Federal Court  Cour fédérale

Date: 20240118

Docket: IMM-1038-22

Citation: 2024 FC 64

Ottawa, Ontario, January 18, 2024

PRESENT: Mr. Justice Pentney

BETWEEN:

MARGALIT LEVI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Margalit Levi, is a citizen of Israel who obtained refugee protection in Canada in 2004. She seeks judicial review of the decision of the Refugee Protection Division [RPD] that granted the Respondent Minister's application to cease her refugee protection because she had reavailed herself of the protection of the state of Israel.

[2] The Applicant claims that the RPD decision is unreasonable because its assessment of her subjective intent is flawed, and the reasons fail to grapple with key elements of her case.

[3] For the reasons that follow, I find that the RPD decision is unreasonable, because it failed to consider all of the factors that are relevant to assessing the Applicant's subjective intent, as required by binding jurisprudence.

I. Background

[4] The Applicant is an Israeli citizen. After marrying an Arab national of Islamic faith, despite the objections of her sons from a previous marriage, she faced abuse from her four children and anti-Muslim fanatics in Israel. She and her husband came to Canada and claimed refugee protection in February 2006. The Applicant was granted refugee status in Canada in August 2007, and became a permanent resident in August 2008. She subsequently separated from and divorced her second husband.

[5] Since obtaining permanent residence, the Applicant returned to Israel on three occasions to care for her mother. She first returned in 2009, using her Israeli passport, and stayed for three weeks. The Applicant explained that her mother had become very ill, and she had to go to Israel to personally arrange for her mother's health insurance and to find a personal support worker to assist her mother. During this stay, the Applicant took her mother to hospital several times. Nobody, including her children, knew about her presence in Israel.

[6] In March 2010, the Applicant went back to Israel again after learning that her mother had fallen and sustained an injury. She remained for two months, returning to Canada in May 2010. The Applicant said that although she was afraid of encountering her children, they were busy with their own lives and she was occupied taking care of her mother. The Applicant limited her exposure to her community by ordering groceries by phone for home delivery and having the drug store deliver her mother's medications.

[7] Finally, the Applicant returned to Israel in 2013, after learning that her mother's situation had started to deteriorate. She stayed there until 2019. During this time the Applicant's mother's dementia worsened and she was admitted to a home. The Applicant stated that she remained in Israel to look after her mother in her declining years. She also obtained a divorce from her second husband, which she was afraid to do in Canada because she feared a violent reaction from him.

[8] In 2018, while she was still in Israel, the Applicant renewed her Israeli passport. In August 2019, she applied online for a Canadian electronic Travel Authorization (eTA), but was informed that she was not eligible because she was or had been a Canadian permanent resident. She returned to Canada using her Israeli passport.

[9] On September 3, 2019, the Minister made an application to the RPD pursuant to paragraph 108(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001 c 27 [*IPRA*] for the cessation of the Applicant's refugee status, on the basis that she had reavailed herself of Israel's protection by voluntarily returning to that country.

II. Decision under Review

[10] The RPD assessed the Minister's cessation application under paragraph 108(1)(a) of *IRPA*, taking guidance from the *United Nations High Commission on Refugees Handbook on Procedures and Criteria for Determining Refugee Status* ("UNHCR Handbook"). The UNHCR *Handbook* provides three requirements for cessation of refugee status: (a) voluntariness: the refugee must act voluntarily; (b) intention: the refugee must intend by their actions to reavail themselves of the protection of the country of their nationality; and (c) reavailment: the refugee must actually obtain such protection.

[11] The RPD found that the Applicant's actions satisfied the voluntariness requirement. While the member was sympathetic to the Applicant's desire to look after her mother, the situation did not fall into the category of "exceptional circumstances" that would compel her to return to Israel without regard to her well-founded fear of persecution. The RPD noted, in particular, that the mother had a care giver and social worker looking after her during the Applicant's absence in 2009, and up until 2013 when the Applicant returned to Israel for the third time. The mother was not dependent on the Applicant for financial support. The RPD noted the length of the Applicant's final stay in Israel, during which time she applied for and obtained an Israeli passport.

