

Federal Court



Cour fédérale

Date: 20220217

Docket: IMM-1388-21

Citation: 2022 FC 213

Ottawa, Ontario, February 17, 2022

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

**LINA EL HRAICH
QAISAR CHIMALI
ABDALLAH CHIMALI
HAYA CHEMALI
OMAR CHEMALI**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of a decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board dated February 11, 2021, to deny the Applicants' claim for protection.

[2] The applicants are stateless Palestinians from Lebanon. They lived on temporary residence permits in the United Arab Emirates (UAE) sponsored by the children's father. The mother, the principal applicant, sought a divorce when the parents became estranged. When the father refused to grant the divorce, he threatened to have the mother and children deported to Lebanon where she fears for her life. The mother, along with her children, then came to Canada to seek refugee protection.

[3] For the reasons that follow, I find that the RPD decision was unreasonable, and the application is granted.

II. **Background**

[4] The principal applicant was born and raised in a Palestinian refugee camp in Lebanon. In 1998, she married another stateless Palestinian who had been born and raised in the UAE and had a temporary residence permit (TRP) to live and work there. The principal applicant moved to the UAE and has lived there on a TRP tied to her husband's employment and status as his dependent spouse. All four of their children were born in the UAE but do not have citizenship as it is not granted to children of foreign workers born in the country. Three of the children are minors. The oldest, Abdallah, was 18 at the time of the RPD hearing.

[5] The children may only remain in the UAE as temporary residents so long as they are under 18 and their father has a job as well as a willingness to sponsor the renewal of their permits. The permits expire every two years.

[6] The principal applicant and her children carry Lebanese Travel Documents for Palestinian Refugees.

[7] The parents separated in April 2018 when the mother learned of the father's infidelity. He left the family home and visited the children occasionally on weekends. In February 2019, the principal applicant travelled to Lebanon to visit her mother. At that time, she had an argument with the woman with whom her husband had an affair. The woman is said to be the niece of an extremist group leader. Shortly thereafter, this group leader threatened the principal applicant who then went into hiding before returning to the UAE.

[8] In an effort to reconcile with her husband, the principal applicant arranged for the family to visit the United States. While there, the couple had another argument and the husband left. He threatened to cancel their residency in the UAE should the mother and children attempt to return there. This would have resulted in their deportation to Lebanon.

[9] The principal applicant says that she waited for two days for her husband to return. When he did not, and as she had no money and knew no one in the United States, she contacted her uncle in Canada who advised her to seek protection here at the border. The applicants crossed the border and made a claim for protection on August 4, 2019.

[10] There was a delay in hearing the claim as consent to proceed was required from the father for the minor children. Abdallah communicated with his father for that purpose and consent was

eventually granted. The hearing proceeded on January 7, 2021, and a negative decision was rendered by the RPD on February 5, 2021.

III. **Decision under Review**

[11] The RPD found that the determinative issue is whether the applicants were at risk in a country of former habitual residence (CFHR). The Panel accepted that the principal applicant had established the UAE and Lebanon to be CFHRs. As for Abdallah and the three minor children, the Panel found the UAE to be their CFHR.

[12] In assessing whether the mother was a convention refugee, the Panel cited to *Thabet v Canada (Minister of Citizenship and Immigration)*, [1998] 4 FCR 21 [*Thabet*] where the Federal Court of Appeal articulated a two-part test for a stateless individual seeking protection. The individual must show that, on a balance of probabilities (1) he or she would suffer persecution in any CFHR, and (2) that he or she cannot return to any of his or her other CFHR.

[13] The Panel found that the applicants had expired UAE residency permits and that the requirement to have a valid UAE residency permit was a law of general application. The absence of a right to return to the UAE resulting from that law did not amount to persecution on a Convention ground. Since the husband continued to reside in the UAE and to be married to the principal applicant, the Panel considered that it remained open to the applicants to have their residency permits renewed by asking the husband to sponsor them or by discussing the matter with the UAE authorities.

[14] The Panel held that the potential of the applicants' deportation to Lebanon if they returned to the UAE did not have to be considered.

[15] In the result, the Panel found that the applicants had not established that they face a serious possibility of persecution for a Convention ground or, that on a balance of probabilities, that they would be personally subjected to a danger of torture, or face a risk to life, or risk of cruel and unusual treatment or punishment.

IV. **Issues and Standard of Review**

[16] The applicants have raised a number of issues about the reasonableness of the RPD decision. The applicants also assert that it was procedurally unfair for the Panel to not refer to the National Documentation Package for the UAE and thus breached a reasonable expectation that it would be considered in the determination of the claim.

[17] The respondent in turn has made a number of complaints about the applicants' approach to seeking judicial intervention in this matter. As described in the respondent's Further Memorandum of Argument, these issues arise from the applicants' description of what occurred during the RPD hearing and information within the possession and knowledge of the applicants at the leave stage. The respondent asserts that it is only with the benefit of the transcript of the hearing that what are described as "misrepresentations" and "contradictions" between the evidence and the principal applicant's affidavit have come to light.

[18] The respondent argues that the applicants cannot now complain about mistakes made by their former counsel before the RPD when they have failed to follow the protocol respecting *Allegations Against Counsel or Other Authorized Representative in Citizenship, Immigration and Protected Person Cases before the Federal Court* dated March 7, 2014 [*Protocol*].

