Federal Court  Cour fédérale

Date: 20201016

Docket: IMM-1028-17

Citation: 2020 FC 972

Ottawa, Ontario, October 16, 2020

PRESENT: Mr. Justice Gascon

BETWEEN:

MOHADESE MIRZAEE

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Ms. Mohadese Mirzaee, is a citizen of Afghanistan who is now 22 years old. Ms. Mirzaee claimed refugee protection when she arrived in Canada in August 2016, at the age of 18. At the time, she alleged that she feared persecution by the Taliban because of her gender and her perceived political opinion related to Western associations, as well as her mother's employment with a human rights organization. Moreover, Ms. Mirzaee claimed to fear

a forced marriage with her cousin. In February 2017, the Refugee Protection Division [RPD] rejected Ms. Mirzaee's application for refugee protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], for lack of credibility [Decision]. Since then, Ms. Mirzaee voluntarily returned to her home country, Afghanistan, in March 2018.

[2] Ms. Mirzaee seeks judicial review of the RPD's Decision, arguing that the adverse credibility findings of the RPD were unreasonably microscopic. She further asserts that the RPD took an unduly critical view of the testimonies provided by her mother and her, and that the RPD ignored evidence central to her claim. The Minister responds that Ms. Mirzaee's application for judicial review is now moot, given her voluntary return to Afghanistan.

[3] Ms. Mirzaee's application raises two issues: 1) is this matter moot, given that Ms. Mirzaee has left the country and is currently in Afghanistan?; and 2) if the matter is not moot, were the RPD's credibility findings reasonable?

[4] Having considered the evidence before the RPD and the applicable law, I can find no basis for overturning the Decision. I agree with the Minister that, considering her voluntary return to Afghanistan, Ms. Mirzaee's application meets the first part of the test for mootness. However, given the unique circumstances of this case, this is a situation where the Court should exercise its discretion to nonetheless consider the matter on the merits. Further to my review, I am satisfied that the Decision is justified and intelligible, and that the RPD considered all relevant evidence in its Decision, before determining that Ms. Mirzaee was not credible. The

Decision is based on an internally coherent and rational chain of analysis, and it is justified in relation to the facts and law that constrain the RPD. There are therefore no grounds to justify the Court's intervention. Since the issue of mootness is not determinative of this case, there is no reason to certify the question proposed by the Minister.

II. Background

A. *The factual context*

[5] Ms. Mirzaee was born in Kabul, Afghanistan, in August 1998. Because of her excellent academic records and extracurricular activities, Ms. Mirzaee was granted an opportunity to participate in a two-week long peace-building program in the United States [US]. In July 2016, after getting a visitor visa for the US, she left Afghanistan to attend this program and to spend some time with her relatives living in the US.

[6] In August 2016, she arrived in Canada and made a refugee claim, advancing three grounds for fleeing Afghanistan: 1) the repeated attempts by her elder cousin to force her to marry him; 2) threats from the Taliban and other extremist groups because of her mother's work as Deputy Executive Director with a human rights organization called Hamida Barmaki Organization for the Rule of Law [Hamida Barmaki]; and 3) potential threats upon her return to Afghanistan from the Taliban, for her attendance at the peace-building conference in the US, which is perceived as a support to the US and the West.

[7] The RPD rejected her claim for refugee protection for lack of credibility.

[8] In March 2017, Ms. Mirzaee filed her application for leave and judicial review of the RPD's Decision. The Court granted leave in June 2017, setting the judicial review hearing for September of that year. However, prior to the scheduled hearing, the parties agreed that this application should be held in abeyance because Ms. Mirzaee had another matter before the Court in relation to the jurisdiction of the Refugee Appeal Division to consider her appeal. That case was affiliated with another matter which was recently dismissed by the Supreme Court of Canada, namely, *Kreishan v Canada (Citizenship and Immigration)*, 2019 FCA 223 [*Kreishan*], leave to appeal to SCC refused, 38864 (5 March 2020). As the *Kreishan* matter made its way through the appeals process, the Court in fact directed that all files that raised similar issues be held in abeyance pending the final resolution of the *Kreishan* matter.

[9] Despite being under no obligation to leave Canada, and while her application for judicial review was pending, Ms. Mirzaee voluntarily departed Canada for Afghanistan at the end of March 2018, five months before the expiration of the work permit authorization she had been granted by the Canadian immigration authorities. Prior to her departure, she signed a Statutory Declaration acknowledging that she was not required to leave Canada at that time, that Canada was not currently removing people to Afghanistan, and that leaving could potentially imperil her ability to seek Canada's surrogate protection in the future.