[12] On the question of intention to reavail herself of the protection of the country of nationality, the RPD relied on the UNHCR *Handbook* and examined the Applicant's intention in communicating with the Israeli authorities for the purposes of seeking their protection, which

includes diplomatic protection extended by a state to its nationals. In the circumstances of this case, the RPD found the Applicant's underlying purpose of seeking the passport (namely to assist her mother) to be immaterial because, once she obtained the passport, the Applicant then voluntarily used the passport to return to Israel, the country against which she had filed a claim for protection.

[13] The RPD found that "[b]y returning to Israel on a new Israeli passport, the [Applicant] has established her intent to re-avail. The [Applicant] has failed to overturn this presumption of re-availment based on her action in applying for, obtaining, and returning to Israel on a new Israeli passport." In view of the fact that the Applicant's sons lived only a few hours away from where she stayed while in Israel, and that this was the same neighbourhood where she claimed to fear persecution by her community, the RPD concluded that the Applicant had demonstrated a lack of subjective fear.

[14] On the final element of the test, the RPD found that the Applicant had actually reavailed herself of the protection of the state of Israel. She obtained and then travelled on an Israeli passport, and thereby obtained the standard diplomatic protection accorded to all nationals travelling using such a document. Despite her explanation for the reason for her travel, the RPD found that the Applicant failed to rebut the presumption of voluntary return and reavailment.

[15] The RPD therefore ordered the cessation of the Applicant's refugee status.

[16] The Applicant seeks judicial review of this decision.

III. Issues and Standard of Review

[17] The Applicant does not contest the RPD's findings regarding voluntariness and reavailment. The only issue raised is whether the RPD's assessment of her subjective intention is reasonable.

[18] The standard of review that applies to this question is reasonableness, in accordance with *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], and recently confirmed in *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21.

[19] In summary, under the *Vavilov* framework, a reviewing court "is to review the reasons given by the administrative decision maker and determine whether the decision is based on an internally coherent chain of reasoning and is justified in light of the relevant legal and factual constraints" (*Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at para 2 [*Canada Post*]). The reviewing court must look for any "fatal flaws" in the reasons' overarching logic (*Vavilov* at para 102).

[20] The burden is on the Applicant to satisfy the Court "that any shortcomings or flaws relied on… are sufficiently central or significant to render the decision unreasonable" (*Vavilov* at para 100, cited with approval in *Canada Post* at para 33). It is only in exceptional circumstances that a reviewing court will interfere with a decision-maker's assessment of the evidence (*Vavilov* at para 125).

IV. Analysis

[21] The Applicant submits that the RPD failed to consider her evidence and particular circumstances in assessing her subjective intent. Instead, she says that the RPD was entirely focused on the fact that she obtained an Israeli passport, and on the length of her stay. The Applicant argues that the RPD failed to properly engage with her evidence on key points, including the purpose of her trip and the precautions she took while in Israel.

[22] On this point, the Applicant cites several specific examples of evidence relevant to assessing her subjective intention that is accepted by the RPD in its summary of the facts but not factored into its analysis. First, the RPD found that none of the Applicant's family members, including her children, knew about her first visit to Israel. Second, the RPD noted that during the Applicant's second trip, she had groceries and medications delivered to her residence in order to minimize her contact with the community. Both of these indicate that she took steps to avoid her agents of persecution while in Israel, which is a relevant consideration in assessing her subjective intention.

[23] The Applicant also argues that while the RAD accepted that the purpose of all of her visits was to care for her ailing mother, which is an example specifically mentioned in the Handbook, the RPD failed to give this proper credence. The Applicant contends that the RPD focused too narrowly on the fact that she obtained a passport and on the length of her final visit, rather than engaging with the totality of the evidence regarding her personal circumstances and the protective measures she took while in Israel.

