

Federal Court



Cour fédérale

Date: 20220802

Docket: IMM-6693-21

Citation: 2022 FC 1155

Ottawa, Ontario, August 2, 2022

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

**RABAB NOUREDDINE EL-JECHI
LAYAL SAMER OMAR ARAFEH**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Rabab Nouredine El-Jechi seeks judicial review of a decision of the Refugee Protection Division [RPD] of the Immigration and Refugee Board [IRB]. The RPD found that Ms. El-Jechi was excluded from refugee protection because she had committed a serious-non-political crime

prior to entering Canada by abducting her minor daughter from their home in the United Arab Emirates [UAE].

[2] The refugee claim of Ms. El-Jechi's minor daughter, Layal Samer Omar Arafeh, was rejected on the ground that she holds Jordanian citizenship and would not be at risk of persecution in Jordan.

[3] The RPD unreasonably found that the only mitigating circumstances favouring Ms. El-Jechi were the absence of any prior criminal history and the fact that her alleged offence did not involve violence. Layal's refugee claim was inextricably intertwined with that of her mother. The application for judicial review is therefore allowed for both Applicants.

II. Background

[4] Ms. El-Jechi is a stateless Palestinian woman of Lebanese origin. She is 48 years old. Her daughter Layal is 12 years old. Both were born in the UAE, where they had temporary residence status.

[5] Ms. El-Jechi's status in the UAE was initially sponsored by her father. After completing her education, Ms. El-Jechi obtained employment with the Abu Dhabi Commercial Bank. The bank then became her sponsor.

[6] On April 5, 2006, Ms. El-Jechi married her now estranged husband, Samer Omar Baker Arafeh. Mr. Arafeh is a citizen of Jordan residing in the UAE as a temporary foreign worker. The couple lived together for approximately one year but divorced in January 2009. They remarried on July 22, 2009 and travelled to Syria for a honeymoon.

[7] The couple did not live together following their return to the UAE. Ms. El-Jechi was Mr. Arafeh's second wife. She lived with her parents while Mr. Arafeh lived with his first wife and their two sons. Layal was born on May 10, 2010. It was around this time that Ms. El-Jechi sought a divorce from Mr. Arafeh for the second time.

[8] The application for divorce took longer because the couple now had a child. Prior to a ruling on the divorce application, Ms. El-Jechi left the UAE for the United States of America with her parents, sister, and daughter. The family travelled to the US on August 12, 2015 and entered Canada on September 16, 2015. Upon crossing the border, each made a claim for refugee protection.

[9] Ms. El-Jechi had permission from her former husband to travel with their daughter to the US, but not to Canada. The Abu Dhabi Enforcement Division Court issued a warrant for her arrest on October 11, 2015.

[10] In the meantime, Ms. El-Jechi obtained an Islamic divorce and filed a divorce application with the Ontario Superior Court of Justice. The Ontario application is ongoing.

[11] The RPD rejected Ms. El-Jechi's and her daughter's refugee claims on August 6, 2021.

III. Issue

[12] The sole issue raised by this application for judicial review is whether the RPD's decision was reasonable.

IV. Analysis

[13] The RPD's decision is subject to review by this Court against the standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov] at para 10). The Court will intervene only where "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100).

[14] The criteria of "justification, intelligibility and transparency" are met if the reasons allow the Court to understand why the decision was made, and determine whether the decision falls within the range of acceptable outcomes defensible in respect of the facts and law (*Vavilov* at paras 85-86, citing *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[15] Ms. El-Jechi challenges the RPD's decision on several grounds. One of these is determinative. The application for judicial review must be allowed because the RPD unreasonably found that the only mitigating circumstances favouring Ms. El-Jechi were the

absence of any prior criminal history and the fact that her alleged offence did not involve violence.

[16] Pursuant to s 98 of *Immigration and Refugee Protection Act*, SC 2001, c 27 and Article 1F(b) of the *Convention Relating to the Status of Refugees*, Can TS 1969 No 6 [Convention], a person with respect to whom there are serious reasons for considering that he or she has committed a serious non-political crime outside the country of refuge prior to admission to that country as a refugee is excluded from protection. Child abduction may be considered a serious non-political crime for the purposes of these provisions (*Kovacs v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1473 at para 27).