[10] Ms. Mirzaee now lives in Afghanistan. Ms. Mirzaee explains in her affidavit from June 2020 that she returned to Afghanistan in March 2018 in order to look for alternative ways to pursue her education as she could not afford international student fees at Canadian universities. She had a dream of becoming a pilot, and she indeed received a scholarship paid by Kam Air, an

Afghan airline, to pursue aviation studies in the Philippines. She started the program in the Philippines in September 2018 and, upon completing it and obtaining her commercial pilot licence, she returned to Afghanistan in February 2020. She undertook further flight training in Bulgaria in March 2020 and returned to Afghanistan the following month. She did not seek asylum in either the Philippines or Bulgaria while she was in those countries.

[11] Ms. Mirzaee now claims that she is still in danger in her home country, a situation which is exacerbated, she says, because of her status as the first civilian commercial pilot in Afghanistan. She fears the Taliban and other extremist groups will target her because she is a female pilot.

B. *The RPD Decision*

[12] In its Decision issued in February 2017, the RPD held that Ms. Mirzaee was neither a Convention refugee nor a person in need of protection, under sections 96 and 97 of the IRPA. The RPD noted that it considered the *Chairperson's Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution* as well as the *Guidelines on Child Refugee Claimants* [together, Guidelines], and that it examined the relevant factors in the evidence under the light of these Guidelines.

[13] The Decision was essentially based on credibility concerns with the testimony of Ms. Mirzaee and her mother's testimony. The RPD considered that there were "critical inconsistencies, vagueness and embellishments" in Ms. Mirzaee's evidence, which undermined

all three of the grounds she had advanced for requiring protection (namely, the forced marriage, her mother's political activities and the perception of being "Westernized").

[14] Regarding the alleged forced marriage, the RPD found that Ms. Mirzaee was not credible with respect to the threats that she faced from her cousin, or that she was persecuted as a result of her gender in relation to this marriage. In particular, the RPD took issue with Ms. Mirzaee's timeline of the relevant events. The RPD found that, given her timeline, the earliest Ms. Mirzaee could have applied to the peace-building program was on April 24, 2016. However, the acceptance letter from the program was dated April 18, 2016. Ms. Mirzaee offered a number of reasons for this contradiction: her life was hectic at that time, therefore she was unsure of the exact dates; she had already applied to the program before the elders' meeting took place; and her acceptance came in less than a week because her mother had connections to the program's organizer. The RPD considered these explanations "muddled and incomprehensible", as well as "improvised".

[15] The RPD was not convinced by Ms. Mirzaee's counsel, who pointed to the Guidelines to explain the discrepancy and argued that vulnerable people like Ms. Mirzaee must be afforded consideration for imprecise recollections of events owing to traumatic events. The RPD instead found Ms. Mirzaee to be a strong, intelligent and articulate young woman, and "not a claimant who required the benefit of the Guidelines". The RPD further noted that, while a "failure to recollect events or details" may be excusable according to the Guidelines, Ms. Mirzaee did not fail to recollect events. Rather, the RPD concluded that Ms. Mirzaee was "fundamentally clear"

about the timeline, but that her timeline was undermined by the documentary evidence, even if concessions were made for imprecision.

[16] The RPD also took issue with the evidence regarding the elders' meeting, considering that Ms. Mirzaee's testimony was vague to the effect that she did not know who the elders were, or whether they were relatives or not. Ms. Mirzaee's mother testified via teleconference from Afghanistan that the elders were all relatives, and they were largely the same people trying to force the marriage in the first place. Despite this, Ms. Mirzaee's mother testified that she did not share this information with Ms. Mirzaee. Furthermore, her mother testified that she had no choice but to submit the matter to the elders. The RPD found that it was not credible that Ms. Mirzaee's mother had no choice but to submit the matter to the elders, given their identity. The RPD considered that this elders' meeting was a "sham". Furthermore, the RPD determined that it was not credible that Ms. Mirzaee's mother would not tell her daughter about the elders' identity, given that they were both "strategically making efforts to refuse [marriage with the cousin]".

[17] The RPD also found additional inconsistencies and discrepancies in the testimonies received from Ms. Mirzaee and her mother. First, Ms. Mirzaee testified that her cousin's mother visited on many occasions to advocate the proposed marriage, whereas her mother testified the visit occurred only once or twice. Second, Ms. Mirzaee testified that she had no memory of her father and that he spent little time with her. However, her mother testified that Ms. Mirzaee's father was home most evenings. According to the RPD, this discrepancy was significant in light of Ms. Mirzaee's emphasis that she was an unaccompanied female and, hence, was at risk. Third, in recounting a fight between her cousin and Ms. Mirzaee's sister, Ms. Mirzaee testified that her

cousin threw a glass of water against the wall. Ms. Mirzaee's mother, who was only told of this fight after the fact, had no memory of this, despite the RPD finding she had "extensive knowledge" of the incident otherwise.

