Federal Court  Cour fédérale

Date: 20191211

Docket: IMM-6490-18

Citation: 2019 FC 1587

Ottawa, Ontario, December 11, 2019

PRESENT: Mr. Justice Norris

BETWEEN:

AFERDITA MELLA (AKA FRIDA SHVRAC), SORELA MELLA, ESTER MELLA

Applicants

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] In October 1999, Aferdita Mella, her then-husband Agron Mella, and their two daughters Sorela (aged 9) and Ester (aged 7) made a claim for refugee protection in Canada on the basis of Mr. Mella's alleged political persecution in Albania, their only country of nationality. They claimed that in July 1997 Mr. Mella had been detained for three days in a local police station in

Albania, that after he was released he took steps to avoid the authorities and eventually went into hiding, that in May 1998 Ms. Mella was assaulted by the police at her home because they could not find Mr. Mella, and that the police had come to their home three more times in 1998 and 1999 in search of Mr. Mella. Mr. Mella claimed that he learned that his name was on a "black list" of people the secret police intended to kill. He decided that he had to leave Albania. With the assistance of a smuggler, Agron and Aferdita Mella obtained false Italian passports. They and their daughters travelled on these false passports from Albania to Italy and then onwards to Canada, where they claimed refugee protection the day after they arrived.

[2] The claim was allowed by the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada [IRB] in December 2000. The family all became permanent residents of Canada in March 2002.

[3] In fact, during the time they alleged they were being victimized by political persecution in Albania, Agron and Aferdita Mella and their daughters were living in Israel, where they were all citizens.

[4] In March 2015, the Minister of Public Safety and Emergency Preparedness filed an application with the RPD under section 109 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], seeking to vacate the decision allowing the family's claim for refugee protection on the basis of misrepresentation.

[5] The hearing began on July 4, 2018, and continued on October 30, 2018. Ms. Mella and her daughters attended the hearing and were represented by counsel. Agron Mella (from whom Ms. Mella was divorced in December 2005) did not attend and his whereabouts were unknown.

[6] For reasons dated December 4, 2018, the RPD allowed the Minister's application, deemed the claims for refugee protection to be rejected, and nullified the earlier decision of the RPD granting refugee protection.

[7] Aferdita Mella and her daughters now apply for judicial review of this decision under section 72(1) of the *IRPA*.

[8] For the reasons that follow, this application will be allowed.

II. BACKGROUND

[9] The applicants entered Canada on October 8, 1999. The next day they indicated their intention to make a claim for refugee protection. Documents supporting their claim were completed with the assistance of a lawyer and an Albanian interpreter and were submitted to the IRB in February 2000.

[10] Agron Mella was the Principal Claimant. Ms. Mella stated in her Personal Information Form [PIF]: "I, Aferdita Mella, female, citizen of Albania, born on November 13, 1970, fear persecution in my country of origin, Albania. My refugee claim is based on the incidents in my husband's PIF (Agron Mella)." She signed her PIF herself, declaring that "the information

contained herein is true and correct to the best of my knowledge and belief." Agron Mella signed his own PIF as well as the PIFs prepared on behalf of Sorela and Ester.

[11] The claims were heard by the RPD on December 20, 2000. As noted, the family was found to be Convention refugees.

[12] In June 2001, the family applied for permanent resident status in Canada. This was granted in March 2002.

[13] On February 16, 2005, Ms. Mella attempted to enter Canada using an Israeli passport in the name of Frida Shvarc. Her airline tickets indicated that she had left Toronto for Tirana via Vienna on February 5, 2005, and then returned from Tirana via Milan. When examined by a Canada Border Services Agency [CBSA] officer on arrival in Toronto, Ms. Mella stated that her name was Frida Shvarc and that she was not known by any other name. She confirmed that she was a citizen of both Albania and Israel. She stated that she lived in Albania with her husband and their two daughters. She was coming to Canada as a visitor and planned to return to Albania in twelve days.

[14] Concerned on the basis of her answers to his questions that Ms. Mella was inadmissible to Canada for misrepresentation, the CBSA officer wrote up a report under section 44(1) of the *IRPA*. Ms. Mella was detained overnight. The officer questioned her further the next day. Ms. Mella now acknowledged that she, her husband and their daughters actually lived in Toronto. She said her proper name was Aferdita Mella. Her Israeli passport was in her maiden

name. She acknowledged that she and her family had claimed refugee status in Canada in 1999 and that they were now permanent residents of Canada. She admitted that she and her family had lived in Israel between 1992 and 1998. She also admitted that she and her family did not disclose their Israeli citizenship or the time they had been living in Israel in connection with their refugee claims. They were afraid they would not be accepted as refugees in Canada if they did. Ms. Mella was held for a detention review hearing.

