Federal Court  Cour fédérale

Date: 20160322

Docket: IMM-3249-15

Citation: 2016 FC 341

Ottawa, Ontario, March 22, 2016

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

AMANI KHZAEE KHATTR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Ms. Khattr seeks to set aside a decision of the Refugee Appeal Division [RAD], affirming the Refugee Protection Division's [RPD] denial of her refugee claim. The RAD upheld the RPD's decision solely on the basis of adequate state protection.

[2] The applicant is an Arab Druze lawyer from the Golan Heights area of Israel. She is a stateless permanent resident of Israel who has declined to apply for Israeli citizenship. She

claims that she fears persecution by the Israeli State (as a result of her work on behalf of Palestinians), by a former employer (who sexually harassed her), by her conservative family (who disapprove of her independence), and by Israeli society at large (which discriminates against Arab Druze women in employment and other areas of life). Her claim is essentially one of cumulative persecution.

[3] In October 2014, the applicant, who had come to Canada on a scholarship to study, made a claim for refugee protection. Her claim was denied by the RPD based, in part, on its finding that the applicant would receive adequate protection from the State of Israel, if she chose to seek it out.

[4] Several issues were raised on appeal to the RAD, two of which are relevant to the present application. First, the applicant sought to introduce several new pieces of documentary evidence. Second, she argued that the RPD had erred in requiring her to rebut the presumption of state protection, because she is stateless.

[5] When considering these issues, the RAD applied a standard of review similar to that established in *Huruglica v Canada (Minister of Citizenship and Immigration)*, 2014 FC 799, [2014] 4 FCR 811, although it did not cite that case. It held that it should show some deference to the RPD's findings in circumstances where the RPD enjoys a particular advantage (e.g. with respect to credibility findings), while otherwise applying a correctness standard of review.

[6] On the issue of new evidence, the RAD held that, to be admissible, the new evidence must pass the test set out in subsection 110(4) of the *Immigration and Refugee Protection Act*, SC 2001, c 27, which reads as follows:

110(4) On appeal, the person who is the subject of the appeal may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.	110(4) Dans le cadre de l'appel, la personne en cause ne peut présenter que des éléments de preuve survenus depuis le rejet de sa demande ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'elle n'aurait pas normalement présentés, dans les circonstances, au moment du rejet.

In addition, the RAD applied the following three factors to determine whether the new evidence should be admitted: (a) whether the proposed new evidence is credible and trustworthy; (b) whether it is capable, together with the other evidence in the record (including other admissible new evidence) of proving or disproving a fact at issue in either the refugee claim or the appeal; and (c) whether the evidence is material, in the sense that it would be capable of justifying, with or without the benefit of an oral hearing, as the case may be, a disposition under section 111 of the Act.

[7] Applying this analysis to the new evidence before it, the RAD held that only one of the pieces of evidence should be admitted: An article from Haaretz dated March 5, 2015, entitled, "Mutual Mistrust Keeps Crime Flourishing in Israel's Arab Communities."

[8] On the issue of state protection, the RAD looked to the language of section 96 of the Act:

96 A Convention refugee is a	96 A qualité de réfugié au sens

person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

[9] The applicant submitted that the reference to state protection in paragraph 96(a) only applies to persons who have a country of nationality. Since she does not have a country of nationality, she is subject to the requirements in paragraph 96(b), which makes no mention of state protection. Therefore, in her submission, the RPD erred by requiring her to rebut the presumption of state protection, and in denying her claim because she was unable to do so.

[10] The RAD disagreed. While it acknowledged that paragraph 96(b) does not mention state protection, it held that the issue of state protection remains relevant to the question of whether the applicant had a "well-founded fear of persecution." In other words, the RAD held that the applicant could only establish that she had a well-founded fear if she was able to establish that

the State of Israel was unable or unwilling to protect her. On this point, the RAD held that the applicant had not made out her case. It found that, as a democratic country, Israel is presumed to provide adequate state protection, and the applicant had failed to adduce clear and convincing evidence to rebut that presumption. She had not identified an error in the RPD's finding that Israel would protect her. Furthermore, although the applicant's new evidence provided useful context for an analysis of state protection of Israeli Arabs, and suggested that Israel's policing of Arab communities is sometimes ineffective and is hampered by mistrust, it did not provide clear and convincing evidence that the applicant would not be protected by the state.

