Federal Court  Cour fédérale

Date: 20210310

Docket: IMM-7758-19

Citation: 2021 FC 214

Ottawa, Ontario, March 10, 2021

PRESENT: Madam Justice Walker

BETWEEN:

IJAZ AHMAD

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Mr. Ijaz Ahmad seeks the Court's review of the December 9, 2019 decision of the Refugee Appeal Division (RAD) confirming the refusal of his refugee claim. The RAD agreed with the Refugee Protection Division (RPD) that Mr. Ahmad is excluded from protection under section 98 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA) because he is a person referred to in Article 1E of the *United Nations Convention Relating to the Status of Refugees*, July 28, 1951, 189 UNTS 137 (Convention).

[2] Article 1E provides that the Convention does not apply to a person who is recognized by the competent authorities of the country in which they have taken residence as having the rights and obligations attaching to the possession of nationality in that country. In turn, section 98 of the IRPA incorporates Article 1E into domestic law and states that a person referred to in Article 1E "is not a Convention refugee or a person in need of protection".

[3] For the reasons that follow, the application is allowed. Briefly, the RAD reasonably concluded that the RPD had authority to consider Mr. Ahmad's exclusion from protection by virtue of section 98 and Article 1E despite the Minister's decision not to intervene in his case. Further, the RAD did not err in concluding that Mr. Ahmad could regain his permanent residence in Spain, though the process was not simple or the result guaranteed. However, the RPD concluded that it was not required to consider the risk of persecution to Mr. Ahmad should he return to Pakistan, his country of citizenship. The RAD's confirmation of the RPD's conclusion is a reviewable error and its decision will be set aside.

I. Context

[4] Mr. Ahmad left Pakistan in 2004 for Spain where he lived for nine years and became a permanent resident. Mr. Ahmad moved to Canada in 2013 but returned to Pakistan in 2015 intending to live there permanently.

[5] Mr. Ahmad states that he was subject to threats and physical violence in Pakistan while trying to establish a restaurant business and returned to Canada in February 2016. He contacted the Spanish consulate in Montréal in May 2016 to inquire about returning to Spain. Mr. Ahmad

was informed he had lost permanent resident status as he had been out of the country for more than 12 months.

[6] Mr. Ahmad made a claim for refugee protection in Canada on July 15, 2016. In accordance with Rule 26 of the *Refugee Protection Division Rules*, SOR/2012-256, the RPD notified the Minister that the RPD believed Mr. Ahmad may be excluded from protection by virtue of Article 1E of the Convention. Mr. Ahmad and his counsel received copies of the notification. The Minister elected not to intervene in Mr. Ahmad's claim. Mr. Ahmad's counsel received a copy of the Minister's response.

[7] The RPD refused Mr. Ahmad's claim on July 16, 2017 in reliance on section 98 of the IRPA and Article 1E because he once held, and could regain, permanent resident status in Spain. The panel rejected Mr. Ahmad's objection that it should not have addressed Article 1E in light of the Minister's decision not to intervene.

[8] Mr. Ahmad appealed the RPD's decision to the RAD. He argued that the RPD (1) displayed a reasonable apprehension of bias and lack of impartiality in proceeding with its exclusion analysis notwithstanding the absence of Ministerial intervention; and (2) misapplied the test for exclusion under Article 1E established by the Federal Court of Appeal in *Canada (Citizenship and Immigration) v Zeng*, 2010 FCA 118 (*Zeng*).

[9] The RAD found that the Minister's decision not to intervene had no impact on the RPD's authority to inquire into whether Mr. Ahmad was excluded from protection under the IRPA. The

RAD stated that the RPD has an obligation to satisfy itself that each application before it meets all of the requirements in the IRPA, including those of section 98.