[18] Turning to her mother's role in Hamida Barmaki, the RPD found that, on a balance of probabilities, Ms. Mirzaee's mother was not employed by this organization. The RPD therefore concluded that the risk Ms. Mirzaee allegedly faced because of her mother's employment with this organization was not credible. The RPD noted the mother's testimony stating that she was employed as the Deputy Executive Director at Hamida Barmaki. However, the RPD observed that her name was not listed on the organization's website, and that another person was identified as being the Deputy Executive Director. Ms. Mirzaee's mother explained that the website was out of date, but the RPD noted that the website had been updated between the second and third hearings before the RPD, and that her name still had not appeared. Ms. Mirzaee's mother further explained that the organization would no longer be publishing the names of its employees online for security reasons. The RPD rejected this explanation, because three names of employees were still listed. The RPD also had a similar concern with the mother's testimony regarding the address published on the organization's website. The RPD found that the lack of clarity regarding Hamida Barmaki's address was concerning. The RPD also determined that Ms. Mirzaee exaggerated the threats faced by the organization. While Ms. Mirzaee testified that "the Taliban never directly threatens anyone, [and that] the threat is to the organization", she could not point to any specific threat ever made against Hamida Barmaki or its members, nor could Ms. Mirzaee's mother.

[19] In any event, the RPD considered that, even if Ms. Mirzaee's mother's employment was real, the threat faced would be "a generalized risk that any [non-governmental organization] NGO faces in Afghanistan", and the RPD deemed this to be insufficient. While acknowledging that NGO employees face a heightened risk of persecution, Ms. Mirzaee had not provided convincing evidence to establish that either her or her mother were actually targeted. As such, the RPD concluded that they "did not fit the risk profile of a person targeted for their association with an NGO".

[20] The RPD found that the abovementioned credibility concerns were severe and determinative. In addition, it held that the concerns were "compounded further" by the fact that Ms. Mirzaee had failed to first seek protection in the US while she was there, and that this failure demonstrated a lack of subjective fear. The RPD considered Ms. Mirzaee's explanation for not claiming status in the US – namely, that she thought she would have a better chance of success in Canada –. However, the RPD found that Ms. Mirzaee's actions were not those of a genuine refugee, but instead demonstrated asylum shopping. Moreover, said the RPD, Ms. Mirzaee had no connections to Canada, whereas she had some in the US.

[21] Finally, the RPD did not find credible that Ms. Mirzaee feared returning to Afghanistan because of her "Western" association. While acknowledging that persons returning from the West may be targeted in Afghanistan for having Western values, the RPD observed that this risk is heightened where a person falls into other risk profiles, none of which applied to the situation of Ms. Mirzaee. The RPD further found it "tenuous at best" that the Taliban would discover that Ms. Mirzaee had even been to the West. Finally, Ms. Mirzaee's "asylum shopping" suggested to

the RPD that she did not really fear returning to Afghanistan simply for the fact of having been abroad.

C. *The standard of review*

[22] The parties agree that the presumptive standard of review of reasonableness is applicable to assess the merits of the Decision (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 25). None of the circumstances warranting a departure from that presumption arises in this case (*Lunda v Canada (Citizenship and Immigration)*, 2020 FC 704 at paras 13-16).

[23] In conducting reasonableness review, the Court must look to understand the decision maker's reasoning process, in order to determine whether the decision as a whole is reasonable. To make this determination, the reviewing court must ask whether the decision has the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision (*Vavilov* at para 25). When reasonableness is the applicable standard, the reviewing court must consider "the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome", to determine whether the decision is "based on an internally coherent and rational chain of analysis" and is "justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at paras 83, 85; *Canada Post Corp. v Canadian Union of Postal Workers*, 2019 SCC 67 [*Canada Post*] at paras 2, 31). *Vavilov*'s revised framework for reasonableness requires the reviewing court to take a "reasons first" approach to judicial review (*Canada Post* at para 26). The reasons must be read holistically and contextually in light of the record as a whole and

with due sensitivity to the administrative setting in which they were given (*Vavilov* at paras 91-94, 97). However, "it is not enough for the outcome of a decision to be *justifiable* […] the decision must also be *justified*" (*Vavilov* at para 86).

III. Analysis

A. *The mootness issue*

[24] The Minister submits that, since Ms. Mirzaee voluntarily returned to Afghanistan in March 2018, and re-established herself there in 2020, her application for judicial review is now moot. Ms. Mirzaee disputes this and claims that the doctrine of mootness is inapplicable to her case based on the criteria established by the Supreme Court of Canada in *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 [*Borowski*]. She submits that her application raises more than a hypothetical or abstract question, as the RPD's Decision makes her ineligible to make another refugee claim to the RPD pursuant to paragraph 101(1)(b) of the IRPA, unless the Decision is overturned by the Court. Relying on case law involving permanent residency requirements, she further asserts that the issue is not whether she is currently in her country of origin, but whether she will be outside of her country of origin at the time the matter is re-determined by the RPD. If the Court deems this matter to be moot, she argues that the Court should exercise its discretion to hear the case as the parties retain an adversarial stake in the issues in dispute and these are important enough to justify the expense of judicial resources (*Borowski* at para 15).

