Federal Court  Cour fédérale

Date: 20220617

Docket: IMM-4457-19

Citation: 2022 FC 917

Toronto, Ontario, June 17, 2022

PRESENT: Justice Andrew D. Little

BETWEEN:

ABDALLAH F M ABUSAMRA
AHMED F M ABUSAMRA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This judicial review application concerns a decision of the Refugee Protection Division ("RPD") dated May 8, 2019 (the "Decision"), under section 96 and subsection 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the *"IRPA"*).

[2] For the reasons below, the application is allowed.

I. Facts and Events Leading to this Application

[3] The applicants are Abdallah Abusamra and Ahmed Abusamra. They are brothers, both born in Saudi Arabia. They hold travel documents issued by the Palestinian Authority and National Identity Cards for Palestine.

[4] The applicants and their mother claimed refugee protection in Canada under the *IRPA* as stateless Palestinians who had a right to live in Gaza.

[5] Based on information in the National Documentation Package, the RPD found that in 2007, Hamas staged a violent takeover of government installations in Gaza. Since then, it has maintained a *de facto* government in the territory and has considerable influence and control in the area. The RPD found the most significant human rights abuses under Hamas *de facto* rule in Gaza included unlawful and arbitrary killings, disappearances, torture, arbitrary arrest and detention. The RPD also quoted from a report that found persons who can establish a "well-founded fear of the de facto authorities in Gaza, i.e., Hamas, will not be able to obtain protection from these authorities". The RPD noted that since Hamas seized control of Gaza in 2007, Israeli authorities have closed or partially closed all borders to and from Gaza.

[6] The RPD concluded that the applicants' mother was entitled to refugee protection in Canada because, as a woman, she faced a serious possibility of persecution on a Convention ground under *IRPA* section 96 throughout Gaza, where Hamas has *de facto* control.

[7] However, the RPD rejected the applicants' claims. The RPD concluded that the applicants have no right to return to Saudi Arabia without a sponsor and that Gaza is a former

habitual residence for them. The RPD assessed the applicants' refugee claims under the *IRPA* only as they related to Gaza. The RPD stated that the applicants claimed persecution in Gaza from Hamas and other militant groups.

[8] The RPD considered the applicants' statements in their initial written narratives, their detailed affidavits and their respective oral testimony at a hearing.

[9] The RPD noted that Abdallah testified that he could not live in Gaza because of the ongoing wars in the area. He feared exploitation from groups operating in Gaza. The RPD noted that he was not a victim of such groups and that his fears were not realized during the time he spent in Gaza. Although he testified about general insecurity and feeling "no sense of safety", the RPD found that he was never targeted by anyone and that his fear of exploitation by various groups was "speculative". The RPD also found that his fears of being viewed as a spy for Saudi Arabia or arrested for being a "traitor for other states" was also speculative. The RPD noted that several of Abdallah's brothers were also born in Saudi Arabia and had travelled to Gaza and lived there for a number of years without facing such accusations.

[10] The RPD noted that Ahmed had lived in Gaza for a number of years as a student from 2011 to 2017. He testified that he feared returning to Gaza because he lived through two different wars while he was there. During that time, he witnessed civilian casualties and animals dying.

[11] The RPD noted both applicants' testimony that they disagreed with the policies of Hamas and Fatah and feared persecution as a result. The RPD found this fear "baseless", as the

applicants had never openly expressed opposition to Hamas or Fatah or any other groups while in Gaza, and the RPD had no reason to believe they would ever do so if they returned to Gaza.

[12] The RPD concluded that the applicants did not face any specific targeting in Gaza and did not experience any special circumstances that distinguished their situation from that of the general population in Gaza. The RPD therefore had no reason to believe that they would be subjected personally to any risks on return to Gaza.

