Federal Court  Cour fédérale

Date: 20200428

Docket: IMM-2336-19

Citation: 2020 FC 560

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, April 28, 2020

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

SCHILLOT BELLEVUE

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] The applicant is seeking judicial review of a decision rendered on March 27, 2019, by the Immigration Division of the Immigration and Refugee Board [ID], making a deportation order against him after it was concluded that he was a person described in paragraph 36(1)(b)

(inadmissibility for serious criminality) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] In its decision, the ID concluded that, when the applicant was in the United States, he was convicted of an offence (use of a fraudulent passport) that, if committed in Canada, would have constituted an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years (paragraph 36(1)(b) of the IRPA; in this case, 14 years, paragraph 123(1)(b) of the IRPA).

[3] According to the applicant, this conclusion is erroneous because section 133 of the IRPA provides for immunity from the equivalent offence under Canadian law, namely, an offence related to the use of a fraudulent passport (section 122 of the IRPA). The immunity is granted to genuine refugees and to refugee protection claimants who use false documents to obtain Canada's protection.

[4] However, the ID concluded that the immunity did not apply to the applicant because he never sought asylum in the United States.

[5] For the reasons that follow, I believe that this conclusion is not unreasonable and that the application for judicial review should not be allowed in this case.

II. Facts

[6] On March 11, 2010, the applicant was a passenger on an Air France flight from Port-au-Prince, Haiti, to Miami, United States. On his arrival at the Miami airport, he presented a Canadian passport, issued to a person named "G.H.", to a United States Customs and Border Protection officer. The applicant's face did not match the photograph in the passport, and, during an interview at the booth, the applicant admitted that he was not G.H. and that his name was actually Schillot Bellevue. It seems that he obtained the passport from a man in Port-au-Prince for $5,000.

[7] At the same time, the applicant told the immigration officers at the airport that his life was in danger and that he would be killed should he return to Haiti.

[8] On March 12, 2010, the applicant was arrested for fraud and misuse of visas, permits and other documents, a criminal offence in the United States with a maximum sentence of 10 to 25 years' imprisonment. He was held in custody.

[9] On March 26, 2010, the applicant was indicted by a grand jury for the misuse of passport offence under section 1544 of Title 18 of the *United States Code* [18 USC § 1544].

[10] On April 9, 2010, the applicant admitted to fraudulent use of a passport and pleaded guilty to that count. The applicant was sentenced to time served, one year supervised release and a $100 fine.

[11] It is unclear whether he was released immediately or a few weeks later. The applicant testified at the hearing that he was held in custody for one or two months before he was released.

[12] In any case, the applicant remained in the United States from 2010 until his arrival in Canada on October 28, 2017. In fact, there is still a warrant out for his arrest in the United States.

[13] During that time, the applicant never formally sought asylum with the American authorities and was never granted refugee status. However, the applicant claims that he expressed his intention to seek asylum in the United States to a few American lawyers and immigration agents.

[14] After he arrived in Canada, the applicant claimed refugee protection.

[15] On November 8, 2017, a Canada Border Services Agency officer found the applicant inadmissible to Canada under paragraph 36(1)(b) of the IRPA. Under that provision, a foreign national is inadmissible if he or she has been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence punishable by a maximum term of imprisonment of at least 10 years.

[16] The same day, the assessment of his refugee protection claim was suspended, and his file was referred to the ID for an admissibility hearing to determine whether the applicant was a person described in paragraph 36(1)(b).

[17] On November 10, 2017, the applicant was detained pending his admissibility hearing and detention review. The admissibility hearing was held on November 17 and 28, 2017.

[18] On December 15, 2017, the ID concluded that the applicant was inadmissible on grounds of serious criminality under paragraph 36(1)(b) of the IRPA because he had been convicted of an offence that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.

[19] The ID stated that the applicant could not rely on the immunity in section 133 of the IRPA, citing *Kathirgamathamby v Canada (Citizenship and Immigration)*, 2013 FC 811 [*Kathirgamathamby*]. The ID also found that the applicant could not benefit from that immunity because the offence in question was unrelated to his arrival in Canada, and that this provision of the IRPA should therefore not be taken into consideration in assessing equivalency under Canadian law.

[20] Dissatisfied with the ID's decision, the applicant was able to successfully challenge it on judicial review.