[17] The RPD did not accept Ms. El-Jechi's argument that she fled the UAE in order to protect her daughter and herself from imminent harm. Pursuant to s 285 of the *Criminal Code*, RSC 1985, c C-46, no one shall be found guilty of child abduction if the court is satisfied that this was necessary to protect the child from danger of imminent harm, or if the person charged with the offence was escaping from danger of imminent harm.

[18] Despite rejecting Ms. El-Jechi's defence of imminent harm, the RPD accepted much of her evidence respecting the difficult conditions she and her daughter faced in the UAE. In particular, the RPD accepted that:

- (a) Mr. Arafah would "accuse [Ms. El Jechi] of alienating Layal from him, then threaten to take Layal." This occurred in Layal's presence, causing her to fear that she may be taken away from her mother.

- (b) The judge in the divorce proceedings told Ms. El-Jechi that Mr. Arafeh had a right to his daughter, and there was a chance he would obtain custody of Layal.
- (c) Mr. Arafeh has a temper and whenever he was angry, he would shout at Layal, using phrases like “stop it” or “don’t cry” or “don’t talk” or “don’t shout.”
- (d) According to a psychiatric assessment prepared by two physicians at SickKids Hospital in Toronto, Layal recalled her father “yelling” and “slapping my brothers in the face”: “when I was younger he would force me to go out with him but I never wanted to go out with him because he would yell at me and get mad at me”.
- (e) The psychiatric assessment also reported Layal as saying: “I never really liked my dad, I never had a good dad” and “he wasn’t a good father.” Layal said that her father attempted to “take me away from my mom” during visits, and “when I would say I did not want to go he would yell, ‘If you don’t want to come you can get out of my car!’”
- (f) The unpleasant conflict between Layal’s parents, while not a form of abuse, caused her to experience “agony”.
- (g) Legally, Mr. Arafeh can have up to four wives. When they were engaged, Mr. Arafeh told Ms. El-Jechi that he had a first wife and children, but she did not know he was still legally married. Discovering this fact led to conflict, because the trust was broken.

- (h) Mr. Arafeh did not want Ms. El-Jechi to work and created difficulties for her at her place of employment. He was angry and aggressive at times. Mr. Arafeh would yell at her and verbally abuse her in front of others.
- (i) Ms. El-Jechi's pregnancy "seemed to make [Mr. Arafeh] more angry and aggressive" and he "would create problems unreasonably". The relationship deteriorated further after Layal was born in 2010.

[19] The RPD did not doubt that Mr. Arafeh was verbally abusive towards Ms. El-Jechi, but found portions of her evidence not to be credible. The RPD concluded that Ms. El-Jechi likely exaggerated details of the abuse during the second marriage. Nevertheless, the RPD explicitly found that Ms. El-Jechi experienced emotional and verbal abuse during her relationship with Mr. Arafeh.

[20] Ms. El-Jechi testified that she had difficulty obtaining a second divorce, because women have limited rights in UAE. She said that a woman's testimony in court is worth half that of a man's. She also stated that her desires were ignored in court because she is a woman, and no one listened to her. The RPD noted that she was able to obtain a first divorce from a court in the UAE, despite her husband's objections, and without the assistance of a lawyer.

[21] The RPD concluded as follows:

Based on the available evidence, the panel finds that the principal claimant did not leave UAE to escape a danger of imminent harm, nor was removing the minor claimant necessary to protect her from a

danger of imminent harm. It is more likely than not that the principal claimant used the refugee process to gain entry to Canada, and to circumvent Mr. Arafeh's access to the minor claimant and visitation rights. She also feared that Mr. Arafeh would deprive her of their daughter, and acknowledged this much upon entering Canada, informing the interviewing officer at the port-of-entry officer [*sic*] that she "is claiming refugee status in Canada because she is worried her husband will take her 5-year-old as he has threatened to do so." However, there was no danger of imminent harm.

[22] Despite Ms. El-Jechi's testimony and country condition reports regarding the unequal treatment of men and woman in the UAE, the RPD relied on Canadian jurisprudence to describe family court as a place "where power imbalances between parents can be addressed". Ms. El-Jechi argues that the RPD conflated Canadian family law principles with those of the UAE. She says that one reason she fled to Canada was to obtain the protection of courts that are impartial and give equal effect to the rights of both parents.