[13] The RPD was aware that the situation in Gaza was "difficult, given sporadic wars and the prevailing humanitarian situation". However, the RPD stated that while the applicants may face generalized risk, there was no more than a mere possibility that they face persecution on return to Gaza on one or more of the grounds contained in the definition of a Convention refugee, and they did not meet the grounds of protection set out in paragraph 97(1)(*b*) of the *IRPA*.

[14] The RPD found that violence in Gaza was endemic and virtually all residents in Gaza bear some level of risk. The applicants had failed to establish that they were likely to face difficulties beyond generalized risk. The RPD found extensive evidence in the National Documentation Package that clearly indicated the devastating impact the ongoing conflict with Israel has had in that area. However, having found that that risk was one faced generally by other individuals in Gaza, the applicants' claims failed. The RPD stated that the applicants:

> … have not established, on a balance of probabilities, that they would be subjected *personally* to a danger of torture or a risk to life or a risk of cruel and unusual treatment or punishment in Gaza. The risk faced by the [applicants] is, unfortunately, one that is faced generally by the population in Gaza. It is a widespread risk, and one faced to the same degree as a significant portion of the population within Gaza. It is a generalized risk, captured by section 97(1)(b)(ii), and is fatal to their claims under s. 97(1).

[15] Accordingly, the RPD concluded that the applicants did not face a serious possibility of persecution in Gaza and would not be subjected personally to the risks or dangers contemplated by section 97, should they return to Gaza. Their claims were therefore rejected.

[16] In this Court, the applicants challenged the RPD's conclusions, principally on the basis that the RPD applied the wrong legal test for assessing risk of persecution and ignored credible evidence of similarly situated individuals.

II. Analysis

A. *Standard of Review*

[17] The standard of review of the RPD's decision is reasonableness, as described in *Vavilov*. The applicant bears the onus to show that the decision is unreasonable: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, at paras 75 and 100.

[18] Reasonableness review is a deferential and disciplined evaluation of whether an administrative decision is transparent, intelligible and justified: *Vavilov*, at paras 12-13 and 15. The Court examines the reasons provided by the decision maker holistically and contextually, and in conjunction with the record that was before the decision maker: *Vavilov*, at paras 85, 91-96, 97, and 103; *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, at paras 28-33. A reasonable decision is one that is based on an internally coherent and a rational chain of analysis and is justified in relation to the facts and law that constrain the decision maker: *Vavilov*, esp. at paras 85, 99-101, 105-106 and 194.

B. ***Did the RPD's Decision Contain a Reviewable Error?***

[19] The applicants submitted that the RPD committed a reviewable error by improperly imposing a requirement that the applicants must have personally experienced past persecution. Relying on *Fodor v Canada (Citizenship and Immigration)*, 2020 FC 218, the applicants argued that it is well established that evidence of persecution of similarly situated individuals is sufficient to ground a refugee claim. They noted that they had adduced evidence that two of their brothers and a friend had all been assaulted in Gaza by Hamas officials on separate occasions, which they submitted was persecution due to Hamas' enforcement of strict Islamic standards. According to the applicants, that risk had a clear nexus to the Convention based on religion. The applicants also relied on persecution documented in country condition evidence. They argued that all of this evidence was sufficient to establish their claim without the need for evidence they have been personally targeted in the past.

[20] The applicants further argued that the RPD disregarded the law in finding that their fears of harm and persecution from Hamas and other groups in Gaza were speculative because they had not been personally targeted in the past. According to the applicants, they presented credible evidence that individuals are at risk of persecution if they do not support Hamas or another faction in Gaza or do not conform to Hamas's strict conservative interpretation of Islam.

[21] The applicants also argued that the RPD improperly imported the "generalized risk" element from section 97 into its analysis under *IRPA* section 96. Citing *Fodor*, the applicant contended that the RPD erred in law by requiring them to show that their risk of persecution was personalized or individualized without considering whether it was also faced by other similarly

situated persons or members of a group – doing so imported the section 97 analysis into section 96, contrary to the principles in *Salibian v Canada (Minister of Employment and Immigration)*, [1990] 3 FC 250 (CA).

