

Federal Court



Cour fédérale

Date: 20190916

Docket: IMM-620-19

Citation: 2019 FC 1178

Ottawa, Ontario, September 16, 2019

PRESENT: The Honourable Madam Justice Fuhrer

BETWEEN:

**PATRICIA MARCIA MARTINEZ CABRALES
and JOSEPH PEREZ, BRANDON PEREZ,
DYLAN PEREZ, by their litigation guardian
PATRICIA MARCIA MARTINEZ CABRALES**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of the decision dated January 3, 2019, of the Refugee Protection Division [RPD] of the Immigration and Refugee Board [IRB] that the

Applicants are not Convention refugees or persons in need of protection as defined in sections 96 and 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] For the reasons that follow, this application is dismissed.

II. Background

[3] The adult applicant, Ms. Patricia Marcia Martinez Cabrales, is a citizen of Colombia and Israel. The minor applicants, Joseph Perez, Brandon Perez, and Dylan Perez, are citizens of the United States of America [USA] and Israel. All Applicants obtained Israeli citizenship under the *Law of Return 5710-1950* after converting to Judaism.

[4] Ms. Martinez Cabrales alleged she initially fled Columbia in September 1999 after receiving threats from FARC guerillas. She claimed she was unable to claim asylum in the USA during this period because shortly after her arrival, all of her personal documentation was stolen, precluding her from applying before the one-year period for claiming asylum expired. She nonetheless remained in the USA, where she met her current common-law spouse and had her three children, who are co-claimants in this case.

[5] Ms. Martinez Cabrales and her family returned to Colombia in 2007 to care for a family member. Shortly thereafter, FARC guerillas kidnapped and extorted her and her spouse. Ms. Martinez Cabrales alleged that despite paying the ransom to secure their release, they remained targets of ongoing extortion.

[6] Ms. Martinez Cabrales' spouse began inquiring about ways to leave Colombia. A friend allegedly advised that if they converted to Judaism, they could relocate to Israel. The family obtained the required documents for the conversion process. On or around October 25, 2007, they completed the immersion ceremony, converted to Judaism, and were married by a Rabbi in a 4-day ceremony. A *Sheliach* (Jewish emissary) subsequently issued them immigration authorizations to travel to Israel. On November 6, 2007, they flew to Tel Aviv, Israel. Upon arrival, a Jewish organization took Ms. Martinez Cabrales and her family to Ramla, where they settled down.

[7] Ms. Martinez Cabrales alleged that, over time, she became distraught that she could no longer practise her religion as a Catholic openly. She stated her children were beaten by both Arab and Jewish children, and were targeted at their Jewish school because they could not speak the language and would sometimes refer to Catholic or Christian traditions or eat the wrong foods. She further indicated she was afraid for her children's future, as they were required to complete military service after finishing high school.

[8] Ms. Martinez Cabrales also explained that while working as a cleaner with two other women for an Israeli family, money went missing. The homeowner accused and threatened her, the other cleaners, and their children. She reported the homeowner to the police, but the police only accepted her report after she sought a lawyer's help and the homeowner made a second verbal threat to remove their nails and fingers.

[9] Ms. Martinez Cabrales alleged that Jewish Israelis knew Latin Americans were falsely converting for citizenship purposes, and as a result would throw stones at their house and call them goya (impure). She alleged the *Sheliach* who provided their initial travel authorizations was detained and subsequently imprisoned for issuing such documents fraudulently in other cases. She stated she was later advised that if she and her family wanted to be Jewish and accepted in the community, they would have to take a course and redo the conversion process and wedding. She refused, stating she knew that doing so would not affect her immigration status, and that she did not want her family to be Jewish after all.

[10] Ms. Martinez Cabrales and her spouse sent their children to Canada in July 2011 to where her mother lives. In October 2011, she and her spouse flew to Canada to join them, with her spouse later continuing to the USA to inquire about his previous permanent residency status and visit his children from a previous marriage. He was detained upon arrival in the USA. In November 2011, Ms. Martinez Cabrales and her children travelled to the USA to hire a lawyer to represent him and secure bail. Having done so successfully, they travelled back to Canada.

[11] Upon their return to Canada on March 21, 2012, Ms. Martinez Cabrales and her family filed for refugee protection against Colombia and Israel at the port of entry. As she filed for refugee protection prior to December 15, 2012, their applications became "Legacy Cases". As a result, their hearing before the RPD was significantly delayed.

[12] The RPD hearing was held on November 13, 2018. By this time, Ms. Martinez Cabrales' husband had withdrawn his joint claim and returned to Israel. Ms. Martinez Cabrales acted as the designated representative for her children. All were represented by counsel.

[13] Near the end of this hearing, counsel requested additional time to submit additional written evidence in lieu of making oral submissions because of the complexity of the case. The RPD disagreed about the complexity, but was willing to grant a 6-day extension. Counsel stated her objection for the record, which the RPD noted, and proceeded to provide oral submissions.

[14] Counsel provided no additional submissions following the hearing, nor brought any motions or requests to admit additional evidence.