[10] The RAD focused its analysis of the *Zeng* test on the RPD's review of the processes available to Mr. Ahmad to reinstate his Spanish permanent resident status. The RAD concluded that, although Mr. Ahmad's circumstances were such that the process may not be simple, he was not precluded from pursuing reinstatement. The RAD dealt briefly with the RPD's failure to address Mr. Ahmad's risk of persecution in Pakistan and Canada's international obligations. The RAD confirmed the RPD's conclusion that the alleged risk to Mr. Ahmad in Pakistan was not a relevant factor given the procedures in place for him to recover permanent residence in Spain.

II. Issues and standard of review

[11] In this application, Mr. Ahmad maintains his objections to the RPD's consideration of exclusion under section 98 and Article 1E in the absence of the Minister's intervention and contests the RAD's confirmation of the RPD's authority to do so. Mr. Ahmad also challenges the RAD's consideration of the *Zeng* test as it relates to his ability to return to Spain and both panels' failure to assess his fear of persecution in Pakistan.

[12] I will review the issues raised by Mr. Ahmad for reasonableness in accordance with the framework set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (*Vavilov*).

[13] The RAD's determination of whether there was a breach of procedural fairness before the RPD is one aspect of the merits of its decision and is presumptively subject to review for reasonableness, consistent with *Vavilov*. None of the exceptions identified by the Supreme Court for departing from the presumptive standard of review apply in this case. A number of recent decisions of this Court have confirmed reasonableness as the standard of review of the RAD's consideration of the fairness of the RPD's process (*Chaudhry v Canada (Citizenship and Immigration)*, 2019 FC 520 at para 24; *Ibrahim v Canada (Citizenship and Immigration)*, 2020 FC 1148 at para 11). In contrast, if an applicant questions the fairness of the RAD's process, no standard of review is engaged and the Court reviews the RAD's process to determine whether it was fair to the applicant having regard to all the circumstances (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54).

[14] The RAD's application of the *Zeng* test to Mr. Ahmad's factual circumstances attracts the Court's deference and is also a matter within the scope of reasonableness review (*Zeng* at para 11; *Majebi v Canada (Citizenship and Immigration)*, 2016 FCA 274 at paras 5-6). Mr. Ahmad argues that the RAD's failure to consider his fear of persecution in Pakistan must be reviewed for correctness as an error of law but I disagree. The argument questions the merits of the RAD's reasons and conclusions, and not its identification of the correct legal test (*Jayasinghe Arachchige v Canada (Citizenship and Immigration)*, 2020 FC 509 at para 28).

[15] A reasonable decision is one that is internally coherent and logical and is justified in relation to the facts and law that constrain the decision maker (*Vavilov* at para 85; *Canada Post Corp. v Canadian Union of Postal Workers*, 2019 SCC 67 at para 32). It follows that

reasonableness review begins with the decision made by the decision maker and considers whether the decision maker applied the relevant law to the facts of the case and whether its chain of reasoning is internally coherent. The person challenging the decision must satisfy the reviewing court "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).

III. Analysis

1. The RPD's authority to consider exclusion pursuant to section 98 of the IRPA and Article 1E of the Convention

[16] Mr. Ahmad submits that the RPD breached its duty of fairness to him and lost the appearance of impartiality in deciding to examine exclusion under Article 1E in the absence of Ministerial intervention. Mr. Ahmad argues that the RPD ignored the fact that the Minister bears the initial evidentiary burden of demonstrating that a claimant is excluded under Article 1E (*Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40 at para 29 (*Ezokola*)).

[17] I have considered Mr. Ahmad's submissions carefully. I have also reviewed the jurisprudence addressing this issue and conclude that it does not support Mr. Ahmad's position. There is no doubt that the RPD and the RAD owed Mr. Ahmad a duty of fairness, impartiality and independence. However, neither tribunal breached those duties in their respective assessment of Mr. Ahmad's refugee claim. First, the RPD made no error in considering exclusion under section 98 and Article 1E even though the Minister decided not to intervene. Second, the RAD's

analysis of the RPD's duty to apply the IRPA was detailed and logical and its conclusion that the RPD had not erred is justified on the facts of Mr. Ahmad's case and in law.