[19] In my view, both parties have overstated the issues. I will note that counsel for the applicants, who was not their counsel at the RPD hearing, has acknowledged that mistakes were made in the presentation of the evidence and the representations made to the Panel at the conclusion of the hearing. Counsel also acknowledged errors in the written argument submitted to this court which were based, in part, from the use of an informal transcript prepared by an assistant in his office.

[20] Based on my review of the record, the legal assistance afforded the applicants before the RPD does not appear to have been adequate. It appears, for example, that the former counsel did not realize that the children had to establish a claim before the UAE as their sole CFHR. Present counsel chose not to invoke the court protocol and has focused on the errors attributable to the Panel. At this stage, I see no reason to question that approach. The sole issue, in my view, is the reasonableness of the RPD decision.

[21] As determined by the Supreme Court of Canada in *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 30, reasonableness is the presumptive standard for most categories of questions on judicial review, a presumption that avoids undue interference with the administrative decision maker's discharge of its functions. While there are

circumstances in which the presumption can be set aside, as discussed in *Vavilov*, none of them arise in the present case.

[22] To determine whether the decision is reasonable, the reviewing court must ask “whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision” (*Vavilov* at para 99). The party challenging the decision bears the burden of showing that it is unreasonable (*Vavilov* at para 100).

[23] The Supreme Court cautioned, at para 133, that justification was not to be viewed in a singular manner:

Central to the necessity of adequate justification is the perspective of the individual or party over whom authority is been exercised. Where the impact of a decision on an individual’s rights and interests is severe, the reasons provided to that individual must reflect the stakes. The principle of responsive justification means that if a decision has particularly harsh consequences for the affected individual, the decision-maker must explain why it’s decision best reflects the legislature’s intention. This includes decisions with consequences that threaten an individual’s life, liberty, dignity or livelihood.

V. Analysis

[24] Both the principal applicant and her adult son, Abdallah, testified during the RPD hearing as to why they have no legal right or practical ability to return to the UAE and why they fear that the agent of persecution could track them down there. Their TRP’s had expired (or, in the case of the last-born child, would shortly expire) and they feared deportation to Lebanon where, the principal applicant testified, her life had been threatened. They both testified that the father had

threatened to revoke their residency permits during the visit to the United States which would have also exposed them to potential deportation.

[25] The Panel made no negative finding as to credibility with respect to either the principal applicant or her son. It was thus incumbent on the Panel to explain why it found that the applicants could return to the UAE despite their testimony that the mother was seeking a divorce and that the husband had threatened to cancel her residency and send the applicants to Lebanon. It is not disputed that the principal applicant did not have the power to obtain a divorce in the UAE independently as that is reserved to men. And Abdallah's testimony was to the effect that his father had expressed no interest in caring for the children or in having them return to the UAE.

[26] In my view, it was unreasonable for the Panel to find that the applicants could return to the UAE given the temporary nature of their status which had, in any event, expired, save for the youngest child, at the time of the hearing. Moreover, it was an error for the Panel not to have assessed the principal applicant's risk in Lebanon as that is where she would have been deported from the UAE being an individual without legal status.

[27] The Federal Court of Appeal in Appeal in *Thabet* found that an individual could be considered "returnable" to a CFHR only if the evidence established that there is nothing preventing a claimant from reacquiring status. In this case, the principal applicant's uncontested testimony was that her husband threatened to cancel her residency when it was still valid. This and the fact that her TRP was by then expired, both established that she cannot through

individual efforts reacquire status (even temporarily) in the UAE. Moreover, it would be contrary to the *Gender Guidelines* and the human rights purpose of refugee determination to require the principal applicant to stay in a marriage where she has been threatened with deportation by her husband, in order to try to save herself from further deportation and/or persecution.

[28] There is no indication that the Panel considered the National Documentary Package on the UAE before it rendered the decision. The Court has found that where central elements of a claim, such as the right to return to a CFHR for a stateless person, are at issue, the RPD should examine and refer to the available country documentation: *Qassim v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 226 at para 58 and *Rahman v Canada (Citizenship and Immigration)*, 2016 FC 1355 at paras 22-23.

[29] While their Basis of Claim (BOC) forms identified risk only in Lebanon and that was the focus of submissions from their then counsel, the principal applicant and her son both testified that they were unsure whether the specific agent of persecution and his extremist group had the means to find and cause them harm in the UAE. The RPD may have concluded that the oral evidence conveyed only a possibility rather than a well-founded fear of the agent of persecution in the UAE but there is no indication that the issue was considered.

VI. **Conclusion**

[30] I am satisfied that the applicants have met their onus to establish that the decision does not bear the hallmarks of reasonableness and is not justified in relation to the relevant factual and legal constraints that bear on it. In particular, the Panel appears to have assumed that the

principal applicant could reacquire status in the UAE simply by virtue of being married, contrary to the evidence.

[31] The decision must, therefore, be returned for reconsideration by a differently constituted panel. No serious questions of general importance were proposed, and none will be certified.

JUDGMENT IN IMM-1388-21

THIS COURT'S JUDGMENT is that the application is granted. No questions are certified.

"Richard G. Mosley"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1388-21

STYLE OF CAUSE: LINA EL HRAICH, QAISAR CHIMALI,
ABDALLAH CHIMALI, HAYA CHEMALI
OMAR CHEMALI V THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: HEARD VIA VIDEOCONFERENCE OTTAWA &
TORONTO

DATE OF HEARING: JANUARY 18, 2022

JUDGMENT AND REASONS: MOSLEY J.

DATED: FEBRUARY 17, 2022

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