III. Decision under Review

[15] In its written decision dated January 3, 2019, the RPD rejected Ms. Martinez Cabrales' and her children's claims for refugee protection under IRPA ss 96 and 97(1). The RPD found, after considering the totality of the evidence, that "the claimants failed to provide sufficient credible or trustworthy evidence to discharge their onus of establishing that a serious possibility of persecution based on a Convention ground exists or that, on a balance of probabilities, they would be subjected personally to a danger of torture or face a risk to life, or a risk of cruel and unusual treatment or punishment" in relation to Israel (for Ms. Martinez Cabrales) and for Israel and the USA (for her children). The RPD refused to assess Colombia as a country of reference

given that all parties had most recently resided in Israel and held Israeli citizenship. It did consider the USA, however, as a country of reference for the minor children.

[16] The RPD began by identifying the nexus grounds as religion, membership in a particular group, and perceived political opinion. These grounds arose respectively from allegations of sustained attacks and taunts, their conversion from Catholicism to Judaism and back to Catholicism, and the children's objection to mandatory military service. The RPD also noted Ms. Martinez Cabrales' generalized fear of terrorism in Israel.

A. *Credibility Concerns*

[17] The RPD found Ms. Martinez Cabrales' evidence "internally inconsistent [and] inherently implausible", noted omissions in the Personal Information Form from what she alleged orally, and stated that objective country condition evidence contradicted her allegations of risk.

[18] The RPD found Ms. Martinez Cabrales generally not credible, and drew negative inferences from her:

- failure to claim protection in Canada in October 2011;
- failure to claim protection in the USA in 1999 and 2011;
- failure to leave Israel prior to 2011, with or after the departure of her mother in 2008;

- misrepresentations to the Canada Border Services Agency [CBSA] at the port of entry in 2012 about her countries of citizenship, routing and previous visit to Canada;
- misrepresentations to CBSA about the location of their Israeli passports;
- inconsistencies in identifying with which passport she travelled to Israel;
- omissions from or exaggerations in her written Personal Identification Form, including:
 - the location of her Jewish marriage ceremony at the home of the Jewish Rabbi;
 - that they were told to take courses and complete the conversion process a second time;
 - that the *Sheliach* who had issued their immigration authorization had been arrested;
- failure to provide a copy of her translated or untranslated Jewish marriage certificate;
- exaggerating her claim by testifying that she would have to take a course to complete the conversion process in Israel; and,
- failure to further amend her Personal Identification Form to include reference to the news article dated 13/2/2008 regarding the *Sheliach*'s detention and their possible fate in Israel as a result.

[19] The RPD also found the evidence submitted to demonstrate Ms. Martinez Cabrales' precarious Israeli citizenship status not credible and did "not support their allegation that their conversion was fraudulent in the eyes of the Israeli authorities." Referring to the news article dated February 13, 2008, the RPD found the article mentioned a specific group of which Ms. Martinez Cabrales was not a member (aborigines from Colombia who utilized false conversion documents and did not undergo the conversion process), and that she and her family had lived in Ramla for years with no interactions with the authorities.

[20] Referring to a similar article dated February 15, 2008, the RPD found the article only referenced Argentina and did not implicate those who converted in Colombia. Finally, the RPD noted Ms. Martinez Cabrales' spouse had renewed his Israeli passport successfully several years after the *Sheliach's* arrest which, in the RPD's view, cast doubt on Ms. Martinez Cabrales' theory that the Israeli authorities suspected them of fraudulent conversion.

B. *Lack of Subjective Fear*

[21] The RPD found that Ms. Martinez Cabrales' should have "claim[ed] international protection at the first opportunity[,]" after first arriving in Canada in October 2011. They rejected her explanation that her husband had convinced her not to file because he wished to visit his other family in the USA first.

[22] The RPD also rejected Ms. Martinez Cabrales' explanations for why she did not seek asylum in the USA from 1999-2007, and again in 2011. She had explained she did not claim in

1999 because of stolen documents. She further explained her husband's prior counsel told them they would be denied refugee protection in light of US policies concerning Latin American immigrants, and in any event was worried that her irregular status from one year after arriving in the US in 1999 until 2007 would affect her ability to make a successful claim.

[23] The RPD also found Ms. Martinez Cabrales unduly delayed leaving Israel, and should have sought protection in Canada prior to October 2011 given that her alleged persecution in Israel began upon their arrival in 2007. The RPD rationalized that because her mother relocated to Canada sometime in or around 2008, she should have left earlier.

[24] Finally, the RPD noted Ms. Martinez Cabrales' claim was at one point joined with her husband's claim, which he withdrew in 2015 prior to a final determination. Without further analyzing the point, the RPD summarized the Minister's arguments at the RPD hearing that her spouse's withdrawal of his claim significantly undermined her allegations of subjective fear; his application for protection asserted the same grounds as hers but he nonetheless returned to Israel after withdrawing it.

C. *Lack of Discrimination Amounting to Persecution*

[25] The RPD rejected Ms. Martinez Cabrales' assertions that she and her children were victims of cumulative discrimination amounting to persecution. The RPD pointed to several distinct incidents which, when assessed cumulatively, did not amount to persecution:

- Arab children beat the two younger children outside of their school. They did not file a police report.
- Children threw stones at their house. They did not file a police report.
- The homeowner for whom Ms. Martinez Cabrales worked as a cleaner, along with two others, threatened to remove their finger nails and break their fingers for stealing money and the police laughed when they attempted to report it. The RPD noted that the police took a report when the homeowner threatened their lives and a lawyer they consulted told them to go to the police again.