[24] The Respondent submits that the RPD's analysis is reasonable, based on the evidence in the record. The RPD noted that the Applicant testified that she was only thinking about taking care of her mother when she went back to Israel the first time, and so she did not consider the consequences of her return. The Respondent notes that the RPD mentioned the relevant facts, and it is not the role of the court to re-weigh the evidence.

[25] Regarding the Applicant's argument about the protective measures she took, the Respondent submits that there was no evidence that the Applicant was actually in hiding during her time in Israel; rather, her family was not aware of her presence. According to the Respondent, the RPD reasonably placed a heavy emphasis on the fact that the Applicant obtained and travelled on an Israeli passport, and in addition it noted that she applied for an eTA when she wanted to come back to Canada, which is another indication that the Applicant's last visit went beyond a "trip" and that she had, in fact, moved back to live there.

[26] In my view, the RPD's assessment of the Applicant's subjective intent is not reasonable, when measured against the binding jurisprudence on this point.

[27] The governing authority in examining the reasonableness of the RPD's assessment of the Applicant's subjective intent is the Federal Court of Appeal decision in *Canada (Citizenship and Immigration) v Galindo Camayo*, 2022 FCA 50 [*Galindo Camayo*]. The RPD did not have the benefit of this decision in making its ruling (the RPD decision was released on December 12, 2021, and *Galindo Camayo* was issued on March 29, 2022). However, the parties agree that the

Federal Court of Appeal decision applies, and I am bound to follow it in assessing the RPD's decision.

[28] In *Galindo Camayo*, the Court of Appeal emphasized the importance of an individualized assessment of all of the evidence that is relevant to assessing a refugee's subjective intent. While there is a presumption that refugees who acquire and travel on passports issued by their country of nationality or to a third country have intended to avail themselves of the protection of their country of nationality, it is a rebuttable one (*Galindo Camayo* at paras 63-65). Because of this, the RPD must examine all of the relevant evidence to determine whether the refugee has met their onus to rebut the presumption.

[29] In that case, the Court of Appeal found that the RPD had failed to carry out such an analysis. While Ms. Galindo Camayo testified she was not aware that using her Colombian passport to travel to Colombia and elsewhere could have consequences for her immigration status in Canada, the RPD found that her ignorance of the law was no excuse. The Court of Appeal found this to be unreasonable:

> [70] An individual's lack of actual knowledge of the immigration consequences of their actions may not be *determinative* of the question of intent. It is, however, a key factual consideration that the RPD must either weigh in the mix with all of the other evidence, or properly explain why the statute excludes its consideration.

[30] In addition, the RPD erred by failing to assess the measures that Ms. Galindo Camayo took to protect herself while she was in Colombia. These steps were an indication of her lack of

faith in the capacity of the state to protect her, and this had to be weighed in assessing whether she intended to seek the protection of the state when she returned to Colombia.

[31] Finally, the Court of Appeal found that the RPD considered that the use of her Colombian passport during her travel satisfied all three elements of the test for reavailment, but "[t]his approach left little room for Ms. Galindo Camayo to demonstrate that even though she had used her Colombian passport for travel, she did not intend to avail herself of the protection of that country" (*Galindo Camayo* at para 79).

[32] For all of these reasons, the Court of Appeal found the RPD's analysis to be unreasonable.

[33] At the end of its decision in *Galindo Camayo*, the Court of Appeal provided guidance on the factors that the RPD should consider in assessing whether the refugee has rebutted the presumption of reavailment, noting that no single factor was determinative of the outcome (*Galindo Camayo* at para 84). Rather than repeating the entire list, I will simply list the factors that are most relevant for the case before me. The Court of Appeal stated that in cessation cases, the RPD should consider, *inter alia*:

- The state of the individual's knowledge with respect to the cessation provisions. Evidence that a person has returned to her country of origin in the full knowledge that it may put her refugee status in jeopardy may potentially have different significance than evidence that a person is unaware of the potential consequences of her actions;
- The personal attributes of the individual such as her age, education and level of sophistication;

