Federal Court  Cour fédérale

Date: 20200220

Docket: IMM-2195-19

Citation: 2020 FC 280

Ottawa, Ontario, February 20, 2020

PRESENT: The Associate Chief Justice Gagné

BETWEEN:

GHILAD PAZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] Mr. Ghilad Paz seeks judicial review of a decision made by the Refugee Appeal Division (RAD) upholding the Refugee Protection Division's (RPD) decision to deny his refugee protection based on his political beliefs.

[2] The Applicant is an Israeli-born activist who claims that his support of the Boycott, Divestment and Sanctions (BDS) movement has put him at risk of persecution by Israeli officials, as well as by fellow citizens.

[3] He argues that the RAD erred in not considering the evidence regarding the rising persecution against dissidents like himself in Israeli society and on the part of the State, as well as the new evidence showing that his refugee claim was widely covered by the Israeli media in 2016 and 2017. The Applicant further argues that the RAD erred in finding that the state of Israel is capable and willing to protect him.

II. Facts

[4] The following facts are from the RAD decision and the Applicant's affidavit.

[5] In 2014, the Applicant became involved with a left-wing political party called Meretz, as well as Amnesty International and the BDS movement, which advocates for boycotts, divestment, and sanctions against Israel. He began to use social media to voice his opinions, criticizing Israeli operations in the Gaza Strip and making statements that Israel had committed war crimes against Palestinians.

[6] In 2016, Israeli government ministers began to push back against the BDS movement, saying that Israeli activists involved in this movement would pay the price and that foreign activists would be prevented from entering Israel, and those already in Israel would be deported.

[7] In light of this public criticism, the Applicant left Israel, fearing for his safety and concerned that Israeli officials would take civil and/or criminal legal action against him. He arrived in Canada on August 11, 2016 and claimed refugee status upon his arrival. He gave

interviews to journalists about his refugee claim, and continues to use social media to communicate his views and the fact that he claimed refugee status in Canada.

[8] The RPD refused Mr. Paz's application for refugee protection. Before the RAD, he stated that he was even more afraid to return to Israel because of his actions in Canada and the growing animosity against left wing, pro-Palestinian activism in Israel from both citizens and government authorities.

III. Impugned Decision

[9] The RAD upheld the RPD's decision, finding that it did not err in its analysis of the availability of state protection for Mr. Paz. It also considered new evidence presented by the Applicant and, while the Member did admit some of it, decided there was no cause for a hearing.

A. *Evidence Presented on Appeal*

[10] The Applicant presented several new pieces of evidence to the RAD, including several news articles. However, he did not follow Rules 29 and 37 of the *Refugee Appeal Division Rules*, which require that an Appellant request the Tribunal's authorization to submit new evidence; that this request be made in writing and be supported by an affidavit; and that their submissions include an explanation of how the evidence meets the requirements of subsection 110(4) of the *Immigration and Refugee Protection Act* (IRPA) and how the evidence relates to the Appellant.

[11] Despite failing to follow the correct procedure for submitting new evidence on appeal, the RAD found that some of the evidence was admissible. Because some of the articles contained

credible and relevant information regarding events that took place after his refugee protection claim was rejected, the following articles were admitted:

> Orly Noy, "'Spilling enemy blood is allowed': After settler attack, Israeli activists speak out", +972 Magazine, August 26, 2018;
>
> Mordechai Kremnitzer, "Shin Bet's Harassment of Left-wing Activists Serves Political Interests – and Not for the First Time", Haaretz, August 16, 2018;
>
> Isabel Kershner, "Israeli Airport Detention of Prominent U.S. Jewish Journalist Prompts Uproar", The New York Times, August 14, 2018;
>
> Edo Konrad, "In Israel, American Jews can kiss their privilege goodbye", +972 Magazine, August 9, 2018;
>
> Editorial, "The Shin Bet State is Here", Haaretz, August 8, 2018;
>
> Jonathan Ofir, "Adi Shosberger called Israeli soldiers 'terrorists' – and Israel has turned on her", Mondoweiss.net, April 27, 2018; and
>
> Noa Landau, "Israel to Deny Tax Breaks, Government Bids from Local Groups Calling for Boycott", Haaretz, February 15, 2018.