D. *Religion*

[26] The RPD accepted Ms. Martinez Cabrales was baptized as a child. The RPD also noted her allegations that her conversion to Judaism in 2007 was for immigration purposes only, and that she considers herself and children Catholic. The RPD further accepted, via a Certificate of Baptism, that the children were baptized in Canada on August 24, 2014.

[27] The RPD found, however, that “the claimant’s religious convictions [were] not deeply entrenched...” and that Ms. Martinez Cabrales in particular “chooses the religion that best suits their needs at a given time.” The RPD referred to her delay in baptizing her children (rejecting her explanation that she wished the entire family to be together), and her willingness to convert to Judaism in order to immigrate to Israel.

[28] The RPD therefore found it was “insincere to say she was unable to practise her Catholic faith in Israel” and rejected her claim based on religion. The RPD also noted that even if she was a practising Catholic moving forward, Israel permits religious freedom.

E. *Perceived Political Opinion*

[29] The RPD rejected Ms. Martinez Cabrales’ claim that she feared her children would be forced to complete mandatory military service. It noted “military service is a law of general application”, that the claimants were not at the age of conscription, and that, on a balance of probabilities, there was an objective mechanism for them to seek exemption from military service in Israel.

F. *Terrorism*

[30] The RPD found the risk of terrorism was a generalized risk and that neither Ms. Martinez Cabrales’ nor her children were individual targets.

G. *State Protection Available*

[31] The RPD found Ms. Martinez Cabrales did not rebut the presumption against state protection in Israel. On most occasions, she did not seek state protection; on the one instance where she did and it took until a second threat for the police to take a report, this was insufficient to rebut the state protection presumption. Finally, the RPD found that even if Israel was not a

safe country for the minor claimants, state protection was available in the USA as they were all American citizens.

IV. Issues

- A. *Is the supporting affidavit admissible?*
- B. *Did the RPD breach the principles of fundamental and natural justice by refusing to provide more than 6 days for counsel to prepare post-hearing submissions and evidence?*
- C. *Was the RPD's decision reasonable?*

V. Standard of Review

[32] The appropriate standard of review for alleged breaches of fundamental and natural justice is correctness: *Canada (MCI) v Khosa*, 2009 SCC 12 at para 43. The common law imposes a duty of procedural fairness upon every public authority making an administrative decision which affects the rights, privileges, or interests of an individual: *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 28; *Dunsmuir v New Brunswick*, [2008] 1 SCR 190 at paras 87, 129. Under these circumstances, the Court is entitled to insist that its view is correct, as no one should have their rights, interests, or privileges adversely dealt with by an unjust process: *Dunsmuir, supra* at paras 124, 129. This duty includes providing an opportunity for the affected person to present their case fully and fairly: *Baker, supra* at para 28.

[33] The appropriate standard of review for reviewing RPD decisions, including any credibility assessments made, is reasonableness: *Hafamo v Canada (Citizenship and*

Immigration), 2019 FC 995 at para 6. For this Court to intervene, the Court must be satisfied that, when assessed in the context of the entire record, the RPD’s decision showed no “justification, transparency and intelligibility within the decision making process,” and the decision was not “within a range of possible, acceptable outcomes which are defensible in respect of the facts and law”: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para. 47.

VI. Relevant Provisions

[34] Part 2 of the IRPA governs Canada’s refugee regime. Sections 95-97 define who is eligible for refugee protection:

Immigration and Refugee Protection Act (S.C. 2001, c. 27)

...

95 (1) Refugee protection is conferred on a person when

(a) the person has been determined to be a Convention refugee or a person in similar circumstances under a visa application and becomes a permanent resident under the visa or a temporary resident under a temporary resident permit for protection reasons;

(b) the Board determines the person to be a Convention refugee or a person in need of protection; or

(c) except in the case of a person described in subsection

Loi sur l’immigration et la protection des réfugiés (L.C. 2001, ch. 27)

...

95 (1) L’asile est la protection conférée à toute personne dès lors que, selon le cas :

a) sur constat qu’elle est, à la suite d’une demande de visa, un réfugié au sens de la Convention ou une personne en situation semblable, elle devient soit un résident permanent au titre du visa, soit un résident temporaire au titre d’un permis de séjour délivré en vue de sa protection;

b) la Commission lui reconnaît la qualité de réfugié au sens de la Convention ou celle de personne à protéger;

c) le ministre accorde la demande de protection, sauf si

112(3), the Minister allows an application for protection.

...

96 A Convention refugee is a 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,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

(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.

97 (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(b) to a risk to their life or to a

la personne est visée au paragraphe 112(3).

...

96 A qualité de réfugié au sens 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) 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) 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.

97 (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n’a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

a) soit au risque, s’il y a des motifs sérieux de le croire, d’être soumise à la torture au sens de l’article premier de la Convention contre la torture;

b) soit à une menace à sa vie

risk of cruel and unusual treatment or punishment if

ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

(2) A également qualifié de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

[35] The Refugee Protection Division [RPD] of the Immigration and Refugee Board is the authorized decision maker in respect of a refugee claim:

107 (1) The Refugee Protection Division shall accept a claim for refugee

107 (1) La Section de la protection des réfugiés accepte ou rejette la demande d'asile

protection if it determines that the claimant is a Convention refugee or person in need of protection, and shall otherwise reject the claim.

selon que le demandeur a ou non la qualité de réfugié ou de personne à protéger.