[25] For the reasons that follow, I agree with the Minister that Ms. Mirzaee's application is now moot. However, in the unusual circumstances of this case, I consider that there are sufficient reasons to exercise my discretion to nevertheless address the merits of Ms. Mirzaee's application.

[26] A proceeding is moot when a decision of the Court would not have the effect of resolving some controversy which affects or may affect the rights of the parties involved. It is not disputed that the controlling authority on mootness is the decision of the Supreme Court of Canada in *Borowski* (*Yuris v Canada (Immigration, Refugees and Citizenship)*, 2018 FCA 173 at paras 7-9). In *Borowski*, the Supreme Court set out the following two-step test for determining whether a court should decline to hear a case due to mootness. First, the court must determine whether the issues have become academic. Second, if that question is answered in the affirmative, the court must decide whether it should nonetheless exercise its discretion to consider the case in the interests of justice. Relevant considerations under the latter inquiry include the presence of an adversarial context, interests of judicial economy and the need for the court to be sensitive to its role as the adjudicative branch under Canada's political framework.

[27] On the first stage of the test, I agree with the Minister that a decision on this application for judicial review will not have a practical effect on the parties' rights because Ms. Mirzaee voluntarily decided to re-establish herself in Afghanistan. In doing so, Ms. Mirzaee can no longer meet the definition of a Convention refugee or of a person in need of protection pursuant to sections 96 and 97 of the IRPA, as she is neither outside of her country of nationality nor inside Canada at the time of the hearing of her application. Put another way, by voluntarily re-

establishing herself in Afghanistan, where she now lives and pursue employment as a civilian commercial pilot, Ms. Mirzaee has dissolved the dispute that first animated this litigation when it was initiated in March 2017.

[28] As correctly pointed out by the Minister, the IRPA makes it clear, at sections 96 and 97, that Parliament intended that the RPD determine whether a claimant is either a Convention refugee or a person in need of protection while the claimant is outside his or her country of nationality or formal habitual residence or within Canada, respectively. This is no longer the situation for Ms. Mirzaee. In fact, by voluntarily returning to Afghanistan in 2018, and re-establishing herself there in 2020 after two training programs in two other countries (namely, the Philippines and Bulgaria), Ms. Mirzaee has demonstrated that she is not a person in need of Canada's protection, and does not require this Court's review of the RPD's denial of that protection. Here, the fact that Ms. Mirzaee had made the choice to live and pursue employment in the country against which she alleges a risk of persecution suffices to render her current application moot. The IRPA does not contemplate the possibility of offering refugee protection to claimants who have put themselves, following their own choice, in the situation in which Ms. Mirzaee now finds herself.

[29] It is true that, in many other cases, this Court declined to acknowledge mootness and considered that the interests of justice required applications to be heard when a refugee claimant had left Canada involuntarily before his or her application for judicial review could be considered by the Court (*Kleib v Canada (Citizenship and Immigration)*, 2016 FC 1238 at para 3; *Mrda v Canada (Citizenship and Immigration)*, 2016 FC 49 at para 31; *Molnar v Canada*

(Citizenship and Immigration), 2015 FC 345 at paras 38, 43; *Rosa v Canada (Citizenship and Immigration)*, 2014 FC 1234 [*Rosa*] at para 36; *Freitas v Canada (Minister of Citizenship and Immigration)*, [1999] 2 FC 432 at para 26, citing *Ramoutar v Canada (Minister of Employment and Immigration)*, [1993] 3 FC 370 at para 15). I must however underline that this line of cases inextricably involved situations where an applicant had been involuntarily removed or deported, against his or her will and under compulsion. In these precedents, the involuntary nature of the removal was central to the Court's decisions. I am aware of no precedent, and Ms. Mirzaee could not cite any, where the issue of mootness was raised in a context where, as here, a refugee claimant has left Canada voluntarily. What is more, Ms. Mirzaee even left Canada for Afghanistan at a time where Canada had measures in place forbidding compulsory removals to that country.

[30] I concede that no case law has yet determined that a voluntary departure from Canada renders moot a judicial review of a decision by the RPD. However, all cases stating the opposite involved involuntary departures from Canada. In the present case, I agree with the Minister that the voluntary departure of Ms. Mirzaee fundamentally changes the equation. The Minister did not remove Ms. Mirzaee, nor did he have any intention to do so at the time she voluntarily departed. In fact, Canada's temporary suspension of removals to Afghanistan remains in effect today.

[31] Ms. Mirzaee contends that the issue is not whether she is currently in her country of nationality, but whether she will be outside her country of nationality at the time the matter is re-determined by the RPD. I find this argument to be without any merit. First, Ms. Mirzaee's

assertion assumes that she will be able to re-enter Canada if the Court grants her application for judicial review. This is purely speculative. Second, all the authorities put forward by Ms. Mirzaee in support of her position are inapplicable to her case, as they relate to applications for permanent residencies where some preconditions were erroneously imposed.