[12] However, the RAD held that all evidence that did not deal directly with left-wing Israeli activists and the question of whether authorities are willing and able to protect them was inadmissible, given that it was not relevant for the purposes of the appeal, where the determinative issue was state protection.

B. *Holding a Hearing before the RAD*

[13] The Applicant initially did not request a hearing before the RAD; however, in one of his applications to submit new evidence, he asked for a hearing regarding the admissibility of said evidence.

[14] Though the RAD found the evidence raised a serious issue related to the Applicant's credibility, it was not central to the decision and thus did not meet the criteria of subsection 110(6). It also determined that the new evidence would not justify allowing the refugee protection claim because it did not contain sufficient information about Israel's ability to adequately protect its citizens.

C. *Analysis of the Appeal*

[15] The RAD then moved on to review the RPD decision by applying the correctness standard and conducting its own analysis of the record. It found that the RPD did not err in its analysis of Israel's state protection for several reasons.

[16] The RAD began by laying out that states are presumed to be capable of protecting their citizens, unless a complete breakdown of the state apparatus has occurred (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689). In order to prove that state protection is not available, an applicant must present clear and convincing evidence that their state is unable or unwilling to protect them, and in cases where protection is available, claimants must approach their state for protection. The more democratic a state's institutions, the higher the burden on the refugee claimant to exhaust all options for protection that are open to them.

[17] The RAD looked at the Applicant's personal circumstances in light of the articles and other evidence he submitted; it found evidence that Israeli activists documenting settlement expansions and who protected Palestinians were attacked by settlers and that the army opposed their activities. It also found that the Israeli security service has summoned left-wing activists

and warned them against taking their activities “too far”. Israeli courts have approved these practices, which some have been criticized as being too broad in scope.

[18] In addition, the articles submitted profile legislation Israel passed in 2017, which barred entry to foreigners who had taken action to advocate for the BDS movement, part of a larger state campaign to push back against NGOs like Amnesty International, which has accused Israel of illegally occupying Palestinian territories.

[19] In light of the documentary evidence presented by the Applicant, the RAD found that Israel is a democratic country that is experiencing human rights issues. The 2017 National Documentation Package (NDP) on Israel includes information about a founding member of the BDS movement who was personally attacked in statements by government ministers; they also threated to revoke his permanent residency and made him fear for his safety and the safety of his family. However, Israeli civilians who receive threats to their life or safety have access to legal and administrative remedies from independent judges, and government organizations and NGOs are available to help people whose rights have been violated.

[20] The RAD also addressed an Israeli law that allows for legal action against anyone who calls for boycotts of any kind against the State, with or without proof that the Plaintiff has suffered direct harm because of the boycott. The Supreme Court of Israel upheld this law as constitutional. However, the RAD notes that Mr. Paz has not been the subject of any such action, and that if he were, there are remedies in Israel available to him; these remedies are also available to targeted NGOs.

[21] Another Israeli law allows the Minister of Finance to impose sanctions on those calling for a boycott of Israel, including restrictions on participating in bids for government contracts. The Appellant submitted that his father lost his security clearance and job in 2016 because of his son's actions against Israel. The RAD said that there was no evidence that his father could not contest this dismissal, especially given that he himself was not involved in the BDS movement.

[22] As such, the RAD found that the Applicant did not discharge his burden of proving that state protection was not available for him in Israel. The RAD also found that the Applicant did not show that he had made use of all the options available to him to obtain state protection from Israeli authorities and that there is nothing preventing him from using those options to obtain protection in his home country.

IV. Preliminary Issue

[23] The Respondent references two documents attached to the Applicant's Affidavit that, according to him, were not before the RAD and thus should be struck: (1) a note from the Applicant's psychologist Dr. Letsas dated December 27, 2017 and (2) a medical note from Dr. Lesperance dated April 12, 2019. The Applicant counters that there were serious reasons for Mr. Paz's filing these documents outside the required delays, including that he was hospitalized in a psychiatric hospital three times.

[24] A review of the Certified Tribunal Record (CTR) shows that the Applicant submitted Dr. Letsas' letter to the RAD on January 17, 2018. The decision was rendered January 23, 2019, and though it does not specifically mention this letter, it is contained within the CTR and was

clearly filed over a year before the decision came out. Therefore, there does not appear to be any reason why the letter from Dr. Letsas should be struck, given that it is in the CTR and was thus before the RAD at the time it rendered its decision.