[21] In a decision dated September 19, 2018, this Court found that the ID committed a reviewable error when it decided to "exclude" the immunity set out in "section 133 . . . from its test of equivalency" (*Bellevue v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 926 at para 44 [*Bellevue*]). Justice St-Louis explained that the Court's case law requires such an

analysis and that the excerpt from *Kathirgamathamby* cited by the ID was only an *obiter dictum* (*Bellevue* at paras 34–42).

[22] The Court therefore decided to refer the matter back to the ID for reconsideration.

III. Decision

[23] After reconsidering the matter, the ID decided the issue, taking into account the application of section 133 of the IRPA. However, in a decision dated March 27, 2019, it found that the applicant could not rely on the immunity set out in section 133 of the IRPA in connection with his equivalency assessment because he would not be able to rely on it in Canada, having never sought asylum in the United States.

IV. Issue

[24] This matter raises only one issue: is the ID's decision reasonable?

V. Standard of review

[25] The parties agree that, since the ID's decision was rendered pursuant to paragraph 36(1)(b) of the IRPA, it is subject to the reasonableness standard of review (*Halilaj v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 1062 at paras 11–12).

[26] I agree. In *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], the Supreme Court established a revised analysis framework for determining the

standard of review applicable to administrative decisions. The starting point for this analysis is the presumption that the reasonableness standard applies (*Vavilov* at para 23). This presumption may be rebutted in two types of situations: where there is a statutory appeal mechanism or where the rule of law requires that the standard of correctness be applied (*Vavilov* at para 17).

[27] In this case, neither of the situations justifying a departure from the presumption of reasonableness review applies. An immigration officer's decision is subject to review on the reasonableness standard (*Vavilov* at paras 73–142).

VI. Analysis

[28] Paragraph 36(1)(b), subsection 122(1) and section 133 of the IPRA read as follows:

Serious criminality	**Grande criminalité**
36 (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for	36 (1) Emportent interdiction de territoire pour grande criminalité les faits suivants :
. . .	. . .
(b) having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or	b) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans;
. . .	. . .
Documents	**Possession, utilisation ou commerce**

122 (1) No person shall, in order to contravene this Act,

122 (1) Commet une infraction quiconque, en vue de contrevenir à la présente loi et s'agissant de tout document — passeport, visa ou autre, qu'il soit canadien ou étranger — pouvant ou censé établir l'identité d'une personne :

(a) possess a passport, visa or other document, of Canadian or foreign origin, that purports to establish or that could be used to establish a person's identity;

a) l'a en sa possession;

(b) use such a document, including for the purpose of entering or remaining in Canada; or

b) l'utilise, notamment pour entrer au Canada ou y séjourner;

(c) import, export or deal in such a document.

c) l'importe ou l'exporte, ou en fait le commerce.

Deferral

Immunité

133 A person who has claimed refugee protection, and who came to Canada directly or indirectly from the country in respect of which the claim is made, may not be charged with an offence under section 122, paragraph 124(1)(a) or section 127 of this Act or under section 57, paragraph 340(c) or section 354, 366, 368, 374 or 403 of the *Criminal Code*, in relation to the coming into Canada of the person, pending disposition of their claim for refugee protection or if refugee protection is conferred.

133 L'auteur d'une demande d'asile ne peut, tant qu'il n'est statué sur sa demande, ni une fois que l'asile lui est conféré, être accusé d'une infraction visée à l'article 122, à l'alinéa 124(1)a) ou à l'article 127 de la présente loi et à l'article 57, à l'alinéa 340c) ou aux articles 354, 366, 368, 374 ou 403 du *Code criminel*, dès lors qu'il est arrivé directement ou indirectement au Canada du pays duquel il cherche à être protégé et à la condition que l'infraction ait été commise à l'égard de son arrivée au Canada.

[29] The applicant does not dispute that the American offence with respect to the use of a fraudulent passport (18 USC § 1544) is similar to the offence set out in subsection 122(1) of the IPRA. He also does not dispute the fact that, if it were established that he never sought asylum in the United States, section 133 of the IRPA would not apply in any case.

[30] However, the applicant argues that, at the time of his conviction under section 18 USC § 1544, on April 9, 2010—which is the relevant time for the purposes of assessing equivalency under Canadian law pursuant to paragraph 36(1)(b) of the IRPA—he made an asylum claim that was not abandoned or withdrawn and that, as such, had he been in Canada, he would have benefited from the immunity in section 133 of the IRPA.