[32] Considering the clear wording of the IRPA, the concern in the mootness jurisprudence for involuntariness, and the inability of Ms. Mirzaee to raise any convincing arguments to the contrary, I agree with the Minister that the first step of the *Borowski* test is met and that the present matter has become academic and moot. In other words, an application for judicial review of a refused claim for protection is rendered moot by the claimant's voluntary departure from Canada and re-establishment in his or her country of nationality.

[33] That said, I still need to assess whether the second step of the analysis in *Borowski* is met in this case. As noted by the Supreme Court, even if a matter is moot, the Court nonetheless retains discretion to determine the matter before it where the circumstances and the interests of justice warrant it. This requires consideration of three principles: 1) the presence of an adversarial relationship; 2) the need to promote judicial economy; and 3) the need for the Court to show a measure of awareness of its proper role as the adjudicative branch of government (*Borowski* at paras 31, 34, 40). The Federal Court of Appeal elaborated on the above principles in *Democracy Watch v Canada (Attorney General)*, 2018 FCA 195 at paragraph 14:

> [14] The first factor may support the exercise of the discretion where despite the absence of a concrete dispute, the issues will be fully argued by parties with a stake in the outcome. The second factor includes, where applicable, consideration of whether the case presents a recurring issue, but one that is of short duration or otherwise evasive of court review. The third factor recognizes that

> the courts' primary task within our constitutional separation of powers is to resolve real disputes. As this Court has stated, "While *Borowski* and cases that apply it do not forbid courts in appropriate circumstances from determining a proceeding after the real dispute has disappeared, this underlying rationale reminds us that the discretion to do so must be exercised prudently and cautiously": *Canada (National Revenue) v. McNally*, 2015 FCA 248 at para. 5.

[34] In this case, I am satisfied that there remains an active adversarial context given the active participation of both parties in this application for judicial review and the memorandum of fact and law filed by the Minister disputing the merits of Ms. Mirzaee's application. Both parties remain interested in advancing their respective position on the reasonableness of the RPD's Decision, and they have ably done so in their written submissions and in their oral arguments before the Court. The necessary adversarial relationship between the parties continues to exist notwithstanding the mootness of the application. This factor therefore weighs in favour of Ms. Mirzaee.

[35] Turning to the second factor, the concern for judicial economy, it could be argued that the interests of judicial economy favour dismissing this application for judicial review because the outcome of the application would have no practical consequences for Ms. Mirzaee, as she voluntarily left Canada and returned to Afghanistan, her country of alleged persecution. There would therefore be little benefit to the parties in the Court reaching a determination of the issues raised by the application for judicial review. This is also not a situation where there is a point of law in dispute that, if resolved, would assist the parties with their ongoing relationship. The dispute between the parties turns on issues of fact, or issues of mixed fact and law that are heavily factually infused.

[36] However, I observe that, to the extent that the Court should be mindful of wasting scarce judicial resources by hearing matters which are otherwise moot, those resources have already been expended by the parties in the preparation of the written materials and for the hearing of this matter. Because of the unusual circumstances of this case, and the delays created by the matter being held in abeyance due to *Kreishan*, the mootness issue has only arisen late in the process. Judicial economy is therefore not really a factor that militates against the consideration of Ms. Mirzaee's application.

[37] The third factor identified in *Borowski* is the obligation for the Court to be aware of its law-making function, and is typically engaged when there is a question of general importance to be decided. Given the factual nature of the dispute in Ms. Mirzaee's application for judicial review, I do not consider that this factor is of particular assistance to Ms. Mirzaee. The issues involved in her application are not matters that absolutely need to be addressed by this Court. The Minister further asserts that Ms. Mirzaee is in fact asking this Court to recognize a new category of persons in need of protection despite paragraph 108(1)(d) of the IRPA which provides that applicants are not in need of protection if they voluntarily re-establish in their country of origin. On this point, the Minister notes that this Court warned against establishing a new category of persons in need of protection (*Mekuria v Canada (Citizenship and Immigration)*, 2010 FC 304 at paras 13-14).

[38] In light of the foregoing, the consideration of the three principles identified in *Borowski* does not lead to a clear direction with respect to the exercise of my discretion. In the end, approaching the question prudently and cautiously, I am satisfied that the *Borowski* analysis and

the interests of justice slightly favor exercising my discretion to consider the merits of Ms. Mirzaee's application, despite the fact that the matter is now moot (*Harvan v Canada (Citizenship and Immigration)*, 2015 FC 1026 at para 7). I will therefore use my discretion to look at the merits of Ms. Mirzaee's case.

B. *The reasonableness of the Decision*

[39] With respect to the merits of the RPD's Decision, Ms. Mirzaee argues that it is unreasonable for several reasons. First, Ms. Mirzaee claims that the RPD erred in performing a microscopic, hair-splitting analysis of evidence to render adverse credibility findings. Put differently, she advances that the RPD focused on minor and irrelevant details, which renders the Decision unreasonable (*Joseph v Canada (Citizenship and Immigration)*, 2011 FC 1515 at para 6; *Shaheen v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 670 at para 14). She singles out different excerpts of the transcript of the RPD hearing, and argues that the RPD's questions about the forced marriage, her failure to claim refugee status in the US and her mother's employment were microscopic.