[36] The *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR] require all applications to be complete:

...
10 (1) Subject to paragraphs 28(b) to (d) and 139(1)(b), an application under these Regulations shall

...
10 (1) Sous réserve des alinéas 28b) à d) et 139(1)b), toute demande au titre du présent règlement :

...
(c) include all information and documents required by these Regulations, as well as any other evidence required by the Act;

...
c) comporte les renseignements et documents exigés par le présent règlement et est accompagnée des autres pièces justificatives exigées par la Loi;

...
(2) The application shall, unless otherwise provided by these Regulations,

...
(2) La demande comporte, sauf disposition contraire du présent règlement, les éléments suivants :

...
(d) include a declaration that the information provided is complete and accurate.

...
d) une déclaration attestant que les renseignements fournis sont exacts et complets.

[37] The *Refugee Protection Division Rules*, SOR/2012-256 [RPDR] sets out the process by which counsel can provide additional documents after a hearing:

43 (1) A party who wants to provide a document as evidence after a hearing but before a decision takes effect must make an application to the Division.

43 (1) La partie qui souhaite transmettre à la Section après l'audience, mais avant qu'une décision prenne effet, un document à admettre en preuve, lui présente une demande à cet effet.

- | | |
|---|---|
| <p>(2) The party must attach a copy of the document to the application that must be made in accordance with rule 50, but the party is not required to give evidence in an affidavit or statutory declaration.</p> <p>(3) In deciding the application, the Division must consider any relevant factors, including</p> <p>(a) the document's relevance and probative value;</p> <p>(b) any new evidence the document brings to the proceedings; and</p> <p>(c) whether the party, with reasonable effort, could have provided the document as required by rule 34.</p> | <p>(2) La partie joint une copie du document à la demande, faite conformément à la règle 50, mais elle n'est pas tenue d'y joindre un affidavit ou une déclaration solennelle.</p> <p>(3) Pour statuer sur la demande, la Section prend en considération tout élément pertinent, notamment :</p> <p>a) la pertinence et la valeur probante du document;</p> <p>b) toute nouvelle preuve que le document apporte aux procédures;</p> <p>c) la possibilité qu'aurait eue la partie, en faisant des efforts raisonnables, de transmettre le document aux termes de la règle 34.</p> |
|---|---|

VII. Analysis

A. *Preliminary Issue: Is the Applicants' supporting affidavit admissible?*

[38] Ms. Martinez Cabrales provided an affidavit from her former counsel explaining what occurred during the RPD hearing as new evidence. Her current counsel, however, cited no case law in support of its admission. The Minister initially sought to strike her former counsel's affidavit or assign its content no weight; however, the Minister later omitted this issue altogether in the Respondent's Further Memorandum of Argument on Judicial Review [Respondent's further memo]. Neither party made any additional submissions regarding this issue at the hearing.

[39] The Minister confirmed at the hearing that the Respondent's further memo replaces the first Respondent's Memorandum of Argument [Respondent's first memo]. This accords with paragraph 9 of Justice Diner's Order dated June 19, 2019 granting leave and commencing the judicial review application. Nonetheless, as the issue remains "live" in Ms. Martinez Cabrales' Reply, and as the issue was not abandoned expressly at the hearing, I address it below.

[40] Generally, such evidence is not admissible on judicial review, as materials are restricted to the record before the decision maker: *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 [Association of Universities and Colleges] at para 19; *Bernard v Canada (Revenue Agency)*, 2015 FCA 263 at para 17. Where the material assists the court to understand the general background circumstances of the judicial review, is relevant to an issue of procedural fairness or natural justice, or highlights a complete absence of evidence before the decision maker, this Court can make an exception: *Association of Universities and Colleges, supra* at para 20. Given that the affidavit supports arguments of procedural fairness and natural justice and clarifies what occurred at the RPD hearing, in my view this exception is met.

[41] I agree with the Minister, however, in respect of the applicable submissions in the Respondent's first memo, that the former counsel's affidavit contains inadmissible statements, including information outside her personal knowledge and legal submissions. An affidavit is not the correct forum for speculation, opinion evidence and legal argument: *Canada (MCI) v Huntley*, 2010 FC 1175 at para 268.

[42] I disagree, however, that it is impossible to derive any value from this affidavit. The affiant is able to testify as to her rationale for seeking an objection to making oral submissions at the end of the RPD hearing, without the benefit of post-hearing written submissions. In my view, this insight helps the Court determine the first substantive question, that is, whether a breach of the principles of fundamental and natural justice occurred. I therefore consider it appropriate to admit the affidavit to establish the following facts:

- Counsel sought to provide additional written submissions because she believed that the matter was complex; and,
- Counsel further believed that current developments pertaining to Israeli citizenship were relevant to the RPD's determination, and wished to supplement the record. I note the affidavit cannot be construed, however, as conclusive evidence establishing the alleged current developments.

[43] Finally, I note that the attached exhibits were before the RPD and form part of the certified tribunal record or CTR; therefore, the Court may consider these documents.