[31] Since there is no similar provision to section 133 of the IRPA in American law, the applicant claims that there is no equivalency between section 18 USC § 1544 and an offence under Canadian law. Therefore, he submits that the ID committed reviewable errors in its equivalency assessment, which makes its decision unreasonable.

A. *Equivalency under IRPA, paragraph 36(1)(b)*

[32] To determine whether the applicant was inadmissible to Canada under paragraph 36(1)(b) of the IRPA, the ID had to first conduct an equivalency assessment.

[33] In assessing the equivalency of offences, the ID must consider whether the applicant would have committed the same offence in Canada (*Steward v Canada (Minister of Employment and Immigration)*, [1988] 3 FC 487 (FCA); *Moscicki v Canada (Citizenship and Immigration)*,

2015 FC 740 at para 38 [*Moscicki*]; *Nshogoza v Canada (Citizenship and Immigration)*, 2015 FC 1211 at para 27; *Li v Canada (Minister of Citizenship and Immigration)*, 1996 CanLII 4086 (FCA), [1997] 1 FC 235 at para 18 [*Li*]; *Bellevue* at paras 30–31). In other words, this exercise is carried out on the basis of a legal fiction that requires an administrative decision-maker to look at the events as they unfolded in a non-Canadian territory and to transpose them into the Canadian legal context.

[34] In this case, the equivalent Canadian provision is paragraph 122(1)(b) of the IRPA, and, in assessing its equivalency, the ID was required to consider the availability of defences and immunities and to take into account Justice St-Louis's decision in *Bellevue* (*Li* at para 19; *Bellevue* at para 32; *Vavilov* at para 112).

[35] The applicant argues that section 133 of the IRPA may confer immunity against his offence related to the use of a false passport. Section 133 of the IRPA provides for immunity from the charge of having committed the equivalent offence under Canadian law, namely, section 122 of the IRPA.

[36] Section 133 of the IRPA provides that a foreign national who enters Canada without documents or with forged documents "may not be charged with related offences while his Refugee Convention refugee claim is still pending or if refugee protection is eventually conferred to him" (*Canada (Public Safety and Emergency Preparedness) v J.P.*, 2013 FCA 262, [2014] 4 FCR 371 at para 18). That protection in available only to "*bona fide* refugees and

refugee claimants" (*Uppal v Canada (Minister of Citizenship and Immigration)*, 2006 FC 338 at para 21 [*Uppal*]).

[37] As Justice St-Louis stated in *Bellevue*, "[t]he jurisprudence of this Court indicates that a test of equivalency must include defences (*Li* at paragraph 19), even more so an immunity".

[38] I agree with Justice St-Louis's finding in *Bellevue* that it is unreasonable for the ID to exclude section 133 of the IRPA from its equivalency assessment and that the findings in *Uppal* and *Kathirgamathamby* that the immunity in section 133 of the IRPA applies only when the fraudulent documents were used in relation to entering Canada, not entering another country, are *obiter dictum* (*Uppal* at para 21; *Kathirgamathamby* at para 17; *Bellevue* at paras 42 and 44).

[39] It is logical that section 133 of the IRPA discusses an offence "in relation to the coming into Canada of the person". Section 133 of the IRPA is associated with other offences set out in Canadian statues involving only incidents committed in Canada. The issue is not whether, for example, section 122 of the IRPA has extraterritorial effect, but rather whether there are "reasonable grounds to believe that such an act would lead to a conviction in Canada" (*Moscicki* at para 38; *Bellevue* at para 30).

[40] There are also policy reasons why section 133 of the IRPA must be part of the equivalency assessment in this case. This interpretation of section 133 of the IRPA complies with Article 31 of the United Nations *Convention Relating to the Status of Refugees*, 189 UNTS

150 [Convention], which prohibits the contracting states from imposing penalties on refugees on account of their illegal entry or presence.