[25] However, the note from Dr. Lesperance is not in the CTR, as it was written and submitted after the RAD's decision was rendered. As such, given that the Applicant has not presented a motion to our Court arguing why this new evidence should be admitted under the narrow circumstances provided by the *Federal Courts Rules* and jurisprudence, the Court will strike Dr. Lesperance's letter.

V. Issues and standard of review

[26] This application for judicial review raises the following issues:

A. *Did the RAD err in its assessment of the evidence presented by the Applicant?*

B. *Did the RAD err in failing to grant the Applicant a hearing?*

C. *Did the RAD err in concluding that state protection is available to the Applicant? In other words, did the RAD reasonably assess the Applicant's risk of return?*

[27] Since the presumption that the applicable standard of review is that of reasonableness cannot be rebutted, it will apply to these questions (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65.

VI. Analysis

A. *Did the RAD err in its assessment of the evidence presented by the Applicant?*

[28] The RAD accepted several pieces of the Applicant's evidence but either declined to accept the following articles or did not explicitly mention them as being accepted:

> Marissa Newman, "Ministers back bill for companies to sue Israel boycotters", Times of Israel, November 5, 2017
>
> Marissa Newman, "Bill opening up Israeli BDS activists to lawsuits advances", Times of Israel, November 22, 2017
>
> Jonathan Lis, "Israeli Lawmakers Push Prison Time for Pro-boycott Activists", Haaretz, November 29, 2017

[29] The Applicant also submitted several articles written about his activism and asylum situation, as well as a note from his psychologist, translated Facebook messages from Israeli official Avi Ovadia, a petition to buy Mr. Paz "a ticket to Gaza", and other articles about the crackdown on pro-BDS activists, including arrests, the creation of a database for activists, denial of entry into Israel and even proposals from a Minister calling for "targeted killings" of BDS leaders.

[30] It is certainly established law that a decision-maker does not have to mention every piece of evidence in order to show that it was properly considered. In addition, the Applicant did not follow the required procedure for submitting evidence on appeal, which includes the requirement to demonstrate that a document is relevant and necessary under subsection 110(4) of the IRPA (*Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 (CanLII) at para 45).

[31] The RAD cites *Galamb v Canada (Minister of Citizenship and Immigration)*, 2016 FC 1230 where, as in the instant case, the applicant did not provide any submissions about how the evidence submitted met the IRPA requirements. As Justice Denis Gascon writes in *Galamb*,

> [20] In the circumstances, it cannot be said that the RAD's finding refusing the admissibility of new evidence does not fall within the range of possible, acceptable outcomes which are defensible in respect of the facts and law. The onus was on Mr. Galamb and Ms. Ganyi to provide full and detailed submissions as to how the new evidence they sought to file fell within the requirements of subsection 110(4) and how the evidence related to them, but they have failed to do so…

[32] Therefore, even if the RAD did choose to accept some of the Applicant's new evidence despite a lack of submissions from the Applicant about the newness or relevance of the evidence, the RAD acted reasonably given the clear requirements set out by the Rules and IRPA.

B. *Did the RAD err in failing to grant the Applicant a hearing?*

[33] Though I agree with the Applicant that the present case certainly deals with important issues such as freedom of speech, the importance of the issues is not part of the RAD's assessment in deciding whether to hold a hearing.

[34] As the Respondent put forth, subsection 110(3) of IRPA sets the general standard that the RAD should proceed on the basis of the RPD's record. Subsection 110(6) allows for an exception to be made when new evidence is submitted which (1) raises a serious issue with respect to the Applicant's credibility; (2) is central to the refugee claim being made; and (3) would, if accepted, justify allowing or rejecting the claim. However, even if those criteria are met, subsection 110(6) still allows the RAD to decide not to hold a hearing.

[35] The Applicant did not put forth any arguments about how subsection 110(6) relates to the evidence he submitted, and the RAD did a thorough assessment of the law as it is set out. Thus, I find that its decision not to hold a hearing was reasonable.

