to in section 6 and subsection 7(1), respectively,

(i) un visa de résident permanent ou un visa de résident temporaire visés respectivement à l'article 6 et au paragraphe 7(1),

(ii) a temporary resident permit issued under subsection 24(1) of the Act,

(ii) un permis de séjour temporaire délivré au titre du paragraphe 24(1) de la Loi,

(iii) a travel document referred to in subsection 31(3) of the Act,	**(iii)** un titre de voyage visé au paragraphe 31(3) de la Loi,
(iv) refugee travel papers issued by the Minister, or	**(iv)** un titre de voyage de réfugié délivré par le ministre,
(v) a temporary travel document referred to in section 151;	**(v)** un titre de voyage temporaire visé à l'article 151;
(g) the claimant is a person	**g)** le demandeur :
(i) who may, under the Act or these Regulations, enter Canada without being required to hold a visa, and	**(i)** peut, sous le régime de la Loi, entrer au Canada sans avoir à obtenir un visa,
(ii) who would, if the claimant were entering the United States, be required to hold a visa; or	**(ii)** ne pourrait, s'il voulait entrer aux États-Unis, y entrer sans avoir obtenu un visa;
(h) the claimant is	**h)** le demandeur est :
(i) a foreign national who is seeking to re-enter Canada in circumstances where they have been refused entry to the United States without having a refugee claim adjudicated there, or	**(i)** soit un étranger qui cherche à rentrer au Canada parce que sa demande d'admission aux États-Unis a été refusée sans qu'il ait eu l'occasion d'y faire étudier sa demande d'asile,
(ii) a permanent resident who has been ordered removed from the United States and is being returned to Canada.	**(ii)** soit un résident permanent qui fait l'objet d'une mesure prise par les États-Unis visant sa rentrée au Canada.

[19] Finally, the definition of "family member" is important in this case and is found in section 159.1 of the IRPR:

Definitions	**Définitions**
159.1 The following definitions apply in this section and sections 159.2 to 159.7.	**159.1** Les définitions qui suivent s'appliquent au présent article et aux articles 159.2 à 159.7.

…	[…]
family member, in respect of a claimant, means their spouse or common-law partner, their legal guardian, and any of the following persons, namely, their child, father, mother, brother, sister, grandfather, grandmother, grandchild, uncle, aunt, nephew or niece. (*membre de la famille*)	**membre de la famille** À l'égard du demandeur, son époux ou conjoint de fait, son tuteur légal, ou l'une ou l'autre des personnes suivantes : son enfant, son père, sa mère, son frère, sa sœur, son grand-père, sa grand-mère, son petit-fils, sa petite-fille, son oncle, sa tante, son neveu et sa nièce. (*family member*)
	[…]
legal guardian, in respect of a claimant who has not attained the age of 18 years, means a person who has custody of the claimant or who is empowered to act on the claimant's behalf by virtue of a court order or written agreement or by operation of law. (*tuteur légal*)	**tuteur légal** À l'égard du demandeur qui a moins de dix-huit ans, la personne qui en a la garde ou est habilitée à agir en son nom en vertu d'une ordonnance judiciaire ou d'un accord écrit ou par l'effet de la loi. (*legal guardian*)

B. *CBSA Decision is reasonable*

[20] The applicant argues that the CBSA Decision is unreasonable in its reasoning and its application of the IRPR in particular. She submits that by virtue of the fact that her son's aunt lives in Canada, the exception to the Safe Third Country Agreement in section 159.5 of the IRPR applies to her as well, and she can claim refugee protection in Canada. The applicant argues that this person is a "family member" as defined in section 159.1 of the IRPR, since she is the sister of her common-law partner. She also argues that the definition of "legal guardian" in section 159.1 of the IRPR should have allowed her to benefit from the same exemption as her son, and that the interpretation applied separates mothers from their children.

[21] I cannot accept the applicant’s arguments.

[22] First, the Decision subject to judicial review by this Court is the one rendered by the CBSA, dated October 22, 2022, in which the refugee protection claim was deemed ineligible under paragraph 101(1)(c). Paragraph 101(1)(c) states that a claim is ineligible if “a prior claim by the claimant was determined to be ineligible to be referred to the Refugee Protection Division, or to have been withdrawn or abandoned”. The CBSA simply applied the law.

[23] The applicant does not contest the application of paragraph 101(1)(c) of the IRPA per se. Rather, she focuses her argument on the exceptions set out in section 159.5 of the IRPR. This section clearly states that these are exceptions to the application of paragraph 101(1)(e) of the IRPA. Thus, none of these exceptions are relevant to the Decision that is the subject of this judicial review.