[40] In addition, Ms. Mirzaee asserts that her evidence was unreasonably interpreted from a developed country perspective, without any consideration for the Afghan cultural context. For example, she notes that her mother could not have protested against holding the elders' meeting considering the significance of such meetings in the Afghan culture. Moreover, Ms. Mirzaee claims that the RPD should have taken into consideration the harmful traditional practices of forced marriages in Afghanistan, as noted in the documentary evidence. She also underlines that the Decision ignored the police report she filed against her cousin, which corroborates her

testimony. As such, she argues that the RPD's conclusions were speculative with no evidentiary basis.

[41] Ms. Mirzaee also emphasizes that the RPD was unreasonable in determining that Ms. Mirzaee did not require the benefit of the Guidelines because she was an articulate "grown woman". Ms. Mirzaee submits that the RPD turned a bind eye on the fact that she was an unaccompanied, 18-year-old female refugee claimant, and therefore failed "to exhibit a special knowledge of gender persecution and to apply the knowledge in an understanding and sensitive manner" (*Keleta v Canada (Minister of Citizenship and Immigration)*, 2005 FC 56 at para 14).

[42] Finally, Ms. Mirzaee argues that the RPD erred in assessing her risk profile. She asserts that, contrary to the RPD's findings, having been in the West is itself a risk profile, as she would be perceived as "Westernized". On a related note, she maintains that it was unreasonable for the RPD to ignore the fact that her identity as a young woman with political opinions exacerbated her risk of persecution. Mr. Mirzaee also faults the RPD for pointing out her failure to claim refugee in the US. She maintains that, in doing so, she was just trying to look for the best protection available.

[43] I disagree with Ms. Mirzaee's assessment and I am not persuaded by any of her arguments. I instead find that the RPD did not commit any reviewable error and that the Decision is reasonable.

[44] In *Lawani v Canada (Citizenship and Immigration)*, 2018 FC 924 [*Lawani*], I summarized the principles governing the manner in which an administrative decision maker such as the RPD must assess the credibility of applicants for refugee protection (*Lawani* at paras 20–26). Applying these principles, I find that, in all respects, the RPD's Decision is reasonable. In the case of Ms. Mirzaee, the accumulation of contradictions and inconsistencies regarding crucial elements of her claim provide ample support for the RPD's findings of lack of credibility (*Lawani* at para 21). I add that the adverse findings of credibility did not arise from minor contradictions that were secondary or peripheral to her claim, but rather went to the very heart of Ms. Mirzaee's underlying narrative, namely, the threats of persecution arising from her alleged forced marriage, her mother's claimed employment and her perceived Westernization.

[45] Contrary to Ms. Mirzaee's submissions, the credibility findings were central to and determinative of all aspects of her allegations. Notably, they related to inconsistencies in the testimonies provided by Ms. Mirzaee and her mother on the elders' meeting, how many times her cousin's mother visited, their relationship with Ms. Mirzaee's father, the alleged violence from her cousin, and her mother's employment. I do not agree that the RPD engaged in an improper "microscopic" analysis of the evidence. An analysis does not become microscopic because it is detailed and comprehensive. It is only when negative findings of credibility are based on a "microscopic" examination of issues irrelevant to the case or peripheral to the claim that they may justify the Court's intervention (*Attakora v Canada (Minister of Employment and Immigration)* (1989), 99 NR 168 (FCA) at para 9; *Cooper v Canada (Citizenship and Immigration)*, 2012 FC 118 at para 4). But, here, the adverse credibility findings were far from relating to peripheral or irrelevant issues.

[46] A review on the standard of reasonableness must include a rigorous evaluation of administrative decisions. However, as part of its analysis of the reasonableness of a decision, the reviewing court must examine the reasons given with "respectful attention" and seek to understand the reasoning process followed by the administrative decision maker in reaching its conclusion (*Vavilov* at para 84). The reviewing court must adopt a deferential approach and intervene only "where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process" (*Vavilov* at para 13). It is settled law that the Court owes deference to the RPD's assessment of a refugee claimant's credibility (*Aguebor v Canada (Minister of Employment and Immigration)* (1993), 160 NR 315 (FCA) at para 4). The RPD's findings of credibility require a high degree of deference from the courts on judicial review, given the role of the trier of fact attributed to the administrative tribunal (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59, 89; *Lawal v Canada (Citizenship and Immigration)*, 2015 FC 155 at para 9).

[47] In the end, the arguments put forward by Ms. Mirzaee simply express her disagreement with the RPD's assessment of the evidence and in fact invite the Court to prefer her opinion and her re-weighing of the evidence to the analysis made by the RPD. This is not the role of a reviewing court on judicial review.