[41] As stated by the Chief Justice in *R v Appulonappa*, 2015 SCC 59 (CanLII), [2015] 3 SCR 754 [*Appulonappa*] at paras 42–43 (see also *B010 v Canada (Citizenship and Immigration)*, 2015 SCC 58, [2015] 3 SCR 704 at paras 62–63):

> The *Refugee Convention* reflects humanitarian concerns. It provides that states must not impose penalties for illegal entry on refugees who come directly from territories in which their lives or freedom are threatened and who are present on the territory of the foreign state without authorization, "provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence": art. 31(1).
>
> Consistent with this, s. 133 of the *IRPA* provides that foreign nationals who enter Canada without documents cannot be charged with illegal entry or presence while their refugee claims are pending. As I explain in *B010*, art. 31(1) of the *Refugee Convention* seeks to provide immunity for genuine refugees who enter illegally in order to seek refuge. For that protection to be effective, the law must recognize that persons often seek refuge in groups and work together to enter a country illegally. To comply with art. 31(1), a state cannot impose a criminal sanction on refugees solely because they have aided others to enter illegally in their collective flight to safety.

[42] In accordance with Article 31 of the Convention, section 133 of the IRPA seeks to protect "genuine refugees" who enter the country illegally or irregularly to seek refuge based on "humanitarian concerns" (*Appulonappa* at paras 42–43).

[43] It is therefore clear that, in assessing equivalency in this case, section 133 of the IRPA must be taken into consideration.

[44] I must also note that there does not seem to be an equivalent provision to section 133 of the IRPA in American law. Accordingly, it is even more important to integrate the application of section 133 of the IRPA into the equivalency assessment to ensure that Canadian standards are met. In *Touré v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 752, Justice LeBlanc stated the following at paragraph 19:

> The test set out by the Federal Court of Appeal in *Hill* permits a certain flexibility when determining whether or not a Canadian and a foreign offence are equivalent, meaning that relevant evidence of a contextual nature may be relied on. As the Court reiterated in *Nguesso v Canada (Citizenship and Immigration)*, 2015 FC 879, at para 206, such an exercise "ensures that a person's acts are always evaluated in accordance with Canada's standard for criminal law, in particular to protect those coming from countries where the criminal law is harsher". In my view, this test does not align with the inflexible model proposed by the applicant.
>
> [Emphasis added.]

[45] If there is a pending claim for protection or a successful refugee claim, the immunity granted by section 133 of the IRPA applies and criminal proceedings are stayed (*Appulonappa*; *R v Agbor*, 2010 BCCA 278 at paras 5–8; *R c Cirahan*, 2003 CanLII 793 (QC SC) at para 31).

[46] If, however, the refugee protection claim is rejected or resolved (for example, abandoned) or was never made, then the immunity of section 133 does not apply (*Lasisi v Canada (Citizenship and Immigration)*, 2011 FC 495 at paras 4, 24–25).

[47] In its decision, the ID reiterated the principle stated in *Hill v Canada (Minister of Employment and Immigration)*, [1987] FCJ No 47 (FCA), (1987) 73 NR 315 [*Hill*]. After citing the relevant excerpt from *Bellevue*, the ID stated the following:

> - Therefore, it is clear that section 133 is part of the *Immigration and Refugee Protection Act* (IRPA), that it is considered an immunity, so it must be taken into account to determine whether there is equivalency between the two sections put forward by the CBSA, namely the section of the U.S. Criminal Code, 1544, "Misuse of a passport," and subsection 122(1) or (2) of the Act.
>
> - So, from there, to establish equivalency, the decision in *Hill* sets out how to establish equivalencies; *Hill* is FC 1987 73 NR 315. So, equivalency can be established in three ways. The first way is by comparing the precise wording of the provisions of each law to identify the essential elements of the respective offences; the second is by assessing the evidence on the record, to show clearly that the essential elements of the offence in Canada were established in the foreign proceedings; and the third way is by a combination of the two.
>
> - Here, when we compare the wording of the two sections, 1544 in the United States and 122(2) in Canada, the IRPA, the elements...the wording is similar and the essential elements are present in both pieces of legislation. In the United States, the wording is "willfully and knowingly uses...any passport issued...for the use of another;" then in Canada, it is "use [a passport] for the purpose of entering or remaining in Canada," and there is a presumption that if the document is not genuine, it is used to contravene the Act.
>
> - However, the introduction of section 133 into Canadian law, section 133 of the IRPA, makes for...it creates a significant difference between the two jurisdictions. So what I think we have to do is use the third *Hill* method, so...I am going to attempt to apply the facts in Mr. Bellevue's record and see if it was indeed an offence in the United States and if it could also be in Canada.
>
> [Emphasis added.]