C. *Did the RAD err in concluding that state protection is available to the Applicant? In other words, did the RAD reasonably assess the Applicant's risk of return?*

[36] The case law on state protection is clear and unequivocal: a state is presumed to be able to protect its citizens unless an Applicant rebuts that presumption. A required element of such a rebuttal requires Applicants to show that they have exhausted all of the possible recourses available for state protection. The more democratic state's institutions are, the higher the burden Applicants have to show they have exhausted their options for state protection.

[37] I agree with the Applicant that human rights situation in Israel—and more specifically, the state's approach to dissenters and activists who are critical of its treatment of Palestinians—can be concerning. Certainly, several laws in place in Israel do not favour the Applicant's position as a BDS activist. However, Israel's actions towards dissidents does not mean that it is a non-democratic country and that the Applicant has discharged his burden to show he has sought state protection. As the RAD points out at paragraph 28 of its decision:

> …[Israeli] civilian authorities maintain effective control over security forces and police forces. When their fundamental rights are violated, including when they receive threats to their life or safety or when they believe that serious crimes, have been committed, including war crimes or actions that amount to torture, Israeli citizens can seek administrative and legal remedies. Judges are independent. Government organizations and NGOs conduct investigations and can help people whose rights have been violated, namely, by petitioning the Supreme Court directly.

[38] The efficacy of Israeli state protection has been assessed several times by our Court. As Justice LeBlanc writes in *Komatsia v Canada (Minister of Citizenship and Immigration)*, 2017 FC 695:

> [11] In *Canada (Attorney General) v Ward*, 1993 CanLII 105 (SCC), [1993] 2 SCR 689 [*Ward*], the Supreme Court of Canada reiterated that international refugee law was established "to serve as a back-up to the protection one expects from the state of which an individual is a national". It was also intended that refugee protection claimants "be required to approach their home state for protection before the responsibility of other states becomes engaged". This right was therefore meant to come into play only "in situations when that protection is unavailable, and then only in certain situations" (*Ward*, at p 709).
>
> [12] Thus, absent a complete breakdown of state apparatus, it should, according to a long line of authority, be presumed that state protection is available for a refugee claimant. […]
>
> [13] In this case, it is not in dispute that this presumption applies to the state of Israel, a democratic country with a professional police force and an independent judiciary. However, to rebut this presumption, the applicant had to demonstrate that he exhausted all of the objectively reasonable avenues to obtain state protection or that it would have been objectively unreasonable for him to do so (*Hinzman v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171 (CanLII), at para 46). In other words, doubting the effectiveness of state protection without reasonably testing it, or simply asserting a subjective reluctance to engage that protection, does not rebut the presumption of state protection (*Ruszo*, at para 33).

[39] The Applicant did submit evidence that shows that there is state-sanctioned animosity towards activists like himself and that the police and courts do not necessarily protect activists who seek their help (see, in particular, Jonathan Ofir's article "Adi Shosberger called Israeli soldiers 'terrorists' – and Israel has turned on her" on Mondoweiss). He also submitted evidence that two Israeli officials have threatened him, evidence that, though not directly considered by the RAD, was given significant attention in the RPD's decision at paragraphs 36 to 47.

[40] However, the Applicant does not show that he personally has sought state protection or assistance as a result of these threats, nor that he has been met with indifference or not been given adequate protection.

[41] Again, the Applicant has been interviewed by journalists, who reported the following:

> "It's been said that people like me will pay the price, and from what I understand by public statements made by the minister there is now a legal team at the Ministry of Strategic Affairs which is looking for all sorts of ways to hurt people like me legally - whether by criminal or civil methods. I'm very curious, but on the other hand I am not a masochist. As such I decided not to wait for Israel to make that decision but rather took pre-emptive measures."
>
> ***Ynetnews.com*, August 24, 2016**
>
> "Attorney Gilad Paz, 34, has based his request on the efforts of Public Security Minister Gilad Erdan and Interior Minister Arye Dery. This month, Erdan and Dery said they were setting up a taskforce to prevent BDS activists from entering the country, while they seek to expel BDS activists who have entered.
>
> […]
>
> A few days after the announcement by the two ministers, Paz bought a plane ticket, packed his bags and flew to Montreal. Immediately upon landing he filed an asylum request."
>
> ***Haaretz*, August 24, 2016**
>
> An Israeli man has sought asylum in Canada claiming that he is persecuted for his activism in the Boycott, Divestment and Sanctions movement. The legitimacy of his BDS credentials, however, are in question.
>
> […]
>
> Earlier this month, Erdan announced that a government task force formed to deport foreign activists calling to boycott Israel will also try to find punitive measures to take against their allies who are Israeli citizens or legal residents.
>
> "We've formed a legal team that will look at what can be done against boycott organizations even if they're Israeli," he told Army