[22] The applicants submitted that there was overwhelming evidence before the RPD that the Palestinian population in Gaza was subjected to persecution because of their nationality and imputed political opinion. They submitted that Israel's treatment of the Gaza territory (including a land, air and sea blockade), the humanitarian crisis, and the wars and violence all occur because of the Palestinian nationality of the population. In particular, in Gaza, the applicants contended that Israel's actions punished all Gazans as supporters of Hamas; the blockade of Gaza was a "deliberate policy of collective punishment related to the election of Hamas, by the Palestinian residents of Gaza" [original emphasis]. They argued that the situation was exacerbated by decisions of the Palestinian Authority, which also focused on punishing the residents of Gaza because of their support of Hamas. On this view, the risk faced by the applicants has a "clear nexus to their nationality and imputed political opinion". The imputed political opinion referred to Israel's view of all Gazans as supporters of Hamas. According to the applicants, the size of the persecuted group to which the applicants belong, or the fact that the general population in a country faces a risk of persecution on a Convention ground, is irrelevant to the analysis.

[23] The applicants further argued that they were at heightened risk as young men.

[24] In response, the respondent submitted that the applicants were required to establish a link between the general documentary evidence and their specific circumstances. The respondent contended that the RPD clearly considered the personalized circumstances of the applicants and found that they were never targeted by Hamas and neither were their brothers who live in Gaza. The applicants had not openly expressed opposition to the policies of Hamas or the Fatah.

[25] The respondent referred to decisions of this Court on the interpretation of section 96 and subsection 97(1), including *Fodor*; *Ugwu v Canada (Citizenship and Immigration)*, 2021 FC 1121; *Agudo v Canada (Citizenship and Immigration)*, 2021 FC 320; *Balogh v Canada (Citizenship and Immigration)*, 2016 FC 426; and *Olah v Canada (Citizenship and Immigration)*, 2017 FC 921. The respondent also relied on *Habboob v Canada (Citizenship and Immigration)*, 2021 FC 162, in which Justice Walker addressed claims about general risks in Gaza and found that the RPD in that case had not erred in its consideration of the applicants' fear of generalized risks and uncertainties in Gaza.

[26] In the respondent's submission, the Court's cases all required the applicants to show a link to their situation. The respondent argued that on the evidence, the RPD found that the applicants did not face any specific targeting in Gaza or special circumstances that would distinguish their situation from the general population. The RPD found on the evidence that they faced a generalized risk, not one particularized to them. The respondent also argued that the applicants were not clear that their allegations of risk were based on religion or political opinion but instead described incidents of discrimination or problems with Egyptian authorities when entering or exiting Gaza.

[27] An important distinction exists in the *IRPA* between claims for protection under section 96 and section 97. In general, section 97 requires the claimant to show a risk that is individual to the claimant, in the sense that it is not faced generally by others in the country. Section 96 protection may be based on the existence of a more generalized risk based on a Convention ground that is applicable to the claimant: *Fodor*, at para 20.

[28] More precisely, section 97 of the *IRPA* requires that the claimant show that their removal to their country of nationality or former habitual residence would subject them "personally" to a danger of torture or a risk of cruel and unusual treatment or punishment. In addition, with respect to risk of cruel and unusual treatment or punishment, subparagraph 97(1)(*b*)(ii) requires that the risk not be faced generally by other individuals in the country.