[11] Having upheld the RPD's finding on the issue of state protection in light of the new evidence submitted, the RAD held that it was unnecessary for it to consider the applicant's other grounds for appeal.

Issues and Standard of Review

[12] The fundamental issue before the Court is whether the RAD's decision is unreasonable. Although the applicant submits that she has raised some issues of law for which the standard of review is correctness, all of these issues have to do with the interpretation of the RAD's home statute and so should be reviewed on a standard of reasonableness: *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654 at paras 34, 39.

[13] The applicant raises three specific issues:

1. Did the RAD err in excluding the new evidence tendered by the applicant?

2. Did the RAD err in applying a state protection analysis to the applicant's claim?

3. Did the RAD err in finding that the applicant's appeal could be disposed of on the issue of state protection alone?

Analysis

A. *New Evidence*

[14] I agree with the applicant that the RAD appears to have overlooked one item of new evidence, but I am not persuaded that this oversight results in an unreasonable decision.

[15] The applicant submits that the RAD erred in rejecting the bulk of her new evidence. She complains that the RAD's assessment of the evidence was overly technical and restrictive. In particular, she claims that the RAD was unreasonable to reject item of evidence "H" because it was not credible or trustworthy. However, she does not support this submission with any evidence that was before the RAD. Instead, she cites a paragraph from her affidavit of August 10, 2015, in which she states that the RAD erred in rejecting the document because "I can attest to the fact that the website for the publisher, AL-Monitor, indicates that it is regularly referenced in The Wall Street Journal, Time, Reuters, Le Monde, The New York Times, The Economist, and many other publications, and that The Washington Post has called the website 'invaluable'." This affidavit post-dates the RAD decision. It is trite law that such evidence is not admissible on judicial review: *Majdalani v Canada (Minister of Citizenship and Immigration)*, 2015 FC 294 at para 20.

[16] The applicant also points out that the RAD ignored item of evidence "J." I agree that the RAD appears to have simply missed this piece of new evidence. The applicant suggests that this is fatal to the RAD's decision. I disagree. Item "J" is an editorial from the New York Times, dated March 17, 2015, entitled "An Israeli Election Turns Ugly." It is about the then recent national election in Israel and focusses on statements made by Prime Minister Netanyahu, which the Editorial Board describes as "anti-Arab," "racist," "inflammatory," and "outrageous." In her affidavit attaching this article, the applicant claims that it "confirms the extent to which the State of Israel, as epitomised in this instance by the person of its Prime Minister, is motivated by a racist and anti-Arab ideology." While I accept that this article post-dates the RPD decision and comes from a credible source, an opinion article about racially charged statements made by the Israeli Prime Minister is only marginally relevant to the issue of whether the Israeli State will adequately protect the applicant. It is certainly not material in the sense that, when considered in light of the evidence as a whole, it could justify a different disposition of this matter than the one the RAD in fact reached. I therefore conclude that, based on the RAD's own approach to admissibility, item "J" would most likely not be admitted into evidence. Furthermore, even if it was admitted, it would have no impact on the RAD's decision. Therefore, although the RAD erred in failing to address item "J," this oversight does not render the decision unreasonable.

B. *State Protection*

[17] The applicant submits that the RAD erred when it held that, even as a stateless person, she was required to rebut the presumption of state protection. She argues that two cases cited by the RAD in support of its position, *Popov v Canada (Minister of Citizenship and Immigration)*,

2009 FC 898 [*Popov*] and *Vetcels v Canada (Minister of Citizenship and Immigration)*, 2013 FC 653 [*Vetcels*], can be distinguished from her case.

[18] In the alternative, she submits that, even if the presumption of state protection applies to her case, that presumption has been weakened or rebutted by the fact that she is stateless, that Israel is not fully democratic, and that Israel is one of the agents of her persecution.

[19] In my view, it was reasonable for the RAD to find that the presumption of state protection should be applied to the applicant's claim.

[20] I agree with the applicant that the Court in *Vetcels* did not decide whether state protection should be considered in the context of a stateless person's claim; rather, it held that it did not need to decide whether the applicants were stateless because they failed to qualify for refugee status under both paragraphs 96(a) and (b) of the Act: *Vetcels* at para 12.