[18] Article 1E is designed to prevent asylum shopping, reflecting the principle that refugee protection will not be conferred on an individual if they have surrogate protection in a country where they enjoy substantially the same rights and obligations as nationals of that country (*Zeng* at para 1; *Riboul v Canada (Citizenship and Immigration)*, 2020 FC 263 at para 25). Section 98 of the IRPA incorporates Articles 1E and 1F of the Convention into Canadian law by reference (*Ezokola* at para 33; *Zeng* at para 10) and the RPD has a statutory duty to apply the IRPA in each case that comes before it, a duty that does not depend on the positions taken by the parties (*Ospina Velasquez v Canada (Citizenship and Immigration)*, 2013 FC 273 at para 15 (*Ospina Velasquez*); *Canada (Citizenship and Immigration) v Badriyah)*, 2016 FC 1002 at para 26). As an inquisitorial body, the RPD does not breach its duty of fairness and impartiality by determining whether section 98 applies to exclude a claimant regardless of the Minister's position, in fact it is required to do so (*Canada (Citizenship and Immigration) v Ahmed*, 2015 FC 1288 at para 11):

> [11] The RPD is an inquisitorial body: *Chairperson's Guideline 7 Concerning Preparation and Conduct of a Hearing in the Refugee Protection Division*. As such, it is required to determine whether section 98 of *IRPA* applies to the applicant before it: *Velasquez v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 273 at para. 15, 429 F.T.R. 143. This obligation exists whether or not the Minister elects to intervene in a given case: *Velasquez*, above at paras. 2 and 15.

[19] The cases cited above involved the RPD's consideration of Article 1F of the Convention. However, their conclusions regarding the role of the RPD apply equally to Article 1E as section 98 draws no distinction between the two provisions:

98. A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection.	**98.** La personne visée aux sections E ou F de l'article premier de la Convention sur les réfugiés ne peut avoir la qualité de réfugié ni de personne à protéger.

[20] In any event, the Court addressed the role of the RPD in applying section 98 and Article 1E in a case in which the Minister confirmed he would not intervene: *Obumuneme v Canada (Citizenship and Immigration)*, 2019 FC 59 (*Obumuneme*). Justice Norris noted that refugee claimants do not bear the initial burden of showing that they are not excluded from refugee protection (citing *Ezokola*) but, once there is *prima facie* evidence that Article 1E is engaged, the onus shifts to the claimant (*Obumuneme* at para 41). He then addressed the Minister's non-intervention (*Obumuneme* at para 42):

> [42] In this connection, I do not agree with the applicants' submission that this shift can occur only when the Minister has intervened in the proceeding and has led evidence in relation to Article 1E of the Refugee Convention. While this might be the typical scenario, what matters for the RPD's fact-finding is whether there is credible or trustworthy evidence suggesting that Article 1E is engaged, not which party has adduced that evidence. If there is such evidence, a claimant runs the risk of an adverse conclusion if it is left unanswered.

[21] In this case, Mr. Ahmad was on notice that exclusion under Article 1E could be an issue well prior to the RPD hearing. The RPD adjourned the hearing when his counsel objected to its consideration of exclusion and provided a short break for counsel to marshal his submissions.

[22] The RAD accurately summarized Mr. Ahmad's concerns in its decision, including his reliance on *Ezokola*. The RAD concluded that the RPD's decision to assess Mr. Ahmad's Spanish residency and possible exclusion under section 98 and Article 1E was consistent with the RPD's duty to apply the IRPA and the principles of refugee protection:

> [16] While it may be fair to read into the Minister's decision not to participate in the proceeding a tacit recognition on his part that the Appellant is not excluded from the *Act*, the Minister's opinion would need to be substantiated before the RPD could ever consider finding on that basis alone that the Appellant was not excluded. In other words, it is possible that the Minister was simply wrong in his assessment of the situation.