[48] After assessing the facts as though they had occurred in Canada, the ID concluded that the applicant would have contravened paragraph 122(1)(b) of the IRPA, which carries a maximum term of imprisonment of 14 years, and that this "clearly falls under the definition of 'serious criminality' in paragraph 36(1)(b)" of the IRPA.

[49] With respect to the application of section 133 of the IRPA, the ID determined that "it is clear that the person concerned never filed an official application with the American authorities for consideration of his claim for protection or asylum status in the United States" [emphasis added].

[50] Accordingly, the ID found as follows:

> When applying the facts of Mr. Bellevue's record to the situation here in Canada under section 122 of the IRPA, the person concerned never filed a formal application. Yes, I agree with Mr. Desbiens that for some time the immigration officers would have considered the person concerned to be a refugee protection claimant, and the immunity of section 133 would have applied, but if the person concerned never filed an official application in Canada, never filed the requisite documents within the prescribed time limits, after a certain period of time, the Minister had the discretion to lay charges under subsection 122(b) and, in my opinion, there are reasonable grounds to believe that, given that the person concerned at no time claimed refugee status in Canada, this could have resulted in a conviction liable to punishment of imprisonment for a term of 14 years.
>
> - Therefore, in my opinion, the Minister has successfully demonstrated that, pursuant to paragraph 36(1)(b), there are reasonable grounds to believe that the person concerned committed outside Canada what would be an offence here.
>
> - Therefore, I declare the person concerned inadmissible under paragraph 36(1)(b) and, pursuant to paragraph 229(1)(c) of the immigration regulations, issue a deportation order against him.
>
> [Emphasis added.]

[51] The ID used the third method in *Hill* to assess equivalency, examined the facts as if the same situation had occurred in Canada and took into account section 133 of the IRPA. However, since it noted that the applicant never formally sought asylum in the United States, he would not

have benefited from the immunity provided by that Canadian provision even if he were in Canada.

[52] I see nothing unreasonable in the manner in which the ID conducted its equivalency assessment, but the reasonableness of its decision rests on its conclusion that no claim was made at the time of the applicant's conviction in the United States, which would otherwise have resulted in the application of section 133 of the IRPA.

B. *Was a valid asylum claim in progress at the time of the conviction?*

[53] The application of section 133 of the IRPA raises two questions: (1) whether a claim for asylum had been presented in this case and, if so, (2) whether the immunity set out in section 133 could have applied at the time of the conviction.

(1) Applicant's asylum claim in United States

[54] In this dispute, the parties disagree about the nature of the applicant's claims while he was in the United States. What is not disputed is that "he did express and verbalize his fear of returning to Haiti right from his first minutes on United States soil". The applicant told immigration officers that his life was in danger in Haiti and that, were he to return there, he would be killed.

[55] The applicant claims that the ID erred in concluding that he had not followed up on his asylum claim in the United States, which was inconsistent with the evidence. According to the

applicant, his actions and words, before he was even convicted on April 9, 2010, are sufficient to constitute an asylum claim.

[56] The applicant argues that Parliament's intention was to protect the "person who has claimed refugee protection" (section 133 of the IRPA), and that there is a distinction between a "person who has claimed refugee protection" and a "person . . . whose claim is referred to the Refugee Protection Division", as provided in subsection 100(4) of the IRPA. Accordingly, refugee claimant status does not require a refugee protection claim to be formally filed.

[57] However, the respondent is of the view that the applicant never made an asylum claim in the United States and would therefore not benefit from the immunity provided by section 133 of the IRPA even if he were in Canada.

[58] I must admit that the answer to whether the applicant had claimed asylum at the time of his conviction under section 18 USC § 1544 is unclear, and there is contradictory oral and documentary evidence on this point. In addition, the respondent's position on these issues also seems to have evolved over time since the first admissibility hearing in 2017.