[48] In the wake of *Vavilov*, the reasons given by administrative decision makers take on greater importance and become the starting point for the analysis. They are the primary mechanism by which administrative decision makers demonstrate the reasonableness of their decisions, both to the affected parties and to the reviewing courts (*Vavilov* at para 81). They

serve to “explain how and why a decision was made”, to demonstrate that “the decision was made in a fair and lawful manner” and to guard against “the perception of arbitrariness in the exercise of a public power” (*Vavilov* at para 79). In short, it is the reasons that make it possible to establish the justification for the decision. In the case of Ms. Mirzaee, I am satisfied that the reasons for the RPD’s Decision provide ample justification for its conclusions in a transparent and intelligible manner and allow me to understand why the RPD found her to be lacking in credibility (*Canada Post Corporation* at paras 28-29; *Vavilov* at paras 81, 136). They demonstrate that the RPD followed a rational, consistent and logical reasoning in its analysis and that the Decision is consistent with the relevant legal and factual constraints affecting the RPD (*Canada Post Corporation* at para 30, citing *Vavilov* at paras 105-107). In the end, there is nothing in the errors alleged by Ms. Mirzaee that causes me “to lose confidence in the outcome reached by the decision maker” (*Vavilov* at para 123).

[49] I am also mindful that caution is required regarding negative credibility findings in refugee cases (*Valtchev v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776 at para 9). Such findings should notably show sensitivity to cultural differences, and the RPD must always sufficiently set out its reasons for making such findings (*Alhaj v Canada (Citizenship and Immigration)*, 2018 FC 98 at para 14; *Kiyarath v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1269 at para 22). Otherwise, they can be seen as arbitrary and unreasonable. In the present case, I am not persuaded that the RPD ignored the context of the Afghan culture. On the contrary, the RPD’s assessments were made in clear and unmistakable terms with detailed explanations on why, in the eyes of the panel, Ms. Mirzaee’s evidence was missing the mark and stood outside the realm of what could reasonably be expected.

[50] Similarly, while the RPD acknowledged that people returning to Afghanistan may be targeted as Western spies or having adopted Western values, the panel noted that the risk is heightened when a person falls under certain risk profiles – such as humanitarian and development workers, and women in the public sphere. The RPD specifically found that Ms. Mirzaee's testimony claiming that she fell into these categories was not credible. In those circumstances, it was open to the RPD to find that Ms. Mirzaee's claimed fear of persecution because she would be perceived as "Westernized" was not substantiated, and that it was tenuous at best that the Taliban would discover that she travelled to the US.

[51] As to the RPD's finding that Ms. Mirzaee lacks subjective fear since she applied for refugee status in Canada despite landing in the US first, I do not see how it could be qualified as unreasonable in the circumstances. Ms. Mirzaee provided no reasonable explanation for not seeking asylum in the US. To the contrary, the evidence illustrates that it was a well-calculated assessment on her part, as she in fact measured the pros and cons of the various possible options before opting for making her refugee claim in Canada. Her behaviour has all the attributes of asylum shopping. It was therefore entirely reasonable for the RPD to conclude that, in the circumstances, this was not compatible with a subjective fear of persecution. It is well recognized that a failure to claim refugee protection at the first reasonable opportunity to do so, or a return to the country of persecution, are factors undermining a refugee claimant's credibility with respect to a subjective fear.

[52] Regarding the Guidelines, I am satisfied that the RPD took Ms. Mirzaee's personal situation into account. Contrary to Ms. Mirzaee's suggestion, the Decision did not ignore or

brush aside the Guidelines. The RPD instead referred expressly to the Guidelines at the beginning of its analysis. Moreover, the Guidelines are not intended to compensate for all omissions or deficiencies in a refugee protection claim or its supporting evidence (*Mavangou v Canada (Citizenship and Immigration)*, 2019 FC 177 at para 48; *Ismail v Canada (Citizenship and Immigration)*, 2016 FC 446 at para 26). They do not require that all documents and allegations be accepted at face value, but they are rather designed to ensure a fair hearing (*Odurukwe v Canada (Citizenship and Immigration)*, 2015 FC 613 at para 40). As Justice Gagné stated in *Duversin v Canada (Citizenship and Immigration)*, 2018 FC 466 [*Duversin*], the Guidelines cannot improve or enhance any evidence of gender-related persecution in themselves. They merely dictate the attitude and open-mindedness that the RPD must demonstrate when dealing with certain allegations of persecution (*Duversin* at para 30). They were enacted to ensure that administrative decision makers consider all the issues with empathy. For an administrative decision maker to take the Guidelines into account in a meaningful way, it has to assess a claimant's testimony while being alert and sensitive to her gender, to the social, cultural, economic and religious norms of her community, and to the factors that may influence the testimony of women who have been the victims of persecution (*Odia v Canada (Citizenship and Immigration)*, 2014 FC 663 [*Odia*] at para 9). In *Boluka v Canada (Citizenship and Immigration)*, 2015 FC 37 [*Boluka*], the Court reminded that an "applicant is required to demonstrate a lack of understanding or insensitivity on the RPD's part to convince the Court that the Guidelines have not been applied" (*Boluka* at para 16).