[15] Ten years later, the Minister filed an application to vacate the applicants' refugee status. The hearing of the application began over three years after that.

[16] No issue was taken with the materiality of the information that had been misrepresented or withheld in the family's refugee claim. Instead, at the hearing Ms. Mella claimed that her husband had provided all the information relating to their refugee claim to their lawyer. She had simply signed the forms (although she did acknowledge knowing that nothing had been said about the family's Israeli citizenship or the years they had lived in Israel). She did not question her husband about anything because she feared he would be physically or verbally abusive towards her if she did. For this latter reason, counsel for the applicants argued that Ms. Mella should therefore be excused from the consequences of any misrepresentation on the basis of the common law defence of duress. For their part, Sorela and Ester testified that they knew nothing about their refugee claims when they were made. They were children at the time. The first they learned that they had come to Canada as refugees and not as permanent residents was in 2015, when they received the Minister's application to vacate. They argued that since they were innocent of any wrongdoing, they should not lose their refugee status (which would in turn lead

to the loss of their permanent resident status). The applicants also contended at the hearing that the Minister's ten-year delay in commencing the application to vacate after learning of the misrepresentations was an abuse of process.

III. DECISION UNDER REVIEW

[17] Section 109(1) of the *IRPA* provides that the Refugee Protection Division "may, on application by the Minister, vacate a decision to allow a claim for refugee protection, if it finds that the decision was obtained as a result of directly or indirectly misrepresenting or withholding material facts relating to a relevant matter."

[18] The RPD member found that the family's Israeli citizenship and the fact that they were living in Israel at the very time they claimed to be experiencing political persecution in Albania were "material facts relating to a relevant matter." As noted, this was not disputed.

[19] The member disbelieved Ms. Mella's claim that she did not know that false information was being presented in support of the refugee claim. Her own PIF had been translated into Albanian for her and she had signed it, declaring its contents to be "true and correct" to the best of her knowledge and belief. The form listed only Albania as her country of present citizenship when in fact (and to her knowledge) she was also an Israeli citizen. It stated that she had resided in Albania from February 1990 until October 1999 when in fact (and to her knowledge) she had lived in Israel from 1992 until 1998. It stated that she had travelled to Canada on a false Italian passport when in fact (and to her knowledge) she had used her Israeli passport (which she still had in her possession but did not declare at the time). While her PIF did not repeat Mr. Mella's

grounds for seeking refugee protection but instead simply adopted them by reference, the member found that it was implausible that Ms. Mella would have attended the refugee hearing without knowing the grounds for seeking protection that were being advanced.

[20] The member found that the common law defence of duress is not available in a proceeding under section 109 of the *IRPA* but, even if it is, there was "no persuasive evidence to establish that Aferdita was facing an imminent threat of death or bodily harm at the time that she decided to go along with her ex-husband's scheme to advance a fraudulent refugee claim."

[21] With respect to Sorela and Ester, the member rejected the argument that since they honestly and reasonably believed that they were not misrepresenting any material facts when their parents made a refugee claim on their behalf, they were "innocent parties" who "should not be held responsible for the actions of their parents." The member explained the basis of his conclusion as follows:

> The vacation of a decision conferring refugee protection is not punishment for a misdeed, though it may certainly appear that way to the Respondents or a finding of guilt or improper intentions. Instead, the vacation process protects the integrity of Canada's refugee protection system by rectifying a decision that rested on incorrect information. The misrepresentation involved need not be deliberate or intentional and the respondents' motives, intention, negligence or *mens rea* are not relevant. While the children may have had little or no role in the misrepresentations, they did obtain refugee protection as a result of those falsehoods and the decision conferring that protection must therefore be nullified [citations omitted].

[22] Finally, the member declined to address the merits of the applicants' submission that the Minister's ten-year delay between learning there were grounds to seek vacation of the applicants'

refugee status and commencing such an application was an abuse of process. The member stated that this argument "was only raised by counsel as an after-thought at the conclusion of the vacation hearing" and that no submissions had been made concerning the remedy sought. As a result, the member concluded that he "need not address a declaration or grant any kind of relief."