[23] Mr. Ahmad takes issue with the RAD's statement that the Minister may have been wrong in his decision not to intervene. Mr. Ahmad argues that, if the Minister could be wrong, so too could the RPD, the RAD and the Court. I do not agree. Indeed, the RAD's observation reinforces the need for the RPD to conduct its own assessment of a claimant's status. It is also consistent with Justice Gleason's statement, while a member of this Court, that "the Board is not bound to accept the position of a party in any case and, instead, is required to carry out its statutory duty of applying the IRPA. […] Accordingly, it was required to determine whether section 98 of the Act was applicable and was not required to agree with the position advanced by the Minister […]" (*Ospina Velasquez* para 15).

[24] Mr. Ahmad also argues that the RPD member exhibited a lack of impartiality and the appearance of bias in arriving at the hearing with documents and prepared to pursue her concerns regarding Article 1E. The RAD addressed the RPD member's duty to be fair and impartial:

> [18] […] Nonetheless, the member did not overstep the bounds of what was acceptable conduct on the part of an independent and impartial tribunal when she questioned the Appellant about his

> efforts to reacquire his status in Spain. The manner in which she went about doing so did not violate the Appellant's right to a fair and unbiased hearing. Having reviewed the transcript of the RPD's hearing in its entirety, I am satisfied that the RPD member maintained her objectivity at all times and adopted an appropriate and unbiased tone throughout the proceeding. At no point did the RPD member say anything which could be construed as her having adopted a closed mind on the issue of exclusion.

[25] I find no reviewable error in the RAD's consideration of Mr. Ahmad's argument. A panel member is not prohibited from bringing reference material to a hearing, nor is a member precluded from reviewing the evidence and consulting source documents, including Responses to Information Requests (RIRs). The RAD focused on the RPD member's conduct during the hearing, reviewed the transcript of the RPD hearing and found that the RPD member maintained her impartiality in discharging her dual roles as inquisitor and adjudicator. The RAD reasonably concluded that the member did not overstep the bounds of acceptable conduct in questioning Mr. Ahmad about his efforts to reacquire permanent resident status in Spain.

[26] In summary, I find no reviewable error in the RAD's reasons for and confirmation of the RPD's authority to consider the application of Article 1E of the Convention and section 98 of the IRPA in the absence of an intervention by the Minister. I also find that the RAD's consideration of any appearance of bias or lack of impartiality on the part of the RPD member was fully explained to Mr. Ahmad and the RAD's rejection of his concerns regarding bias and partiality justified on the facts and in law.

2. The RAD's application of the factors in the third step of the Zeng test

[27] The three-part test for exclusion under Article 1E was articulated by the Federal Court of Appeal in *Zeng* as follows (at para 28):

> [28] **(1)** Considering all relevant factors to the date of the hearing, does the claimant have status, substantially similar to that of its nationals, in the third country? If the answer is yes, the claimant is excluded. If the answer is no, **(2)** the next question is whether the claimant previously had such status and lost it, or had access to such status and failed to acquire it. If the answer is no, the claimant is not excluded under Article 1E. If the answer is yes, **(3)** the RPD must consider and balance various factors. These include, but are not limited to, the reason for the loss of status (voluntary or involuntary), whether the claimant could return to the third country, the risk the claimant would face in the home country, Canada's international obligations, and any other relevant facts.
>
> [Numbering added in bold]

[28] Mr. Ahmad submits that the RAD misapplied two elements of the third step in *Zeng*: his ability to return to the third country, Spain, and the risk he would face in his home country of Pakistan.

A. Reacquisition of permanent residence in Spain

[29] Mr. Ahmad argues that the RAD rubber-stamped the RPD's finding that he could reacquire Spanish permanent residence. He finds it absurd that, despite the failure by officials at the Spanish consulate in Montréal to inform him of the alternate processes available to him, he bore the onus of making further inquiries. Mr. Ahmad also argues that the RAD reviewed the documentary evidence in a selective manner and that its conclusion that there was a process he could have pursued was unreasonable.