B. *Did the RPD breach the principles of fundamental and natural justice by refusing to provide more than 6 days for Applicants' counsel to prepare post-hearing submissions and evidence?*

(1) Applicant's Submissions

[44] Ms. Martinez Cabrales argues her and her children's situation is "complex." As such, the RPD's failure to provide an extended window (beyond the 6 days offered at the November 13,

2018 RPD hearing) for additional submissions, combined with its subsequent failure to consider Colombia as a country of reference, amounted to a breach of natural justice and duty of fairness.

[45] Their counsel relied on the facts pleaded in the former counsel's affidavit. In addition, at the hearing before this Court, the Applicants' counsel pointed to the RPD Screening Form dated November 13, 2012 in the CTR which shows, under the heading "STREAM & SCHEDULE INFORMATION" an X in the box beside "Complex – specify hearing duration:". I note a reference to "DRUGS RELATED CRIMINAL RECORD IN U.S.A." in the Comments section under "STREAM & SCHEDULE INFORMATION". Based on the CTR, this pertained to Ms. Martinez Cabrales' spouse, Julio Ernesto Perez Lopez, who later withdrew his claim in 2015. The extent to which the noted criminality had a bearing on the RPD's early indication of "Complex" is unknown. Furthermore, the transcript of the RPD hearing discloses that the issue of "complexity" on which the Applicants' former counsel and the RPD Member disagreed was possible revocation of Israeli citizenship.

[46] In oral submissions, Ms. Martinez Cabrales' counsel referred to the non-exhaustive factors relevant to considering the variable content of the duty of procedural fairness elucidated by the Supreme Court of Canada (SCC) in *Baker*, namely: (i) the nature of the decision being made and process followed in making it; (ii) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; (iii) the importance of the decision to the individual or individuals affected; (iv) the legitimate expectations of the person challenging the decision; and (v) the choices of procedure made by the agency itself: *Baker v Canada* (Minister of Citizenship and Immigration), [1999] 2 SCR 817 [*Baker*] at paras 23-27. As noted by Ms.

Martinez Cabrales' counsel, the SCC has said with respect to point (ii) that “[g]reater procedural protections ... will be required when no appeal procedure is provided within the statute, or when the decision is determinative of the issue”: *Baker, supra* at para 24. Counsel submitted the RPD decision is determinative in this case as access to the RAD (Refugee Appeal Division) is not available to the Applicants and there are no further avenues prior to removal. Counsel also requested the Court consider the importance of the decision in terms of persecution of and serious harm to the Applicants, their potential loss of Israeli status, and the RPD's lack of consideration of their claim against Colombia. Regarding the choice of procedure by the agency and whether to permit further written submissions, counsel submitted that such decisions must be made fairly.

[47] The Applicants' counsel also argued the RPD's refusal to provide Applicants' counsel with more time to make written submissions was similar to *Davis*, where Heneghan J. found the Immigration Appeal Division [IAD] incorrectly refused to adjourn Mr. Davis' appeal (of a removal order on the grounds of serious criminality): *Davis v Canada (Citizenship and Immigration)*, 2018 FC 1219 [*Davis*].

(2) Respondent's Submissions

[48] The Minister submitted “[t]he RPD had no duty to afford the Applicants an indeterminate amount of time post-hearing so that their counsel could conduct additional research and provide written submissions.” Ms. Martinez Cabrales' identified her possibly tenuous citizenship in Israel in her own pleadings, and was therefore alive to the issue and had adequate time to

prepare. The Minister also noted at the hearing that while it is within the RPD Member's discretion to permit oral or written submissions, Ms. Martinez Cabrales' counsel did not provide any advance warning to the RPD member regarding the issue of providing submissions in writing: *Pion Tarazona Silvana v Canada (Citizenship and Immigration)*, 2012 FC 605 at para 16. Given that oral submissions are the normal course, the Minister argued something more than the expression of a preference to make submissions in writing is necessary to permit written submissions. The Minister points to the RPD's offer nonetheless for an additional 6 days to make written submissions, which counsel chose not to use; and to the RPD's Rules, which provide a process to admit post-hearing documentary evidence, which Ms. Martinez Cabrales' counsel did not heed nor provide an explanation as to why this was not an option.

(3) Analysis

[49] I agree with the Minister that the RPD had no duty to afford Ms. Martinez Cabrales nor her children any, yet alone an indeterminate, amount of time post-hearing to make additional submissions: *Farkas v Canada (Citizenship and Immigration)*, 2014 FC 542 at para 12. IRPR s 10 is clear that the burden was on Ms. Martinez Cabrales to bring forward all evidence and information she believed relevant to their claims for refugee protection. Given Ms. Martinez Cabrales' perceived precarious status was one of the grounds of her application, she was alive to the necessity of disproving her and her children's citizenship and the lack of available state protection in Israel.

[50] Even on the higher correctness standard of review, it is incorrect to assume that applicants have an indefinite opportunity to make submissions on issues they clearly knew might arise. Furthermore, the RPD member offered Ms. Martinez Cabrales' counsel a period of 6 days following the hearing to make written submissions; the only justification provided by their former counsel in her affidavit for needing a longer period of time was "to conduct research to 'connect the dots'." Moreover, counsel presented nothing to the RPD in the days and weeks following the hearing until the impugned decision issued in January 2019.