IV. STANDARD OF REVIEW

[23] It is well-established that the RPD's decision to vacate a previous finding of refugee protection under section 109 of the *IRPA* is reviewed on a reasonableness standard: see *Omar v Canada (Citizenship and Immigration)*, 2016 FC 602 at para 36; *Frias v Canada (Citizenship and Immigration)*, 2014 FC 753 at para 9; and *Khan v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 881 at para 24.

[24] Reasonableness review "is concerned with the reasonableness of the substantive outcome of the decision, and with the process of articulating that outcome" (*Canada (Attorney General) v Igloo Vikski Inc*, 2016 SCC 38 at para 18). The reviewing court examines the decision for "the existence of justification, transparency and intelligibility within the decision-making process" and determines "whether the decision falls 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). These criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16). The reviewing court should intervene only if these criteria are not met. It is not the role of the reviewing court to reweigh the

evidence or to substitute its own view of a preferable outcome (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61).

V. ISSUES

[25] I would frame the issues raised in this application as follows:

a) Did the RPD member err in rejecting Ms. Mella's "defence" of duress?

b) Did the RPD member err in vacating the decision granting Sorela and Ester refugee protection even though they personally did not misrepresent or withhold material facts?

c) Did the RPD member err in his assessment of the applicants' argument that the proceeding under *IRPA* s 109 was an abuse of process?

VI. ANALYSIS

[26] As I will explain, the RPD member did not err in rejecting Ms. Mella's "defence" of duress or in finding that the decision granting Sorela and Ester refugee protection should be vacated even though they were not complicit in any misrepresentation or withholding of material facts. However, it was unreasonable for the member to decline to address the applicants' argument that the delay in proceeding with the application to vacate was an abuse of process. Consequently, there must be a new hearing where this issue can be re-determined.

A. *Did the RPD member err in rejecting Ms. Mella's "defence" of duress?*

[27] The applicants submit that the RPD member erred in rejecting Ms. Mella's "defence" of duress. I do not agree.

[28] In criminal law, duress is an excuse for the commission of a wrongful act in circumstances where that act was morally involuntary – that is to say, where the actor realistically had no choice but to commit the wrongful act because of threats of serious harm made by a third-party. In such circumstances, the law recognizes that it would be fundamentally unjust to impose criminal liability on the accused. The defence first emerged in the common law but in Canada it has been codified by what is now section 17 of the *Criminal Code*, RSC 1985, c C-46. This provision sets out the constituent elements of the defence and lists many offences with respect to which it is not available. This codification did not completely supersede the common law defence, however, which remains available for parties to an offence. See generally *R v Hibbert*, [1995] 2 SCR 973, *R v Ruzic*, [2001] 1 SCR 687 [*Ruzic*], and *R v Ryan*, [2013] 1 SCR 14.

[29] The defence of duress concerns whether an accused should be exempted from criminal liability because of the circumstances under which the wrongful act was committed. Section 109 of the *IRPA*, however, has nothing to do with the assignment of blame – criminal or otherwise. Rather, it is concerned with whether material facts relevant to a refugee claim were misrepresented or withheld by someone seeking refugee protection. If they were, the reason this happened is irrelevant to the claimant's entitlement to refugee protection, which is the

fundamental question at issue in the application to vacate (cf. *Canada (Citizenship and Immigration) v Pearce*, 2006 FC 492 at para 36). It was thus entirely reasonable for the RPD member to conclude that, despite how it might feel to a party facing an application to vacate, it is not undertaken for a punitive purpose and the "defence" of duress is therefore irrelevant. Rather, the decision to vacate an earlier decision to confer refugee protection serves to protect the integrity of the Canadian refugee protection system (cf. *IRPA* paragraph 3(2)(e)). To continue to confer refugee protection on someone when it has been determined that that protection was obtained on the basis of material falsehoods or by withholding material facts would undermine the integrity of the Canadian refugee protection system and bring it into disrepute.