[30] I do not find Mr. Ahmad's arguments persuasive.

[31] Mr. Ahmad acknowledges in his submissions that, "[a]ccording to the documentation in the record, reacquiring permanent residence in Spain is both complicated and discretionary". The RAD's analysis parallels Mr. Ahmad's acknowledgement. The RAD stated that it was unclear that Mr. Ahmad could access the simplified reinstatement process, the process communicated to him by Spanish consular officials, and considered the RPD's analysis of whether the general process was reasonably available to him:

> [23] Nonetheless, there was another process, available generally to all former permanent residents, which the Appellant could have pursued. The Appellant points out that this is a cumbersome process, which offers no guarantee that he would receive a favourable decision. I do not consider that these factors are adequate reasons to justify his decision not to make an application to Spanish authorities to have his status reinstated.

[32] Mr. Ahmad bore the burden of establishing that he could not reacquire his status as a permanent resident in Spain (*Obumuneme* at para 41). The RAD found that Mr. Ahmad's one visit to the Spanish consulate and his receipt of incomplete information regarding the processes available to him did not discharge his evidentiary onus. He had ample opportunity during the 15-month period between his arrival in Canada and his RPD hearing to pursue his inquiries. I find no reviewable error in the RAD's finding.

[33] Mr. Ahmad's argument that the RAD engaged in a selective review of the evidence regarding his ability to regain permanent residence in Spain is inconsistent with his acknowledgement that, in fact, the general process was available to him. The RAD did not ignore or discount Mr. Ahmad's testimony regarding the information he had received from the Spanish

consulate in Montréal but reasonably relied on the RIR for Spain (Permanent residence, status, requirements) which included detailed information on the available procedures (*Mikelaj v Canada (Citizenship and Immigration)*, 2016 FC 902 at para 21).

[34] Finally, the fact that the process for renewing Mr. Ahmad's Spanish permanent residency is complex and discretionary does not undermine the RAD's conclusion that it was open to him to pursue (*Osazuwa v Canada (Citizenship and Immigration)*, 2016 FC 155 at para 41 (*Osazuwa*)). I find that the RAD made no reviewable error in concluding that Mr. Ahmad could return to Spain even though such a return was not guaranteed.

B. Risk of persecution in Pakistan

[35] Mr. Ahmad submits that the RAD's endorsement of the RPD's failure to consider his risk of persecution in Pakistan, his country of citizenship or home country, was a reviewable error. In this, I agree with Mr. Ahmad. As a result, I will allow the application and remit this matter for reconsideration.

[36] In its decision, the RAD addressed the RPD's statement that it had not assessed Mr. Ahmad's risk in Pakistan and Canada's international obligations:

> [27] One final point which needs to be addressed is the fact that the RPD did not address two of the criteria mentioned in *Zeng*, which are the risk in the home country, in this case, Pakistan, and Canada's international obligations. At paragraph 37 of its decision, the RPD cited the Federal Court's decision in *Osazuwa* in support of its conclusion that the alleged risk in the home country was not a relevant factor given that there is a procedure in place for the Appellant to recover his permanent residence in Spain. I consider this conclusion to be a correct interpretation of the case law. For

> the same reason, no consideration has to be given to Canada's international obligations.

[37] The Respondent states that the RPD turned its mind to the *Zeng* sub-factor of risk of return in the country of origin but, because it had found Mr. Ahmad could return to Spain, "the RPD concluded that the risks in the Applicant's country of origin in Pakistan was of little relevance at this point". The Respondent argues that it was reasonable for the RAD to find that the RPD's conclusion was a correct interpretation of the case law, namely *Osazuwa*.

[38] I am not persuaded by the Respondent's argument. The RPD found that Mr. Ahmad could return to Spain if his application for reinstatement was granted. The RPD panel stated that it considered Mr. Ahmad's allegations and Canada's international obligations and noted that he did not allege a risk in Spain. The RPD continued:

> [37] […] Lastly, since there is a procedure in place to recover his permanent residence and the claimant did not follow it, the panel did not consider the alleged risk in the home country to be a relevant factor.