[53] In this case, Ms. Mirzaee has not convinced me that the RPD failed to show appropriate compassion or sensitivity in assessing her testimony. I agree that it is not enough for the RPD to

say that the Guidelines have been considered or applied to conclude that they have indeed been observed and followed. The Decision must also show that they have been applied sufficiently (*Odia* at para 18). In my opinion, the RPD's reasons illustrate the compassion and sensitivity shown by the RPD towards Ms. Mirzaee, and the RPD's acknowledgment of her particular circumstances, background and education. Although the RPD ultimately found that Ms. Mirzaee lacked credibility, I am satisfied that it fully followed the letter and spirit of the Guidelines in its analysis.

[54] Before a decision can be set aside on the basis that it is unreasonable, the reviewing court must be satisfied that "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100). An assessment of the reasonableness of a decision must be robust, but it must remain sensitive to and respectful of the administrative decision maker (*Vavilov* at paras 12-13). Reasonableness review is an approach anchored in the principle of judicial restraint and in a respect for the distinct role and specialized knowledge of administrative decision makers (*Vavilov* at paras 13, 75, 93). In other words, the approach to be followed by the reviewing court is one of deference, especially with respect to findings of facts and the weighing of evidence. Absent exceptional circumstances, the reviewing court will not interfere with an administrative decision maker's factual findings (*Vavilov* at paras 125-126). I find no such exceptional circumstances in Ms. Mirzaee's case.

C. *The certified question*

[55] At the hearing before the Court, the Minister proposed the following question for certification: is an application for judicial review of a decision of the RPD moot where the individual who is the subject of the decision has voluntarily returned to his or her country of nationality, and if yes, should the Court normally refuse to exercise its discretion to hear it? For the reasons that follow, I find that the proposed question does not meet the strict requirements for certification developed by the Federal Court of Appeal.

[56] According to paragraph 74(d) of the IRPA, a question can be certified by the Court if "a serious question of general importance is involved". To be certified, a question must be a serious one that: 1) is dispositive of the appeal; 2) transcends the interests of the immediate parties to the litigation; 3) contemplates issues of broad significance or general importance (*Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22 at para 46; *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at para 36; *Mudrak v Canada (Citizenship and Immigration)*, 2016 FCA 178 [*Mudrak*] at paras 15-16). As a corollary, the question must have been dealt with by the Court and it must arise from the case (*Mudrak* at para 16; *Varela v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 145 at para 29).

[57] I decline to certify the question proposed by the Minister because it would not be dispositive of the appeal. As discussed above, no matter whether Ms. Mirzaee's application for judicial review is moot or not, there are no reasons for the Court to intervene and to quash the RPD's determination as the Decision is not unreasonable. Given my conclusion that the Decision

is reasonable, whether the matter is moot or not, the outcome is the same. As I pointed out at the hearing, if the Minister had not challenged Ms. Mirzaee's allegations that the Decision was unreasonable and solely relied on the mootness of her application for judicial review, or if I had found that the Decision was unreasonable, the mootness issue would have been dispositive of the appeal. However, in this case, the Minister did not concede that the Decision was unreasonable and in fact argued that it was not.

[58] The current case can be distinguished from *Celestin v Canada (Citizenship and Immigration)*, 2020 FC 97 [*Celestin*] where the Court found that the question to be certified was determinative because it had concluded that the decision maker's underlying decision was unreasonable (*Celestin* at para 140). In that case, given the finding of unreasonableness, the determination on the interpretation of the regulatory regime was determinative of the need for judicial intervention. As the Court said in *Rosa* at paragraph 47, a motion to dismiss an application for judicial review would provide a more efficient method for bringing an issue of mootness before the Federal Court of Appeal through a certified question, after initial adjudication by this Court.

IV. Conclusion

[59] For the reasons set forth above, this application for judicial review is dismissed. I am satisfied that the RPD reasonably considered the evidence before it and adequately explained why it concluded that Ms. Mirzaee's claim for refugee protection should be denied. On a reasonableness standard, it is sufficient that the reasons detailed in the Decision demonstrate that the conclusion is based on an internally coherent and rational chain of analysis and that it is

justified in relation to the facts and law that constrain the decision maker. This is the case here. Furthermore, Ms. Mirzaee's application for judicial review is now moot as she voluntarily returned to her country of citizenship, Afghanistan, and re-established herself there. There are no grounds for the Court's intervention.

[60] There is no question of general importance to certify.

JUDGMENT in IMM-1028-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed, without costs.

2. No serious question of general importance is certified.

"Denis Gascon"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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