> Radio. “Of course, it’s a more complicated matter because it comes in conflict with free speech.” Nevertheless, he said, “we will take real steps against them.”
>
> […]
>
> While Paz’s Facebook page is full of pro BDS postings, there appears to be no other confirmation of his views and Paz acknowledged to the Post that most of his activism is done “via social media”.
>
> According to BDS activists contacted by the Post, Gilad Paz is unknown in their circles.
>
> ***The Jerusalem Post,* August 24, 2016**

[42] The Applicant acknowledges in these articles that he left Israel before any sanction was taken against him and other Israeli activists, and obviously, before any future legislated sanction could be judicially challenged.

[43] The RAD has assessed all of the evidence and found that the Applicant has not rebutted the presumption that Israel is capable and willing to protect its citizens. It is not the role of our Court to re-weigh the evidence. The role of the Court is to assess whether the decision is justifiable, intelligible and transparent and falls within a range of possible, acceptable outcomes that are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47; *Vavilov* at para 99).

[44] As such, given that the RAD carefully considered multiple pieces of additional evidence from the Applicant as well as the National Documentation Package, and given it properly applied the jurisprudence on state protection, I do not find that its assessment of this issue is unreasonable. While the Applicant may possibly encounter difficulties in his home country, there

is no evidence on the record to show that he has attempted to seek protection and was denied such protection. The evidence also demonstrates that there are several avenues open to him and his family to seek protection from the state of Israel should they experience persecution of any kind.

VII. Proposed questions for certification

[45] At the end of the hearing, counsel for the Applicant requested additional time to formulate questions of general importance he viewed as being proper for certification.

[46] By letter dated December 20, 2019, he proposed the following two questions:

> Is the Refugee Appeal Division correct to consider the question of state protection solely on the general question of the protection of all Israeli citizens or must the Refugee Appeal Division address the personal characteristics of the applicant who has been directly threatened by the Public Security Minister and other top figures in the Israeli government?
>
> Does the Refugee Appeal Division have an obligation to consider the legal framework in Israel today, which provides for serious prosecution and probable prosecution for activists in favour of BDS movement? Is the Refugee Appeal Division under an obligation to address the unwillingness of the Israeli Government to ensure the rights of BDS activists?

[47] However, I agree with the respondent that these questions do not meet the threshold established by the Federal Court of Appeal to be properly certified. These questions would not be dispositive of an appeal, they do not transcend the interest of the Applicant, and they do not raise an issue of broad significance or general importance (*Lewis v Canada (Minister of Public Safety and Emergency Preparedness)*, 2017 FCA 130 at para 36).

[48] First, the criteria for state protection analysis have been reviewed by the Federal Court of Appeal on several occasions and are now settled law (*Mudrak v Canada (Minister of Citizenship and Immigration)*, 2016 FCA 178).

[49] Second, the RAD considered whether the Applicant's personal circumstances meant that he would not be able to avail himself of state protection should he return to Israel.

[50] Neither question is dispositive of this application, nor would they be dispositive of an appeal. As such, they will not be certified.

VIII. Conclusion

[51] The RAD's assessment of the Applicant's new evidence and its decision not to hold a hearing in light of that evidence were both reasonable. The Applicant has failed to rebut the presumption of state protection in Israel. He had a clearly established burden of proof, which he has failed to meet in order to qualify for refugee protection in Canada. As such, the Applicant's request for judicial review is dismissed.

JUDGMENT in IMM-2195-19

THIS COURT'S JUDGMENT is that:

1. The Application for Judicial Review is dismissed;

2. No question of general importance is certified.

"Jocelyne Gagné"
Associate Chief Justice

FEDERAL COURT

SOLICITORS OF RECORD

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