[51] The decision in *Davis, supra*, is distinguishable because, in addition to adjourning the appeal, the IAD terminated the appeal and cancelled the stay of the removal order in effect. Here, the RPD conducted the oral hearing, considered the merits of Ms. Martinez Cabrales' and her children's claims and offered counsel an opportunity to make written submissions within a set period of time, an offer which was not pursued. Further, Ms. Martinez Cabrales did not even try to apply to the RPD to provide further documentary evidence after the hearing but before a decision takes effect, as she was permitted to do under RPDR s 43(1).

[52] Given the above, I am not persuaded that the RPD breached procedural fairness and natural justice. This issue is answered in the negative.

[53] I further disagree with Ms. Martinez Cabrales' submission that the RPD's refusal to grant unlimited time for submissions led them incorrectly to discount Colombia as a country of reference, such that it violated the principles of fundamental and natural justice. This Court has previously held that in the case of dual nationals, the RPD properly may refuse to analyze a

secondary country of reference where it finds no risk in the first such country: *Harris v Canada (MCI)*, 1997 CanLII 5567.

[54] Ms. Martinez Cabrales' counsel asserts that Israel has a process to strip citizenship obtained via misrepresentation, and on that basis it was unreasonable for the RPD to not assess Colombia. The RPD reasonably concluded, however, that despite Ms. Martinez Cabrales' assertions that their legal status was precarious because of her false conversion, the evidence supports the RPD's finding that the conversion was true. Further, at the time of the hearing, there were no ongoing state actions to remove that status. The documentary evidence demonstrated that after three years, this process required formal adjudication and could not be pursued solely at the Minister's discretion. The RPD reasonably concluded that given that no formal proceedings were currently underway, and that Ms. Martinez Cabrales' spouse was subsequently issued an Israeli passport renewal, Ms. Martinez Cabrales (and by extension her children) were not at risk of citizenship revocation.

[55] In the RPD hearing, Ms. Martinez Cabrales' former counsel submitted that even if Israel were unaware of this misrepresentation before, they would be aware of it moving forward because the family would have to provide their PIFs to the Israeli authorities in order to secure travel authorizations. This argument was not advanced at the hearing, however, and Ms. Martinez Cabrales provided no evidence demonstrating the Israeli authorities required them to submit their Personal Information Forms [PIFs] or disclose to the Israeli authorities why they claimed refugee status in Canada. Given this, and the RPD's conclusion that Ms. Martinez Cabrales and her children actually had undergone the conversion process necessary to secure

status (although in their heart of hearts may never have converted), the RPD's conclusion that their legal status was not at risk of revocation moving forward also was reasonable.

[56] For clarity, I do not mean that in order for this Court to find the RPD erroneously excluded a country of reference, the applicant must first demonstrate that proceedings to revoke their citizenship in the RPD's chosen country of reference are underway. Such an approach would be contrary to the RPD's role to assess both backward and forward-looking risk. Instead, this case hinges on the RPD's factual finding that Ms. Martinez Cabrales did complete the conversion process properly prior to obtaining her Israeli citizenship. Therefore, there was no reason for the RPD to believe that the Israeli authorities would strip her status to begin with. Were it the case that the RPD was convinced that Ms. Martinez Cabrales had not converted and had instead obtained her Israeli citizenship by fraud, it would have been erroneous to discount Colombia as a country of reference because there would be grounds for Israel to strip their status in the future. However, this is not what occurred here.

[57] Ms. Martinez Cabrales never led evidence demonstrating that Israel could revoke her status simply because subjectively she did not adopt a Jewish identity leading up to or following the conversion process. I understand this may be what her former counsel wished to research further. However, I agree with the RPD's finding that the information Ms. Martinez Cabrales is concerned about reasonably could be considered country condition evidence, which Ms. Martinez Cabrales should have provided prior to the commencement of the RPD hearing. As such, in my view the RPD correctly assessed the risk posed in Israel based on the record before it and hence, whether to discount Colombia as a country of reference.

C. *Was the RPD's decision reasonable?*

(1) Applicants' Submissions

[58] Ms. Martinez Cabrales asserts the RPD made several erroneous adverse credibility findings, which tainted its overall credibility and rendering the entire decision unreasonable: "if some blocks are poor, the whole tower crumbles."

[59] Ms. Martinez Cabrales first submits the RPD drew negative inferences from:

- Her failure to claim asylum in the United States in 1999. She claims that this was irrelevant given that Colombia was not a country of reference;
- Her failure to claim asylum in the United States in 2011. She claims "the RPD overlooked the applicant's evidence that the family's papers were stolen at the airport in New York when they were travelling from that city to Florida, and that this prevented them from claiming asylum within the one year period after their arrival in the United States in 1999." Ms. Martinez Cabrales asserts this, along with her explanation that she sought advice from her spouses' lawyer and was advised her claim would not be successful, reasonably explained the situation enough to rebut a negative credibility finding;
- Her failure to refer to the Jewish wedding ceremony as part of the conversion process in her PIF, but to discuss such in her oral testimony. She asserts this was a case of "poor memory", and had no reason to lie about the marriage service;

- Her failure to provide a copy of her Jewish wedding certificate. She submits her explanation about failing to provide translation at Legal Aid rates was sufficient and that, in any case, it was not relevant to her claim;
- Her inconsistent explanations on (a) what documents she used to travel from Colombia to Israel; and (b) the need to complete the courses as part of the conversion process in Israel (which the RPD also perceived as embellishment). She argues the first is irrelevant information, and the second is not contradictory and therefore cannot reasonably sustain a negative credibility finding;
- Her choice to lead evidence not directly related to her claim, namely the articles showing travel authorizations issued to individuals under false pretenses of conversion in Argentina and Venezuela. Counsel asserts the RPD misconstrued the evidence and the articles were relevant, as they demonstrated the same *Sheliach* was under investigation.