[29] Under section 96 of the *IRPA*, claimants are not required to show they have been personally persecuted in the past: *Salibian*, at p. 258*a-b* and p. 259*f*; *Chukwunyere v Canada (Citizenship and Immigration)*, 2021 FC 210, at para 13; *Zidan v Canada (Citizenship and Immigration)*, 2021 FC 170, at para 52; *Garces Canga v Canada (Citizenship and Immigration)*, 2020 FC 749, at para 49. A claimant may show a fear of persecution through evidence of the treatment of members of a group, to which the claimant belongs, in their country of origin: *Salibian*, at pp. 258-59 (paras 17-19); *Garces Canga*, at paras 48-50; *Fodor*, at para 19 (and the cases cited there); *Arocha v Canada (Citizenship and Immigration)*, 2019 FC 468, at para 23. That is, by showing that the applicants themselves belong to, or share sufficient characteristics with, the persecuted group, the generalized evidence of the group's treatment may be tied or "personalized" to the applicants and ground an objectively-based fear of persecution: *Fi v*

Canada (Minister of Citizenship and Immigration), 2006 FC 1125, [2007] 3 FCR 400, at paras 13-17; *Olah*, at paras 14-18; *Conka v Canada (Citizenship and Immigration)*, 2018 FC 532, at paras 19-21; *Vangor v Canada (Citizenship and Immigration)*, 2019 FC 866, at paras 12-13; *Agudo*, at para 45.

[30] In *Salibian,* the Refugee Division had rejected a claim for protection under section 96 because it found that the claimant had not shown he had been personally targeted or that his life would be more disrupted by the conflict in Lebanon than any other citizen – he was "a victim in the same way as all other Lebanese citizens are": *Salibian*, at p. 257. The Federal Court of Appeal found that the Refugee Division had erroneously required the claimant to show that the persecution was personal. The Court of Appeal set out a summary of legal principles from its decisions, at p. 258*a-f*:

> (1) the applicant does not have to show that he had himself been persecuted in the past or would himself be persecuted in the future;
>
> (2) the applicant can show that the fear he had resulted not from reprehensible acts committed or likely to be committed directly against him, but from reprehensible acts committed or likely to be committed against members of a group to which he belonged;
>
> (3) a situation of civil war in a given country is not an obstacle to a claim provided the fear felt is not that felt indiscriminately by all citizens as a consequence of the civil war, but that felt by the applicant himself, by a group with which he is associated, or if necessary by all citizens on account of a risk of persecution based on one of the reasons stated in the definition; …

[31] The Court of Appeal also adopted the following passage, at p. 259*b-d*:

> In sum, while modern refugee law is concerned to recognize the protection needs of particular claimants, the best evidence that an individual faces a serious chance of persecution is usually the treatment of similarly situated persons in the country of origin. In

> the context of claims derived from situations of generalized oppression, therefore, the issue is not whether the claimant is more at risk than anyone else in her country, but rather whether the broadly based harassment or abuse is sufficiently serious to substantiate a claim to refugee status. If persons like the applicant may face serious harm for which the state is accountable, and if that risk is grounded in their civil or political status, then she is properly considered to be a Convention refugee.

[32] The applicants relied on principles (2) and (3) above. I note that in both the third principle and the passage quoted immediately above, the Court of Appeal did not exclude the possibility that in some (presumably rare) circumstances, many or even all citizens in an area may be subject to persecution on a Convention ground.

[33] This Court has applied the *Salibian* principles in *Vangor*, at paras 12-14; *Mohammed v Canada (Citizenship and Immigration)*, 2009 FC 768, at paras 69-70; and *Fi*, at paras 13 and following.

[34] In the present case, the RPD considered whether the applicant had been personally targeted in the past under *IRPA* section 96 and whether the applicants faced the risks contemplated by subsection 97(1). It found that they "did not face any specific targeting in Gaza" or experience "any special circumstances that would distinguish their situation from that of the general population".

[35] However, the RPD did not distinguish between the analyses of objective circumstances under section 96 and subsection 97(1). With respect to the section 96 claim, the RPD did not discuss or make explicit findings on the subjective and the objective bases for a fear of

persecution. The RPD did not refer to the applicants' ability to establish a claim under section 96 with reference to similarly situated persons in Gaza.

