Federal Court Cour fédérale

Date: 20221222

Docket: IMM-9581-21

Citation: 2022 FC 1788

Toronto, Ontario, December 22, 2022

PRESENT: Madam Justice Go

BETWEEN:

SHARBIL ASHKAR
BREJET ASHKAR
ELINOR ASHKAR
NASER ASHKAR

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Sharbil Ashkar [Principal Applicant], Brejet Ashkar [Principal Applicant's wife], and their minor children Elinor and Naser [together, the "Applicants"] seek judicial review of the

decision of the Refugee Appeal Division [RAD] to uphold the Refugee Protection Division's [RPD] decision denying the Applicants' claim for refugee protection.

[2] The Applicants are Palestinian Arabs and Christians. They are citizens of Israel and resided in that country before coming to Canada in 2018. They applied for refugee protection in April 2019, based on the fear of persecution from a non-state actor, MS, a Muslim man who pursued and threatened the Applicants after having an argument with the Principal Claimant about religion.

[3] In a decision dated May 21, 2021, the RPD denied the Applicants' claims due to credibility concerns and on the grounds that they did not rebut the presumption of state protection. On appeal, the RAD upheld the RPD's decision on December 7, 2021, finding state protection to be the determinative issue [Decision]. The RAD confirmed that the Applicants were neither Convention refugees nor persons in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27. The Applicants challenge the Decision.

[4] I dismiss the application as I find that the RAD reasonably determined the issue of state protection.

II. Issues and Standard of Review

[5] The Applicants acknowledge that the RAD noted the proper legal test regarding operational adequacy but argue that it failed to actually apply it. The Applicants argue that the

Decision was unreasonable because the RAD (1) failed to use the proper legal test to assess state protection, and (2) failed to respond to and misinterpreted the evidence.

[6] The Respondent argues that the RAD reasonably determined that the Applicants failed to rebut the presumption of state protection by applying the correct legal test for state protection and adequately addressing the evidence before it.

[7] The parties agree that these issues are reviewable on a reasonableness standard, per *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[8] A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision-maker: *Vavilov* at para 85. Whether a decision is reasonable depends on the relevant administrative setting, the record before the decision-maker, and the impact of the decision on those affected by its consequences: *Vavilov* at paras 88-90, 94, 133-135.

[9] For a decision to be unreasonable, the Applicants must establish the decision contains flaws that are sufficiently central or significant: *Vavilov* at para 100. Not all errors or concerns about a decision will warrant intervention. A reviewing court must refrain from reweighing evidence before the decision-maker, and it should not interfere with factual findings absent exceptional circumstances: *Vavilov* at para 125. Flaws or shortcomings must be more than superficial or peripheral to the merits of the decision, or a "minor misstep": *Vavilov* at para 100.

III. Analysis

A. *Did the RAD apply the proper legal test for state protection?*

[10] According to the Applicants, they received attacks perpetrated by MS and some associates, including sound bombs being thrown at their home on multiple occasions, beginning on October 20, 2018. The Applicants also described an incident involving MS seeking out the minor Applicants at their school on October 22, 2018. The Principal Applicant's wife reported the incident to the police, who came to the Applicants' home to conduct interviews. The police said they would look into it and returned the same evening stating that they had spoken to MS, who denied responsibility. The police notified the Applicants that there was nothing further they could do. The Applicants never attempted to report to the police again following further attacks between October and November 2018, and fled to Canada instead.

[11] In the Decision, the RAD found that it was reasonable to expect the Applicants to make efforts beyond the one attempt to exhaust the avenues of recourse available to them. The RAD relied on the objective evidence pointing to mechanisms for contesting police (in)action and civil society organizations that could have assisted the Applicants in accessing these mechanisms. As the Applicants did not make efforts to access the operational measures implemented in Israel to strengthen police accountability, the RAD found that the Applicants could not demonstrate that these measures were ineffective.