[21] I also agree with the respondent that in *Popov* this Court did decide that the presumption of state protection applies when determining whether a stateless person has a "well-founded" fear of persecution in their country of former habitual residence. In that case, as in this one, the applicants argued that "as they are stateless individuals, they are not subject to the presumption of state protection." The Court disagreed, holding that, in order to establish persecution in either of their countries of former habitual residence, the applicants "must prove not only a subjective fear but also an objective fear. This requires that they rebut the presumption of state protection:" Popov at para 45. The applicant attempts to distinguish *Popov* on the grounds that those

claimants failed to establish that they had a well-founded founded fear of persecution in the United States, separate and apart from the issue of state protection. Even if so, the fact remains that the Court squarely considered whether the stateless applicants were required to rebut the presumption of state protection, and found that they were. The fact that the decision was also made on other grounds is neither here nor there.

[22] Having concluded that the presumption of state protection should be applied to the applicant's claim, was it reasonable for the RAD to find that this presumption had not been weakened or rebutted on the facts of the applicant's case? When considering this question, it is relevant to have regard to the way in which it was raised before the RAD. In her memorandum of argument on appeal, the applicant specifically addressed the issue of state protection in a section entitled "State Protection." In that section she raised only two arguments. The first was that the presumption of state protection does not apply to the applicant because she is stateless; an argument considered and rejected by the RAD.

[23] The second argument was that Israel is not fully democratic, and therefore the presumption of state protection is weakened. This argument was not addressed by the RAD. However, it was only raised obliquely by the applicant in the form of an observation in her memorandum that:

> …the decisive findings underlying the RPD's determination that the Appellant is not a Convention refugee, and not a person in need of protection, involve state protection and the application of the presumption which flows from the finding that the country of reference is a democracy.

The applicant had suggested earlier in her memorandum that Israel was not, in fact, fully democratic.

[24] In her application for judicial review, the applicant faults the RAD for failing to address this second argument. She states:

> Applicant's counsel argued before the RPD that the political institutions and practices in the country of reference are such that the presumption of state protection which normally flows from the identification of the country of reference as a democracy is diminished in this case. This argument was wholly ignored by the RPD and unmentioned by the RAD.

[25] In support of this proposition, the applicant cites a single page of her affidavit from April 10, 2015, in which she states:

> At paragraphs 44 through 47 of its reasons the RPD member finds that Israel is a democratic state without making any reference to my counsel's submissions in this regard: that as a specifically Jewish state in which members of one particular faith are privileged over all others, Israel is not a democracy in which all citizens are granted equal rights and protections. The fact that the RPD makes her findings with regard to state protection without considering or even mentioning my counsel's arguments does not give me confidence that she approached the question with an open mind.

[26] The RPD's decision states that it has "reviewed the National Documentation Package and the claimant's objective evidence and finds that Israel is a democracy" [emphasis added]. In any case, the applicant does not identify what specific information the RAD is alleged to have ignored when it upheld the RPD's finding that Israel is a democratic country. Given the presumption that the RAD has considered all of the material before it, the applicant must specifically identify what evidence the RAD has failed to consider, and should explain why it

was sufficiently important that it had to be specifically addressed: *Canada (Minister of Citizenship and Immigration) v Khoreva*, 2015 FC 1239 at para 8, citing *Hassan v Canada (Minister of Employment & Immigration)* (1992), [1992] FCJ No 946 (Fed CA), *Cepeda-Gutierrez v Canada (Minister of Citizenship & Immigration)* (1998), 157 FTR 35 (Fed TD) at paras 14-17. The applicant does not do this in the present case. I therefore conclude that the RAD did not err on the issue of state protection.

C. *Other Issues*

[27] The applicant takes issue with the RAD's failure to consider all aspects of the RPD's decision. The RPD found that the applicant did not have a well-founded fear of persecution because she would be adequately protected by the State of Israel. The RAD upheld that finding. Having done so, there was no way that the applicant could succeed, even if the RPD had erred in some other way. It was therefore not necessary for the RAD to analyze the other aspects of the RPD decision.

[28] The decision under review is reasonable and this application must be dismissed.

[29] Neither party proposed a question for certification nor is there one.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is dismissed and no question is certified.

"Russel W. Zinn"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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