[39] The RAD confirmed the RPD's conclusion to be correct and stated, "[f]or the same reason, no consideration has to be given to Canada's international obligations". I find that the omission by the RPD and the RAD to consider Mr. Ahmad's risk of persecution in Pakistan ignored the mandatory language used by the Federal Court of Appeal in *Zeng* in formulating the third element of its test for exclusion.

[40] The approach to *Zeng* adopted in *Osazuwa* and advocated by the Respondent is not consistent with the principles of refugee law set out in *Zeng*. Mr. Ahmad faces a cumbersome

process in reacquiring permanent resident status in Spain and there is no certainty he will be successful. If his attempts to reacquire status are not successful, the RAD's interpretation of the *Zeng* test means that Mr. Ahmad may be removed from Canada to Pakistan without the benefit of a risk assessment. The Court of Appeal rejected the Minister's arguments in *Zeng* that an applicant's ability to apply for a pre-removal risk assessment (subs. 112(1) of the IRPA) or for discretionary consideration on humanitarian and compassionate grounds (subs. 25(1) of the IRPA) were viable solutions in such cases (*Zeng* at paras 22-24).

[41] The language used by the Court of Appeal to describe the third step of the test for exclusion is mandatory. If an applicant had permanent resident status and lost it, "the RPD must consider and balance various factors. These include, but are not limited to, […] the risk the claimant would face in the home country, Canada's international obligations, and any other relevant facts". The Court of Appeal's formulation of the test is its response to the competing concerns of asylum shopping and protection of at-risk individuals after full consideration of the parties' submissions on the appropriate balancing of those concerns.

[42] Since *Zeng* was decided in 2010, the RPD and the RAD have conducted an analysis of the persecution faced by the applicant in their country of origin in the majority of cases reviewed by this Court where the exclusion finding was based on the third prong of the *Zeng* test (*Petit Homme v Canada (Citizenship and Immigration)*, 2020 FC 276 at para 7; *Xie v Canada (Citizenship and Immigration)*, 2020 FC 36 at paras 12-16; *Elisias v Canada (Citizenship and Immigration)*, 2019 FC 1626 at para 5; *Desir v Canada (Citizenship and Immigration)*, 2019 FC 1164 at para 6; *Su v Canada (Citizenship and Immigration)*, 2019 FC 1052 at paras 13-15). In

contrast, a search of the Federal Court's decision database reveals one case that refers to *Osazuwa*. In *Jean-Pierre v Canada (Citizenship and Immigration)*, 2020 FC 136, the Court referred to *Osazuwa* in the course of its evaluation of the applicant's allegations of persecution in the third country and not for the principle cited by the RPD, RAD and Respondent in the present case regarding risk in the home country.

[43] In making a determination under the third *Zeng* step, the RPD must consider and balance the elements identified by the Court of Appeal. One aspect of that determination requires the balancing of the certainty, complexity and discretionary nature of any process in place to reacquire permanent residence against the risk a claimant alleges they would face in their home country. In this way, the RPD satisfies the principles identified in *Zeng*, including the prevention of asylum shopping, while ensuring a reasonable assessment of the claimant's risk allegations.

[44] In the present case, the RAD conceded that it was unclear Mr. Ahmad could use the simplified process to reacquire his permanent resident status but stated that the general process would be available to him. The RAD did not contest Mr. Ahmad's statement that the general process was cumbersome with no guarantee of success. As Mr. Ahmad raised no risk of persecution in Spain, the RPD and RAD undertook no further analysis. Specifically, they stated that the alleged risk to Mr. Ahmad in Pakistan "was not a relevant factor". I acknowledge the Respondent's able arguments in positioning the RAD's concluding paragraph as a somewhat tacit balancing endeavour but remain unconvinced. The two panels did not reasonably complete the balancing assessment mandated by the Court of Appeal.