[12] The Applicants submit that the adequacy of state protection must be assessed at the operational level. While efforts to implement such protection are relevant, the decision-maker must consider the capacity to implement protective measures at a practical level for the

individual(s) involved. As such, the Applicants submit that the legal test is not what measures have been introduced but how well one is protected: *Magonza v Canada (Citizenship and Immigration)*, 2019 FC 14 at paras 71-75 [*Magonza*]; *AB v Canada (Citizenship and Immigration)*, 2018 FC 237 at para 17; *Poczkodi v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 956 [*Poczkodi*] at paras 36-37; *Galamb v Canada (Citizenship and Immigration)*, 2016 FC 1230 at paras 32-33; *Kovacs v Canada (Citizenship and Immigration)*, 2015 FC 337 at para 71.

[13] Rather than assessing the operational adequacy of state protection, the Applicants submit that the RAD focused on the measures of state protection undertaken by the government of Israel to reject the Applicants' claim that the state would be unable or unwilling to protect them. The Applicants assert that this erroneous focus led to the RAD relying on the number of times the Applicants sought state protection and unreasonably holding that number against them.

[14] The Applicants also assert that the highly contextual state protection analysis might differ with respect to a common ethnicity and nationality. As such, it is possible for a state to provide adequate protection generally but still fail to provide it to some of its citizens: *Lakatos v Canada (Citizenship and Immigration)*, 2018 FC 367 [*Lakatos*] at para 22. The Applicants submit therefore that the contextual analysis rests on claimants' personal circumstances, which may reveal instances where it is "objectively reasonable for a claimant to take only limited steps to test state protection, depending on the state's ability and willingness to provide the same": *Lakatos* at para 22, relying on *Poczkodi* at para 40 and *Bozik v Canada (Citizenship and Immigration)*, 2017 FC 961 [*Bozik*] at paras 29-30.

[15] The Applicants argue that the case at bar represents such an instance; in addition to referring to the highly developed democratic state of Israel, the RAD was also required to consider all aspects of state protection, including the well-documented failure to protect its Arab population.

[16] Specifically, the Applicants take issue with the RAD's reliance on the US Department of State's "Country Report on Human Rights Practices" for Israel, West Bank, and Gaza [US Report], which was included in the National Documentation Package [NDP]. In the Decision, the RAD cited the US Report to find that the Israeli government was making progress in addressing discrimination against Arab citizens. The Applicants assert that the RAD unduly relied on NDP evidence to conclude that since the state was making progress, the Applicants could not establish that state protection would be unavailable to them.

[17] The Applicants further rely on *Magonza* to demonstrate that this Court has warned against focusing the state protection analysis on measures undertaken, rather than the practical operational adequacy of the measures: at para 75. By focusing on the fact that the Israeli government had introduced measures to combat discrimination against Israeli Arabs and finding that state protection was therefore available, the RAD concluded that the Applicants' one failed attempt at accessing state protection was insufficient to rebut the presumption.

[18] I do not disagree with the Applicants' submission that state protection analysis is highly contextual, nor do I take issue with the assertion that even highly developed democratic states

can and do often provide differential level of protection to its citizenry, as a result of race-based, faith-based and other forms of discrimination.

[19] Indeed, this Court confirmed once again in *Jaworowska v Canada (Citizenship and Immigration)*, 2019 FC 626 that assessing the adequacy of state protection is a highly factual exercise, which should take into account the claimant's identity. The Court stated at para 45:

> The adequacy of state protection is in each case highly fact dependent. Almost inevitably, the adequacy of protection in a country is linked to the circumstances of the particular claimant(s) before a decision-maker and their ability to access state resources. Generally, a finding that adequate state protection is not available to a claimant in one case is not determinative of the adequacy of that protection to other claimants who belong to the same group or segment of a country's population. The analysis of state protection is too complex to give rise to a single answer of general application. A decision-maker is required to begin its analysis with an assessment of the nature of the state in question and its security and judicial processes; to then assess the operational effectiveness of those processes in the context of an identified group to which the claimants belong; and to analyse the ability and actions of the particular claimants in accessing the available state protection.
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> [Emphasis added]

[20] However, in this case, I am not persuaded that the RAD failed to adopt a contextual approach, failed to recognize the discrimination faced by Israeli Arabs, or focused erroneously on the state's efforts instead of operational adequacy in finding that the Applicants have not rebutted the presumption of state protection.

[21] It is trite law that all refugee claimants must show that the state from which they are seeking protection is unable to protect them. As submitted by the Respondent, the presumption of state protection as the starting point stems from the rationale underlying the international

refugee protection regime, which has been characterized as “surrogate or substitute protection” that is “activated only upon failure of national protection”: *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 [*Ward*] at para 25.