- The identity of the agent of persecution. That is, does the individual fear the government of her country of nationality or does she claim to fear a non-state actor? Evidence that a person who claims to fear the government of her country of nationality nevertheless discloses her whereabouts to that same government by applying for a passport or entering the country may be interpreted differently than evidence with respect to individuals seeking passports who fear non-state actors. In this latter situation, applying for a passport or entering the country will not necessarily expose the individual to their agent of persecution. This may be especially so when all the individual has done is apply for a passport: applying for a passport may have little bearing on the risk faced by a victim of domestic violence, for example, or her level of subjective fear;

  …

- What was the purpose of the travel? The RPD may consider travel to the country of nationality for a compelling reason such as the serious illness of a family member to have a different significance than travel to that same country for a more frivolous reason such as a vacation or a visit with friends;

- What the individual did while in the country in question;

- Whether the individual took any precautionary measures while she was in her country of nationality. Evidence that an individual took steps to conceal her return, such as remaining sequestered in a home or hotel throughout the visit or engaging private security while in the country of origin, may be viewed differently than evidence that the individual moved about freely and openly while in her country of nationality.

[34] I find that the RPD's analysis did not adequately explain how it considered several of the factors listed above. As in *Galindo Camayo*, the RPD emphasized the Applicant's application for and use of her passport as the key factors indicating her subjective intention. While these factors are certainly relevant to that assessment, there are other elements in the factual matrix of this case that needed to be analyzed.

[35] For example, although the RPD was clearly aware that the Applicant had taken some protective measures, it did not explain how this was weighed in its assessment of her subjective intention. The RPD found that the Applicant had not informed her children or other family members of her first trip to Israel, and that she took steps to limit her contact with the local community by having food and medications delivered to her residence during her second visit. While these are not extreme security measures, they do indicate a desire on the Applicant's part to limit her contact with her agents of persecution.

[36] Similarly, the RPD focused on the Applicant's contact with Israeli authorities in regard to her passport application, but it did not mention that her agents of persecution were her immediate family and local community rather than state officials.

[37] Based on the guidance in *Galindo Camayo*, I am unable to conclude that the RPD's analysis of the Applicant's subjective intention to reavail is reasonable. The problem with the RPD's reasoning is not that it failed to mention most of the relevant facts. Rather, it failed to show how the key facts, including the measures the Applicant took to protect herself, were weighed in the assessment of her subjective intention. Under *Vavilov*, it is not sufficient for a decision-maker to merely mention the relevant facts in the background portion of the analysis, but then fail to refer to them when it counts, when it applies the legal tests to those facts to reach its conclusion.

[38] I find the RPD failed to do the required analysis of subjective intention in this case, in accordance with the guidance in *Galindo Camayo*. For these reasons, the RPD's decision will be quashed and set aside, and the matter will be returned to the RPD for reconsideration.

[39] I should add an important caveat here. The Court of Appeal in *Galindo Camayo* emphasized that none of the factors listed above are necessarily determinative; rather, they are elements that should be considered in the overall assessment. Each case will turn on its particular facts.

[40] In this case, the RPD reasonably noted a number of important elements that weigh against the Applicant's case, including the fact that she applied for and obtained an Israeli passport after she received refugee protection and permanent residence in Canada; the length of her final trip, and the alternate care arrangements that were in place for her mother during this period (i.e. that the Applicant's presence was not needed for the entire duration of her stay). Although there was evidence that the Applicant took some protective measures during her first two trips, the record was relatively silent regarding her conduct during her last extended stay in Israel. These are all relevant factors. The fact that I have overturned the RPD decision and sent the matter back for reconsideration should not be interpreted as an indication that the outcome of the next review is a certainty. It will be up to the RPD to examine the evidence before it, in light of the legal framework and the guidance in *Galindo Camayo*.

[41] There is no question of general importance for certification.

JUDGMENT in IMM-1038-22

THIS COURT'S JUDGMENT is that:

1. The RPD's decision dated December 12, 2021 is hereby set aside and quashed.

2. The matter is returned to the RPD for redetermination.

3. There is no question of general importance for certification.

"William F. Pentney"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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