[30] Vacating a decision granting refugee protection does have other consequences in addition to the loss of refugee protection. It results in a finding of inadmissibility under paragraph 40(1)(c) of the *IRPA* and, under paragraph 46(1)(d), in the loss of permanent resident status. These consequences are not punitive, however. Rather, they simply restore the claimant's status to what it was prior to the erroneous grant of refugee protection. Like the vacation process itself, they serve to maintain the integrity of the Canadian refugee protection system. Paragraph 40(2)(a) of the *IRPA* does stipulate that one's inadmissibility to Canada lasts for five years – in the case of the applicants, five years from the date their removal order is enforced – and, under section 40(3), there is a bar on applying for permanent resident status during this period. While this is arguably an administrative sanction intended to deter individuals from engaging in misrepresentation, it falls well-short of the concerns about unjust criminal convictions that gave rise to the defence of duress in the first place (cf. *Ruzic* at paras 42-47). Importantly, relief from the operation of paragraph 40(2)(a) and section 40(3) of

the *IRPA* may be sought on humanitarian and compassionate grounds under section 25(1) of the *IRPA*. Extenuating circumstances such as those that might otherwise constitute a "defence" of duress can be advanced there as grounds for being granted equitable relief from a rigid application of the law (cf. *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at paras 11-25).

[31] Finally in this regard, for the sake of clarity I note that the question of whether a "defence" of duress could excuse as morally involuntary other grounds for a finding of inadmissibility that depend on voluntary acts committed by a person (e.g. under sections 34, 35(a), 36(1)(b) or (c), 36(2)(b) or (c), 37 or 40(1)(a) of the *IRPA*) does not arise here (but see *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40, [2013] 2 S.C.R. 678, at paras 86 and 100).

B. *Did the RPD member err in vacating the decision granting Sorela and Ester refugee protection even though they personally did not misrepresent or withhold material facts?*

[32] The applicants argue that the RPD member erred in vacating the decision granting Sorela and Ester refugee protection even though they personally did not misrepresent or withhold material facts. I do not agree.

[33] There is no question that Sorela and Ester were wholly innocent with respect to the fraudulent refugee claim advanced by their parents. Indeed, they did not even know a refugee claim was being advanced on their behalf. While one can certainly empathize with them for this reason, it is irrelevant to their entitlement to refugee protection. Given their ages at the time of

the refugee hearing (respectively, 10 and 8), it is likely that there would have been no inquiry into their subjective fear of persecution. This is consistent with their own memories that they were not asked any questions at the hearing. Rather, the subjective fear advanced by their father as the Principal Claimant would simply have been imputed to them. As the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection* (Reissued February 2019) explains: "If there is reason to believe that the parents wish their child to be outside the country of origin on grounds of well-founded fear of persecution, the child himself may be presumed to have such fear" (at 46, para 218).

[34] However, where it is later determined that material facts offered to support that well-founded fear of persecution were misrepresented or that material facts were withheld, and where there is no other basis upon which refugee protection could be conferred (see *IRPA* s 109(2)), there is nothing that warrants the granting of refugee protection to impute to the child. As the Federal Court of Appeal stated in a distinct but related context in *Canada (Citizenship and Immigration) v Tobar Toledo*, 2013 FCA 226 at para 68: "The Act offers a child claimant for refugee protection the same protections that it offers his or her parents, but it also imposes the same consequences when the claim for refugee protection is rejected, unless the child's condition is different from that of his or her parent [reference omitted]."

[35] In the present case, Sorela and Ester should not have been granted refugee protection in the first place because the claim made on their behalf by their father depended entirely on material falsehoods. The RPD's December 2018 decision simply corrects the mistake the RPD made in December 2000. As section 109(3) provides, if the application to vacate is allowed, "the

claim of the person is deemed to be rejected and the decision that led to the conferral of refugee protection is nullified." The RPD member reasonably determined that this result follows for Sorela and Ester irrespective of the lack of any fault on their part at the time refugee protection was originally granted.

C. *Did the RPD member err in his assessment of the applicants' argument that the proceeding under IRPA s 109 was an abuse of process?*

[36] The applicants submit that the RPD member's decision not to address the merits of their argument that the proceeding under *IRPA* s 109 was an abuse of process is unreasonable. I agree.

[37] As set out above, the member dismissed the argument without addressing its merits. This is problematic in at least three ways.

[38] First, the member characterizes the abuse of process argument as an "after-thought" only raised by counsel at the conclusion of the hearing. Although counsel for the applicants directed most of her submissions to the duress issue, the allegation of abuse of process was fully argued as well. It was far from an "after-thought." Further, the issue had clearly been raised earlier in the hearing, when Ms. Mella was testifying. Counsel had sought to adduce evidence from her about the prejudice caused by the Minister's delay in bringing the application to vacate. The member was concerned that this was irrelevant to the issues before him. Eventually he was persuaded to allow counsel to explore the question of prejudice somewhat, as long as they did not spend "the entire morning" on the issue.