[22] Rebutting the presumption of state protection requires “clear and convincing” evidence of the state’s inability to provide protection, which need not be perfect, but adequate: *Ward* at para 57; *Flores Carrillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94 at para 19; *Komatsia v Canada (Citizenship and Immigration)*, 2017 FC 695 at para 12.

[23] In the context of this case, the RAD not only set out the proper legal test, but it reasonably assessed the adequacy of state protection on an operational level in line with the contextual analysis required by the jurisprudence.

[24] The RAD acknowledged that there is discrimination in Israel against minorities like Arab Christians. The RAD also acknowledged the country condition evidence demonstrating the discrimination against Arab communities in Israel, which results in higher levels of crime and lower levels of trust toward the police. The RAD found that this evidence of discrimination aligned with the Applicants’ position. However, the RAD also pointed out that the Israeli government has acknowledged these issues and taken targeted efforts to address them.

[25] Quoting from the US Report, the RAD noted some of the measures adopted by the Israeli government, including “opening a number of new police stations in Arab communities, enhancing trust with the community, enhancing communication in Arabic, enhancing community policing, and increasing enforcement.” The RAD then concluded that “[t]his evidence establishes

that the Israeli authorities have made targeted efforts to implement measures at the operational level aimed at enhancing their ability to provide state protection to Israeli Arabs like the Applicants." The RAD's reasoning, in my view, confirmed that it conducted an assessment of the operational effect of the said measures.

[26] The Applicants also argue that the proposition that claimants must exhaust all avenues of assistance open to them before rebutting the presumption of state protection should be more contextual. The Applicants rely on *Bozik,* where the Court set aside a decision of an officer who found that the applicants failed to exhaust all avenues of assistance open to them. The Court concluded that the officer failed to address the country condition evidence on the unwillingness of the police in Hungary to assist Roma citizens: *Bozik* at para 31.

[27] I note, however, in *Bozik,* the Court specifically refers to the 'spectrum of democracy' concept and stated that "[a]n applicant may be required to exhaust all avenues of recourse available to her or him in a developed democracy such as the United States or Israel": at para 29.

[28] The Respondent maintains that the RAD correctly applied the state protection analysis, including by addressing the Applicants' personal circumstances, and thereby took a contextual approach. The Respondent relies on *Burai v Canada (Citizenship and Immigration)*, 2020 FC 966 [*Burai*] to demonstrate that a contextual approach necessarily requires the RAD to have sufficient evidence before it to find in each specific case whether there is adequate state protection: at para 33.

[29] In *Burai*, the Court reviewed the numerous cases where the Court has both granted and rejected applications for judicial review on state protection determinations in the context of Roma citizens of Hungary. At para 33, the Court summarized:

> As already noted by this Court, the situation in Hungary is difficult to gauge and the assessment of the adequacy of state protection will depend on the evidence in each specific case. Sometimes state protection will be adequate, sometimes it will not (*Ruszo 2018* at para 28; *Olah v Canada (Citizenship and Immigration)*, 2016 FC 316 at para 35; *Molnar v Canada (Citizenship and Immigration)*, 2012 FC 530 [*Molnar*] at para 105). As reflected by the submissions of Mr. Burai and Mrs. Forgacs, there are indeed numerous precedents where this Court has granted applications for judicial review and quashed state protection determinations with regard to Roma citizens from Hungary and other countries. Conversely, the reverse is also true. In the end, each matter must be considered and decided on its own facts and merits. The starting point is the decision itself and what the reasons actually say, with the recognition that the administrative decision maker has the primary responsibility to make this type of factual findings.
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> [Emphasis added]

[30] I find that the Court's analysis in *Burai* can be aptly applied to the case at hand. The Applicants have not persuaded me that the RAD in this case failed to apply the proper test. The RAD acknowledged the test to be applied with respect to state protection. It recognized the discrimination of Arab Israelis like the Applicants based on NDP evidence, and reasonably assessed the adequacy of state protection by focusing on the measures adopted by the state at the operational level.