IV. Certified question

[45] At the hearing of this matter, Mr. Ahmad's counsel indicated that he would like to propose a certified question regarding the RPD's authority to address the application of Article 1E of the Convention where the Minister has been notified of the RPD's concern but has chosen not to intervene. I received written submissions from the parties following the hearing.

[46] Mr. Ahmad proposes the following questions for certification:

> In the absence of a Refugee Protection Officer (RPO), in the absence of a Minister's representative, does the RPD member become a party that has the evidentiary burden to allege exclusion, as indicated in the *Ezokola* case? Can such an RPD Board member be said to be neutral, fair and impartial? Can the RPD member be said to be neutral, fair and impartial, when he/she assumes the role of the Minister's representative, a party, in an exclusion case, by presenting evidence, questioning witnesses, when the Minister's representative declines to intervene orally or in writing?

[47] Mr. Ahmad submits that the question meets the test for certification as being a serious question of general importance that would be dispositive of an appeal. The Respondent resists certification of the proposed question on the bases that (1) the proposed question deals with the RPD process and not the RAD decision under review; and (2) the question does not raise an issue of broad significance or general importance as the issue has been settled by this Court's case law.

[48] In *Lunyamila v Canada (Public Safety and Emergency Preparedness),* 2018 FCA 22 at paragraph 46, the Federal Court of Appeal summarized the criteria for certification of a question pursuant to subsection 74(d) of the IRPA: "[t]he question must be a serious question that is

dispositive of the appeal, transcends the interests of the parties and raises an issue of broad significance or general importance".

[49] The Respondent rightly points out that the question as proposed puts in issue the RPD's process. However, the RAD addresses the question in its decision. In the interests of responding to Mr. Ahmad, I will answer the request for certification with reference to the Respondent's second argument.

[50] I have canvassed the jurisprudence of this Court that addresses the substance of the question now proposed for certification: whether the RPD breaches its duty of fairness and impartiality by assessing the application of section 98 of the IRPA in the absence of Ministerial intervention. The case law is unequivocal. The RPD is an inquisitorial body. It must apply the IRPA to the facts of each case before it regardless of the arguments and positions taken by the parties. To properly discharge its statutory duty, the RPD is required to consider the application of section 98 in cases involving exclusion on the basis of either Article 1E or 1F of the Convention whether or not, once notified, the Minister chooses to intervene.

[51] Justice Leblanc (as he then was) explains the role of the RPD as follows (*Aloulou v Canada (Citizenship and Immigration)*, 2014 1236 at para 27):

> [27] The RPD panel member was simply doing his job here. In that regard, it is important to note that the RPD's work is inquisitorial and that it is at the heart of a process that is non-adversarial, in that no one appears to object to the refugee claim. In that sense, its role differs from that of judges of traditional courts, which is to consider the evidence and arguments that the parties choose to present while refraining from telling the parties how to present their cases. In contrast, the RPD must be

> actively involved in the hearings before it to make its inquiry process work properly. Furthermore, for that purpose, its members have the same powers as commissioners who are appointed under the *Inquiries Act*, which gives them the power to inquire into anything they consider relevant to establishing whether a claim is well-founded (*Canada (Minister of Citizenship and Immigration) v Nwobi*, 2014 FC 520, at paragraphs 16 and 17; *Velasquez v Canada (Minister of Citizenship and Immigration*), 2013 FC 273, 429 FTR 143, at paragraph 15).

[52] An issue that has already been satisfactorily settled by the courts does not transcend the interests of the parties (*Dubrézil v Canada (Minister of Citizenship and Immigration)*, 2006 FC 142 at para 16). Mr. Ahmad's disagreement with the case law does not justify certification.

[53] Therefore, I decline to certify the proposed question.

JUDGMENT IN IMM-7758-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.

2. No question of general importance is certified.

"Elizabeth Walker"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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