[24] Secondly, the Court cannot review the CBSA’s August 2, 2022 decision at the Peace Bridge port of entry since it has not been challenged or judicially reviewed in this case. Nevertheless, this decision is reasonable.

[25] First, it is based on the evidence of the applicant herself, who answered “no” to the question “do you have any of the following family members in Canada: a grandmother or grandfather, a mother or father, a sister or brother, any other half-sister or half-brother, any aunts or uncles or a niece or nephew, any children[?]”. It is important to note that the applicant also

stated to the CBSA that she did not know anyone living in Canada in her interview following her entry via Roxham Road when she made her second refugee protection claim. However, in relation to her son, the applicant clearly acknowledged that he had a paternal aunt living in Canada.

[26] The evidence also shows that the applicant does not consider her son's father to be her common-law partner. During her interview with CBSA on August 2, 2022, she stated that she had never married her son's father and that "[w]e are friends", and during her interview with CBSA on October 22, 2022, she claimed that she was [TRANSLATION] "single".

[27] The applicant also failed to explain how, or under which section of the IRPA or the IRPR, a "legal guardian" can benefit from the exemption recognized for the person of whom he or she would be the guardian.

[28] The applicant draws analogies with *Biosa v Canada (Public Safety and Emergency Preparedness)*, 2014 FC 431 [*Biosa*]. In that case, the issue was whether the applicant's niece, a Canadian citizen, would be a "family member" under the definition in section 159.1 of the IRPR. This niece was the daughter of the applicant's brother-in-law, also present in Canada. Moreover, in that case, the applicant entrusted her children to her brother-in-law in Canada, her spouse's brother and thus her children's uncle. However, Justice Noël concluded that although "[o]ut of habit or convenience, we expand the scope [of the terms nephew, niece, uncle and aunt] to include the persons who occupy the same positions in the family through marriage . . . these

shortcuts . . . must not be transposed into the legal context" (*Biosa*, at paras 26-27). Thus, Justice Noël concluded that "[t]he list in the definition of 'family member' in section 159.1 appears to include persons who are directly connected to the claimant . . . [and] that it was reasonable for the immigration officer to require that the applicant be related by blood to the potential person to justify exempting her from the application of the Agreement (with the exception, it goes without saying, of her spouse or common-law partner and her legal guardian)" (*Biosa*, at paras 29, 31). In this case, there is no blood relationship between the applicant and her son's aunt.

[29] The aunt of the applicant's son is therefore not a "family member" of the applicant within the meaning of the definition in section 159.1 of the IRPR. The *ejusdem generis* rule states that it is appropriate to limit a general term "to the genus of the narrow enumeration that precedes it" (*National Bank of Greece (Canada) v Katsikonouris*, [1990] 2 SCR 1029 at 1040, 74 DLR (4th) 197 at 203; Ruth Sullivan, *The Construction of Statutes*, 7th ed, Toronto, Ontario, LexisNexis Canada, 2022 at 234). Applied to the definition, this rule confirms that the enumeration restricts the definition to persons directly related to the person in question, including by blood, and a former sister-in-law would not be included. The *noscitur a sociis* rule explains that an ambiguity in the presence of analogous words linked by terms such as "and" or "or" is resolved by determining the common or related meaning of all the terms (*Regina v Goulis*, 1981 CanLII 1642 (ON CA), 33 OR (2d) 55 at 61; Ruth Sullivan, *The Construction of Statutes*, 7th ed, Toronto (Ontario), LexisNexis Canada, 2022 at 230). However, the common meaning of the terms in the definition of family member is a direct link and a blood relationship.

[30] Despite the fact that the August 2, 2022 decision is not strictly before me, the applicant has not convinced me that the CBSA's decision is unreasonable on this point. She disagrees with the CBSA's conclusions and essentially invites the Court to conduct a *de novo* analysis of the evidence. However, it is not the role of the Court on judicial review to reweigh the evidence submitted and substitute the CBSA's analysis with its own (*Vavilov* at paras 124-25).

VI. Conclusion

[31] I am of the opinion that the CBSA's Decision is, on the whole, reasonable, and is justified in light of the factual and legal constraints of the case (*Vavilov*, at para 99).

[32] For these reasons, the application for judicial review is dismissed.

[33] No questions of general importance are certified, and the Court agrees there are none.

JUDGMENT in IMM-12565-22

THIS COURT ORDERS as follows:

1. The application for judicial review is dismissed.

2. No questions are certified.

"Guy Régimbald"
Judge

Certified true translation
Janna Balkwill

FEDERAL COURT

SOLICITORS OF RECORD

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