[60] Finally, Ms. Martinez Cabrales further submitted the RPD's decision lacked transparency and justification when assessing her subjective fear. At the hearing, her counsel referred to *Raveendran*, where Beaudry J. found the RPD's predecessor unreasonably discounted the applicant's contextually reasonable explanation for not claiming asylum in the USA: *Raveendran (Guardian of) v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 49 at paras 58-59. He reminded this Court that here, Ms. Martinez Cabrales failed to seek asylum in the USA first because she did not have the proper documentation due to a robbery; and second because her spouse's prior counsel had told them they would be denied refugee protection in light of US policies concerning Latin American immigrants. Counsel also asserted that Ms. Martinez

Cabrales' spouse's fear was not reflective of her own subjective fear despite their claims previously being joined.

(2) Submissions by the Respondent

[61] The Minister submits the RPD's statements concerning Ms. Martinez Cabrales' failure to seek asylum from Colombia earlier were insights into a "pattern of behaviour inconsistent with a well-founded fear of persecution" and not determinative of the outcome. Where the RPD did draw firm conclusions, including on her delays in claiming in Canada and in providing necessary evidence, they did so reasonably: *Samseen v Canada (Minister of Citizenship and Immigration)*, 2006 FC 542 at paras 20-23; *Romero Davila v Canada (Citizenship and Immigration)*, 2012 FC 1116 at para 31.

[62] The Minister submits that in reviewing the RPD's decision, this Court must read it as a whole. The reviewing court's analysis does not involve determining whether each point in the reasoning meets the reasonableness test: *Ogiriki v MCI*, 2006 FC 342 at paras 13-14.

(3) Analysis

[63] I note at the outset that on judicial review, this Court's analysis need not involve "a line-by-line treasure hunt for errors; the decision should be approached as an organic whole": *Yan v MCI*, 2017 FC 146 [Yan] at para 19, citing *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34. I also note the deference this Court

owes to the RPD on issues of credibility, given they have the benefit of an in-person hearing: *Yan, supra* at para 18:

[18] ... First, the RPD has broad discretion to prefer certain evidence over other evidence and to determine the weight to be assigned to the evidence it accepts: *Medarovik v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 61 (CanLII) at para 16, Tremblay-Lamer J; *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 867 (CanLII) at para 68, Blais J. Second, the Federal Court of Appeal confirms that findings of fact and determinations of credibility fall within the heartland of the expertise of the RPD: *Giron v Canada (Minister of Employment and Immigration) (1992)*, 143 NR 238 (FCA). Third, the RPD is recognized to have expertise in assessing refugee claims and is authorized by statute to apply its specialized knowledge: *Chen v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 805 (CanLII) at para 10, O'Reilly J; see *Siad v Canada (Secretary of State)*, 1996 CanLII 4099 (FCA), [1997] 1 FC 608 at para 24 (FCA), where the Federal Court of Appeal said that the RPD, "... is uniquely situated to assess the credibility of a refugee claimant; credibility determinations, which lie within "the heartland of the discretion of triers of fact", are entitled to considerable deference upon judicial review and cannot be overturned unless they are perverse, capricious or made without regard to the evidence". Third, it is well-established that the RPD may make credibility findings based on implausibility, common sense and rationality, although adverse credibility findings "should not be based on a microscopic evaluation of issues peripheral or irrelevant to the case": *Haramichael v Canada (Minister of Citizenship and Immigration)*, 2016 FC 1197 (CanLII) at para 15, Tremblay-Lamer J, citing *Lubana v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116 (CanLII) at paras 10-11, Martineau J [Lubana]; *Attakora v Canada (Minister of Employment and Immigration)*, [1989] FCJ No 444 (FCA). Fourth, the RPD may reject uncontradicted evidence if it "is not consistent with the probabilities affecting the case as a whole, or where inconsistencies are found in the evidence": *Lubana*, above at para 10. Fifth, the RPD is entitled to conclude that an applicant is not credible "because of implausibilities in his or her evidence as long as its inferences are not unreasonable and its reasons are set out in 'clear and unmistakable terms'": *Lubana*, above at para 9.

[64] I agree that the RPD was unreasonable in drawing negative inferences in some respects, including:

- Referring to Ms. Martinez Cabrales' failure to seek asylum in the USA between 1999 - 2007. It was unreasonable for the RPD to focus on this given that it rejected Colombia as a country of reference;
- Referring to Ms. Martinez Cabrales' failure to seek asylum in Canada from Israel prior to October 2011. Given that her grounds are largely focused on cumulative persecution, it was unreasonable for the RPD to speculate at what point Ms. Martinez Cabrales' subjectively believed that threshold had been met, regardless of when her mother relocated to Canada;
- RPD's focus on inconsistencies between written and oral statements concerning which passport she used when travelling from Colombia to Israel. The Minister argued this was relevant as it helped the RPD understand their legal status in Israel. I disagree with this characterization, and accept it as reasonable that Ms. Martinez Cabrales may have confused the difference in "passport" versus "temporary travel authorization" between testimonies; and,
- Ms. Martinez Cabrales' failure to provide a translated copy of her Jewish wedding certificate. Her explanation for the translated version is reasonable given that she was restricted to Legal Aid rates when seeking translation. That said, an untranslated copy could have been but was not submitted.