[59] However, I do not think that it is necessary to detail the parties' arguments on this issue. The ID accepted that the applicant had expressed that he feared for his life on his arrival in Miami. In its decision, the ID concluded as follows:

> - At any rate, that is relatively unimportant, the fact that . . . the person concerned later stated before my colleague, in his testimony, that he had verbalized to the American immigration officers, upon arrival at the airport, that his life was in danger in

> Haiti. So, I will assume that the person concerned did verbalize a claim, upon arriving at the airport in the United States, that his life was in danger in Haiti.
>
> - Had the same thing happened in Canada, it is clear that the immigration officers would have considered the person concerned to be a refugee protection claimant upon his arrival in Canada.
>
> [Emphasis added.]

[60] After reading the hearing notes and taking into account the parties' arguments, I see nothing unreasonable in the ID's conclusions on this issue.

[61] Accordingly, as a result of the equivalency analysis, I find that the applicant made an asylum claim when he arrived in the United States. I am also of the view that nothing in the evidence shows that, at the time of his conviction, on April 9, 2010, his asylum claim had been abandoned or withdrawn.

> (2) Was the protection set out in section 133 in effect at the time of the conviction?

[62] The applicant claims that, if he meets the requirements of section 133 of the IRPA by showing that he made an asylum claim at the time of his conviction in the United States, he will benefit from the immunity in Canada.

[63] The ID noted that, although he expressed a fear of returning to Haiti when he arrived in Miami, the applicant never followed up on it by filing a formal asylum claim after he was released from custody and, for that reason, could not benefit from the immunity set out in section 133 of the IRPA.

[64] According to the applicant, this is where the ID erred.

[65] According to the applicant, it should have assessed equivalency at the time the applicant was convicted of criminal charges—when he was convicted on April 9, 2010, while he was still in custody, he had already expressed his fear of returning to Haiti—not at a later time, to determine whether the immunity set out in section 133 of the IRPA was in force (*Liberal v Canada (Citizenship and Immigration)*, 2017 FC 173 [*Liberal*]).

[66] First of all, *Liberal* does not help the applicant. In *Liberal*, the issue was whether the applicable version of a statute, that is, the version that existed at the time of conviction, had to be used in the equivalency assessment (*Liberal* at paras 25–27). That is not the issue here since it is undisputed that the ID referred to the applicable versions of American and Canadian legislation in its equivalency assessment.

[67] That said, I acknowledge that the equivalency assessment must be conducted with the elements, including the facts and law, that were in force at the time of the conviction.

[68] However, that is exactly what the ID has done. Nowhere in its decision did the ID state that section 133 of the IRPA was not in force at the time of the conviction. It only concluded that it was not applicable because the applicant had not followed up on his asylum claim.

[69] In my view, the ID determined that section 133 of the IRPA was in force at the time of the conviction, but this raises the question of why that statutory provision, which was in effect at the time of the applicant's conviction, did not apply in his case.

(3) Was the immunity set out in section 133 applicable at the time of the conviction?

[70] The applicant claims that the ID erred in its interpretation of section 133 of the IRPA, namely, that the subsequent loss of that immunity could be used to uphold a prior conviction even though, when the conviction was handed down, the immunity was still in effect.

[71] The applicant adds that the ID erroneously determined that the mere fact that he did not follow up on his asylum claim after being released somehow made him retroactively lose the immunity that had until then been granted to him by section 133 of the IRPA.

[72] According to the applicant, the issue at the heart of the matter is that the ID failed to properly conduct the equivalency assessment that it was supposed to conduct under paragraph 36(1)(b): it did not go back to the time of the conviction to determine whether he had met the requirements of Canadian law to benefit from the immunity.

[73] The applicant adds that, in Canada, once it is considered that a claimant made a refugee protection claim at the border, it is considered that the immunity under section 133 of the IRPA applies immediately. Normally, when they arrive in Canada, claimants take the time provided for in the regulations to file their official refugee protection claims. These regulatory timelines are in

fact a preliminary period during which Canadian authorities do not deem it appropriate to charge a claimant with entering Canada on a false passport.

[74] What the applicant basically argues is that it is sufficient for a person to have made a refugee protection claim to be able to rely on the immunity provided in section 133 of IRPA, regardless of whether the person then files a formal claim, and that this preliminary period can go on indefinitely without it being necessary to file a formal refugee protection claim. .

[75] The respondent's principal argument is that section 133 of the IRPA provides immunity for any person who has arrived in Canada and filed a refugee protection claim for as long as his or her claim has not been disposed of. For section 133 of the IRPA to apply, there must be a formal refugee protection claim that can be disposed of and for which a final decision can be rendered. In this case, the expression of fear, which may or may not constitute an asylum claim, was never formalized, so the claim can never be disposed of, as provided in section 133 of the IRPA.