[39] Second, the member states that "at no time did counsel request a remedy of any kind to cure the prejudice which she alleges her clients suffered as a result of the inordinate and unreasonable delay." While it is true that counsel did not expressly state what remedy she was seeking on behalf of the applicants, the only remedy at issue in the leading authority she relied on – *Blencoe v British Columbia (Human Rights Commission)*, [2000] 2 SCR 307 [*Blencoe*] – as well as in the other cases she reviewed with the member was a stay of proceedings. In the circumstances, there could be no doubt that the applicants were seeking a remedy and no reason to think that the remedy they sought was anything other than a stay of proceedings. It being entirely obvious what remedy the applicants were seeking, it is unreasonable for the RPD member to have made the result turn on what could only have been an oversight by counsel.

[40] Third, counsel framed the legal questions correctly in her submissions (cf. *Blencoe* at paras 100-33). She submitted that the delay was inordinate and unexplained, especially considering that the Minister had confirmed the applicants' Israeli citizenship within about a month of Ms. Mella's return to Canada in February 2005. She submitted that materials obtained through a request under the *Access to Information Act*, RSC 1985, c A-1, and filed with the RPD shed very little if any light on why it took the Minister so long to bring the application to vacate. Counsel also identified several specific forms of prejudice she alleged that the applicants had suffered in the ten years of inaction by the Minister, including the following:

- The applicants had applied for Canadian citizenship in October 2004. The applications were evidently held up by the Minister's intention to seek vacation of the decision granting refugee protection yet the applicants were left completely in the dark about this, despite making inquiries. In fact, for a time they believed (erroneously but

understandably) that their applications were delayed by an investigation into whether Agron Mella (who was now gone from their lives) had a criminal record.

- As time passed, Aferdita Mella became more and more confident that no action would be taken against her or her children despite her disclosures in February 2005.

- The applicants – especially Sorela and Ester – had built their lives in Canada and a significant part of this had occurred between 2005 and 2015.

- Files and records relating to the proceeding before the RPD in 2000 (including the recording of the hearing) had been destroyed.

- Agron Mella was not available to testify at the application to vacate.

- As a result of the enactment in the interim of section 25(1.2)(c)(i) of the *IRPA*, the applicants would be barred for a year from the date of the decision to allow the application to vacate from making an application for permanent residence on humanitarian and compassionate grounds.

[41] Whether the delay was inordinate and unexplained and whether these allegations of prejudice were established or, if established, were sufficient to support the claim that the delay in proceeding with the application constituted an abuse of process are all questions of fact and mixed fact and law. They are questions it was incumbent on the RPD member to answer in the first instance. Regrettably, he did not do so. It is not for the reviewing court "to supply the reasons that might have been given and make findings of fact that were not made" (*Komolafe v*

Canada (Citizenship and Immigration), 2013 FC 431 at para 11; see also *Delta Air Lines Inc v Lukács*, 2018 SCC 2 at para 28).

[42] The issue of abuse of process having been squarely raised before him, it was unreasonable for the RPD member to conclude that he "need not address a declaration or grant any kind of relief." As a result, the decision must be set aside and the matter must be reconsidered.

VII. CERTIFIED QUESTION

[43] It was agreed at the hearing of this application that, exceptionally, the parties should have an opportunity to see how the Court disposed of the application before offering their positions on whether a question or questions should be certified under section 74(d) of the *IRPA*.

[44] The parties are therefore directed to provide brief written submissions regarding whether any questions should be certified within seven days of receipt of these reasons. If more time is required, the parties may contact the Court.

VIII. CONCLUSION

[45] For these reasons, the application for judicial review is allowed, the decision of the Refugee Protection Division dated December 4, 2018, is set aside, and the matter is remitted for redetermination in accordance with these reasons by a different decision-maker.

JUDGMENT IN IMM-6490-18

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed, the decision of the Refugee Protection Division dated December 4, 2018, is set aside, and the matter is remitted for redetermination in accordance with these reasons by a different decision-maker;

2. Whether there is a question for certification under section 74(d) of the *IRPA* remains under reserve pending receipt of written submissions from the parties.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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