[65] I find however, that the RPD's credibility assessment was reasonable in a number of important instances. First, I agree with the RPD's concern regarding potential forum shopping,

given that Ms. Martinez Cabrales and her children failed to claim when they originally arrived in Canada in October 2011. I do not accept Ms. Martinez Cabrales' explanation that she was waiting until after her husband visited his family reasonable, given that neither of them held visitor visas to the USA and there was nothing precluding their removal to Israel: *Saleem v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1412 at para 32; *Kreishan v Canada (Citizenship and Immigration)*, 2019 FCA 223 at para 1. This speaks against her subjective fear.

[66] Second, I agree the RPD could draw a negative inference from Ms. Martinez Cabrales' misrepresentations to CBSA officers at the port of entry in 2012 about their legal status in Israel, as this was directly relevant to the availability of state protection. I note Ms. Martinez Cabrales' counsel conceded this point. This speaks against her subjective fear.

[67] Third, I agree with the RPD's negative finding concerning her failure to refer to the location of Jewish wedding ceremony and the requirement to take a course or courses for the second conversion process in her PIF. I acknowledge her argument that this was a case of "poor memory" and that she had no reason to lie about the marriage ceremony. I also acknowledge her explanation that she excluded the information about the second conversion because her former counsel wanted only the key facts. However, the RPD concluded she provided this information to explain in more detail her ties to the impugned *Sheliach* and to cast doubt on the Israeli authorities' acceptance of her conversion, both of which later formed the basis of her argument against Israel offering a safe alternative. Given her Israeli citizenship was central to the RPD's assessment on the availability of state protection and its choice of a reference country, it was reasonably open to the RPD to conclude that Ms. Martinez Cabrales sought to embellish her

claim against Israel so that they would not discount her claim against Colombia on this basis. This speaks against her subjective and objective fear.

[68] Fourth, I agree with the RPD's negative treatment of the news articles. These news articles explained the *Sheliach* was under investigation for issuing travel authorizations to individuals under false pretenses of conversion in Argentina and Venezuela. Ms. Martinez Cabrales' counsel asserts the RPD misunderstood or misinterpreted misconstrued the evidence in that it could have applied to other parts of South America.. However, the RPD's conclusion that the articles did not support her allegations of precarious Israeli status, and therefore did not support a finding against the objective availability of state protection, was reasonable. The RPD reasoned the articles indicated only those who did not undergo conversion but still were issued travel authorizations were under suspicion and, given Ms. Martinez Cabrales' testimony concerning her conversion process, there was no reason to believe she or her children fell under this category given that they actually completed the conversion process. This is a reasonable conclusion for the RPD to draw based on the evidence available to it.

[69] Credibility assessments are not a side-by-side checklist. While the RPD made several erroneous credibility findings on specific points, after reviewing its reasons as a whole, I do not believe these errors were sufficient to taint the entire credibility assessment. The RPD reasonably concluded that Ms. Martinez Cabrales and her children had legal status in Israel. Further, Ms. Martinez Cabrales does not take issue with the RPD's conclusion that on the evidence before it, the discrimination Ms. Martinez Cabrales and her children suffered in Israel did not amount to persecution, torture, a risk to life, or a risk to cruel and unusual punishment with the possible

exception of mandatory military service. Here, the RPD concluded the laws were of general application, noted that the minor claimants were not of conscription age yet., and recognized their dual citizenship with the USA. On the whole, I find the RPD's conclusions were reasonable..

[70] Given the above, I find the RPD's final conclusion fell within the range of reasonable outcomes defensible in respect of the facts and the law: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47; *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16. The RPD reasonably concluded that the evidence did not support Ms. Martinez Cabrales and her children's subjective nor objective fear of Israel, and that it was unnecessary to consider Colombia as a country of reference.

VIII. Conclusion

[71] The application for judicial review should be dismissed. The RPD provided Ms. Martinez Cabrales, a dual national, with a fair opportunity to present her case for refugee status. The RPD's refusal to assess a secondary country of reference was reasonable since it found state protection existed in the first. While they made some erroneous credibility findings, these were not cumulatively fatal to its assessment of the merits of Ms. Martinez Cabrales' claims.

[72] Ms. Martinez Cabrales' counsel requested costs for this motion. Cognizant that these proceedings traditionally attract no cost awards absent special reasons, I find these proceedings

do not justify such an order: *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, R 22.

[73] Counsel were provided with the opportunity to submit a question for certification. None was submitted.

JUDGMENT in IMM-620-19

THIS COURT'S JUDGMENT is that:

1. The judicial review application is dismissed.
2. No costs are awarded.
3. There is no question for certification.

“Janet M. Fuhrer”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-620-19

STYLE OF CAUSE: PATRICIA MARCIA MARTINEZ CABRALES and
JOSEPH PEREZ, BRANDON PEREZ, DYLAN PEREZ,
by their litigation guardian PATRICIA MARCIA
MARTINEZ CABRALES v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

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