B. *Did the RAD unreasonably respond to the evidence or misinterpret it in its state protection finding?*

[31] The Applicants argue that the RAD unreasonably responded to the evidence before it, citing three errors in particular.

[32] First, the Applicants submit that the RAD selectively applied evidence within the same material. The Applicants refer to the RAD's reliance on the US Report in finding that there was adequate state protection in Israel due to the measures to target discrimination against Arab Israelis. However, the Applicants point out that within the same US Report, there was contradictory evidence detailing the inadequacy of state protection for Arab Christians in Israel. The Applicants highlight an excerpt which states that minorities like Arab Christians continue to face high levels of crime and violence and that the causes include a low level of policing:

> There were multiple instances of security services or other citizens racially profiling Arab citizens. Some Arab civil society leaders described the government's attitude toward the Arab minority as ambivalent; others cited examples in which Israeli political leaders incited racism against the Arab community or portrayed it as an enemy.

[33] Second, the Applicants take issue with the RAD's treatment of an article submitted as new evidence [Article], which the Applicants maintain demonstrates the "ongoing intimidation and retaliation against Israeli Arabs by the police." The Article detailed the arrests of over 1000 people following conflict between Israel and Hamas, a vast majority of whom were Israeli Arabs. The Article suggested that these arrests were discriminatory and amounted to a campaign of intimidation and retaliation against Israeli Arabs.

[34] At the hearing, the Applicants added another ground, referring to an email they received from a relative alleging that the police "did nothing" about an attack of the relative's home. The

Applicants argued that this was part of the "evidence" that demonstrated that other similarly situated individuals were let down by the Israeli police. I note however that the RAD had ruled the email inadmissible as new evidence because the identity of the sender could not be confirmed. The Applicants never challenge the RAD's refusal to admit this new evidence and it is inappropriate for them to rely on it as part of the judicial review application.

[35] In any event, I find no errors with respect to the RAD's consideration of the evidence. Instead, I agree with the Respondent that the passage from the US Report relied on by the Applicants does not contradict the RAD's finding. The burden was on the Applicants to provide "clear and convincing evidence" that Israeli police would or could not offer them protection. It was not unreasonable for the RAD to find that the Applicants did not rebut assumption for state protection solely because the police did not arrest MS after the Applicants went to the police on one occasion and because there is societal discrimination against Arabs in Israel.

[36] I also find that the RAD reasonably assessed the Article and concluded that it failed to establish that the Applicants would not have access to adequate state protection in Israel. The RAD pointed out the context within which the arrests were made, in that most of the arrests occurred around political protests. As such, the RAD found that the allegations of police misconduct were targeted amongst those involved in political protests rather than at the Israeli Arab community at large, and that the Applicants have not alleged any participation in political protests. Based on these reasons, the RAD found the Article unpersuasive on how Israeli authorities would treat citizens who approach them for protection as victims of crime. The RAD

concluded that the Applicants' identity as Israeli Arabs was insufficient to establish that they face a serious possibility of persecution by the police.

[37] Other than stating that the Article confirms that Israeli Arabs like the Applicants cannot expect to obtain adequate state protection from the police, the Applicants offer no submissions as to why the RAD's analysis regarding the Article was unreasonable. Nor do I find any basis for interfering with the RAD's findings on a reasonable standard.

[38] While a different decision-maker may have come to a different conclusion about the issue of state protection for Arabs in Israel under a different set of facts, in light of the analysis conducted by the RAD in this case and the evidence before it, I cannot conclude the Decision was unreasonable.

[39] The RAD examined the Applicants' circumstances and the documentary evidence, particularly concerning police treatment of the Israeli Arab population, and conducted a detailed and thorough analysis based on the record. The Decision thus "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Vavilov* at para 86.

IV. Conclusion

[40] The application for judicial review is dismissed.

[41] There is no question for certification.

JUDGMENT in IMM-9581-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question for certification.

"Avvy Yao-Yao Go"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-9581-21
STYLE OF CAUSE:	SHARBIL ASHKAR, BREJET ASHKAR, ELINOR ASHKAR, NASER ASHKAR v MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD VIA VIDEOCONFERENCE
DATE OF HEARING:	NOVEMBER 30, 2022
JUDGMENT AND REASONS:	GO J.
DATED:	DECEMBER 22, 2022

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