[23] The Federal Court of Appeal has identified a number of relevant factors when determining the seriousness of an offence for the purposes of Article 1F(b) of the Convention: the nature of the act; the actual harm inflicted; the form of procedure used to prosecute the crime; the nature of the penalty for the crime; and whether most jurisdictions would consider the act in question as a serious crime (*Jayasekara v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 404 [*Jayasekara*] at paras 38-44).

[24] The purpose of the "*Jayasekara* factors" is to ensure a degree of parity between an international perspective and a Canadian one, given that there can be significant differences. The Federal Court of Appeal has also affirmed that the interpretation of the exclusion clause in Article 1F(b) of the Convention requires an evaluation of the elements of the crime, the mode of

prosecution, the penalty prescribed, the facts, and the mitigating and aggravating circumstances underlying the conviction (*Jayasekara* at para 44).

[25] In this case, the RPD noted that Ms. El-Jechi had “physical custody” and thus “lawful care” of Layal. The RPD found that Ms. El-Jechi made a premeditated decision to travel to Canada with her daughter, after telling her husband they were destined for the US, with the intent of remaining in Canada permanently. This had the effect of depriving Mr. Arafeh of “possession of the child”. The RPD found these elements suggested a level of seriousness.

[26] The RPD distinguished between three different categories of child abduction cases: impulsive abduction, retribution abduction and hospital abduction (citing *R v Rodrigues*, 2019 ONSC 2752 [*Rodrigues*] at paras 29-32). The RPD found that Ms. El-Jechi had committed a retribution abduction, which the Court in *Rodrigues* described as occurring in the context of an acrimonious custody fight with one parent absconding with the child to a jurisdiction where Canada has no ability to enforce its laws (at para 30).

[27] The RPD found there were a number of aggravating factors in this case. Ms. El-Jechi expressed no remorse or guilt, she acted in a manner that was planned and premeditated, and she deprived Mr. Arafeh of six years of parenting Layal. The RPD held that this deprivation caused severe damage to Layal’s relationship with Mr. Arafeh, despite acknowledging that Layal has generally refused to speak with her father since her arrival in Canada.

[28] The RPD found the only mitigating circumstances were Ms. El-Jechi's lack of any prior criminal history and the fact that the alleged offence did not involve violence. It is impossible to reconcile this conclusion with the many considerations advanced by Ms. El-Jechi's in support of the attempted defence of imminent harm. While the RPD disagreed that these factors justified the alleged offence of child abduction, it did not take issue with most of the underlying facts.

[29] The RPD's reliance on Canadian family law jurisprudence, such as the decision of the Ontario Court of Appeal in *R v Li*, 2017 ONCA 509 [*Li*], was misplaced. *Li* involved the abduction of a Canadian child to China. There was no evidence that the child's father was abusive, and prior to the abduction both parents were under the jurisdiction of Canadian courts.

[30] Mr. Arafah's history of abusive behaviour towards Ms. El-Jechi and Layal, coupled with the diminished rights of women and girls under UAE law, were mitigating factors that ought to have been considered by the RPD in its assessment of whether the alleged offence of child abduction was sufficiently serious to merit exclusion from refugee protection. The failure of the RPD to address the numerous factors advanced by Mr. El-Jechi's in support of her defence of imminent harm, most of which were accepted by the RPD, renders its assessment of aggravating and mitigating factors unreasonable.

[31] The RPD assessed Layal's refugee claim against Jordan, a country where she holds citizenship but has never visited. The RPD expressed sympathy for the concerns that Layal has "very little knowledge" of Jordan, and would be separated from her mother if she were to go there. However, the RPD concluded it was speculative to assume that Layal would be separated

from her mother, noting that Ms. El-Jechi was able to live in the UAE for most of her life as a temporary resident. The RPD observed that Ms. El-Jechi is an educated woman who previously secured temporary residence status in the UAE through an employer who sponsored her.

[32] The RPD's assessment of Layal's claim was premised on the assumption that she would not be separated from her mother. The two claims are therefore inextricably intertwined, and both must be returned to the RPD for redetermination.

V. Conclusion

[33] The application for judicial review is allowed, and the matter is remitted to a differently-constituted panel of the RPD for redetermination.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed,
and the matter is remitted to a differently-constituted panel of the RPD for redetermination.

“Simon Fothergill”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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