[76] I agree with the respondent and cannot accept the applicant's position.

[77] What is clear is that the ID assumed that the applicant had only expressed his fear of returning to Haiti and that he never followed up on such an asylum claim. Therefore, there was never a claim to be disposed of.

[78] The immunity provided under section 133 of the IRPA applies “pending disposition of [a] claim for refugee protection or if refugee protection is conferred”. This presumes that there is a formal refugee protection claim that can be considered and subsequently decided.

[79] I acknowledge that this period of immunity conferred by section 133 of the IRPA continued to apply during the regulatory preliminary period during which a refugee claimant must file a formal refugee protection claim in Canada, but during that period, immunity is only deemed, pending the conditions being met.

[80] Based on my interpretation of the provision, the immunity under section 133 of the IRPA, that is, the deferral of a charge, contains a statutory suspensive condition: immunity continues to exist as long as the conditions to which it is subject continue to exist. Subject to such a preliminary period, the statutory suspensive condition is a condition that must exist before the benefit it is associated with becomes effective. The consequence of not complying with a statutory suspensive condition is that the immunity becomes null, as though it was never conferred (*Jean v Gagnon*, 1944 CanLII 65 (SCC), [1944] SCR 175 at p 193).

[81] Considering the benefit of the immunity conferred by section 133 of the IRPA as being subject to a statutory suspensive condition is consistent with other similar provisions of the IRPA (*Ujkaj v Canada (Citizenship and Immigration)*, 2017 FC 587 at para 1; see also *General Trust of Canada v. Artisans Coopvie, Société Coopérative d'Assurance-vie*, 1990 CanLII 44 (SCC), [1990] 2 SCR 1185 at pp 1194-95; *MacLeod v Canada Permanent Trust Co.*, 1980 CanLII 2612 (NS SC) at para 12).

[82] The fact that the applicant never sought asylum in the United States results in retroactively nullifying any immunity that may have existed at the time of the conviction, even though section 133 of the IRPA was in effect at the time.

[83] The ID's decision is consistent with that approach. At page 6 of its decision, the ID stated the following:

> When applying the facts of Mr. Bellevue's record to the situation here in Canada under section 122 of the IRPA, the person concerned never filed a formal application. Yes, I agree with Mr. Desbiens that for some time the immigration officers would have considered the person concerned to be a refugee protection claimant, and the immunity of section 133 would have applied, but if the person concerned never filed an official application in Canada, never filed the requisite documents within the prescribed time limits, after a certain period of time, the Minister had the discretion to lay charges under subsection 122(b) and, in my opinion, there are reasonable grounds to believe that, given that the person concerned at no time claimed refugee status in Canada, this could have resulted in a conviction liable to punishment of imprisonment for a term of 14 years.
>
> [Emphasis added.]

[84] As stated by Justice St-Louis in her decision in *Bellevue*, "[o]bviously, if the person entering Canada with a fake passport does not claim refugee protection in Canada, he or she can be charged under section 122 of the Act, in the same way as a person whose refugee protection claim was denied" (*Bellevue* at para 33).

[85] Since the immunity became null as if it had never been conferred, the applicant ended up, retroactively, with no applicable immunity at the time of his conviction on April 9, 2010, and was liable to be charged with the offence at that time.

[86] In this case, I see nothing unreasonable in the ID's decision.

VII. Conclusion

[87] It was not unreasonable for the ID to conclude that, at the time of the applicant's conviction in the United States, the manner in which he claimed asylum did not make it possible for him to benefit from the immunity under section 133 of the IRPA.

[88] For the above reasons, the officer's decision is not unreasonable, and the application for judicial review is dismissed. The parties did not submit a question for certification.

JUDGMENT in IMM-2336-19

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed.

2. There is no question to certify.

"Peter G. Pamel"
Judge

Certified true translation
This 26th day of May 2020.
Michael Palles, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2336-19
STYLE OF CAUSE:	SCHILLOT BELLEVUE v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	JANUARY 22, 2020
JUDGMENT AND REASONS:	PAMEL J.
DATED:	APRIL 28, 2020

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