[36] In my view, the RPD erred in law in this case by failing to consider and analyze the principles in *Salibian*, including whether the applicants were entitled to protection under *IRPA* section 96 based on the possible persecution of similarly situated persons in Gaza. See also the analyses in *Fi*, *Mohammed* and *Vangor*, cited already.

[37] There was evidence that could have been assessed by the RPD with respect to this issue. With respect to possible persecution by Hamas or others, there was considerable country condition evidence on the circumstances affecting people living in Gaza and actions and motivations giving rise to those conditions. As noted above, the RPD made certain findings about Hamas and the situation in Gaza. In addition, Abdallah's affidavit set out a list of events or circumstances that had affected his brothers (Khalid and Mohammed) in Gaza, including wars and the "siege imposed on Gaza" for more than 12 years; lack of basic life necessities, electricity, proper medical treatment, and housing; and that the applicants have no home or work in Gaza. Abdallah noted that local organizations (including Fatah and Hamas) govern the country and one can only get employment by joining one of the factions. In his affidavit, Ahmed detailed his own experiences in Gaza while studying there. He also stated that Gaza "is not a place for a person who does not belong to a particular faction. [That person is] perceived as a person without identity" and that Hamas and other factions provide financial support and food to their members but not to others. Both Abdallah and Ahmed took the position that they were not supporters of Hamas (or any other faction) and both noted the difficulties (or impossibility) of

leaving Gaza to escape the conditions there. The applicants also pointed to two examples mentioned in both Ahmed's and Abdallah's affidavits concerning arbitrary actions by Hamas police against their brothers (in separate incidents, one of which was mentioned by the RPD and which grounded Khalid's successful claim for *IRPA* protection).

[38] The respondent relied upon *Habboob*, in which the claimant family also expressed a fear of returning to Gaza. However, the legal issues and RPD's conclusions at issue in *Habboob* were different from the present case. In *Habboob*, the RPD refused their claim for *IRPA* protection because it found that their fear was based on the general adverse living conditions there and the threat posed by military intervention from Israel. The RPD also found that one claimant, Ms Habboub, had raised no prior ill-treatment as a woman while in Gaza nor had she expressed a fear of future persecution based on her gender. In this Court, Justice Walker dismissed an application for judicial review. Consistent with the legal principles stated above, she concluded that a claimant cannot simply refer to the general situation in a country without establishing links to their personal circumstances (citing *Garces Canga*): *Habboob*, at para 31. Justice Walker stated that the claimants' "description of their risk was limited to a general description of the situation in Gaza without elaboration". She held that the RPD reasonably concluded that the claimants/applicants had not established a subjective fear of persecution on a Convention ground.

[39] By contrast, the RPD in the present case made no finding about the applicants' subjective fear. The RPD also did not consider whether the applicants' claim was made out based on persecution of similarly situated persons, which was either not argued or did not arise in

Habboob. In addition, the RPD in this case upheld the applicants' mother's claim for protection under section 96, whereas in *Habboob*, the comparable claim was dismissed. While it is not clear what evidence was before the RPD in *Habboob* that was merely a "general description of the situation in Gaza without elaboration", there was more than a general description available to the RPD in the present case and it made express and detailed findings on the situation in Gaza.

[40] I have considered the RPD's statement that while the applicants may face generalized risk, there was no more than a mere possibility that they face persecution on return to Gaza on one or more of the grounds in the definition of a Convention refugee. In my view, this conclusory statement did not discharge the RPD's mandate to identify, analyze and apply the legal principles articulated by the Federal Court of Appeal, which the RPD was constrained to follow. In doing so, the RPD would also have had to incorporate its stated conclusions about the situation in Gaza.

[41] Given the absence of express findings on subjective and objective fear under section 96 and its failure to distinguish the objective analyses under the two *IRPA* provisions, I also do not accept that the RPD's analysis implicitly addressed the claim based on similarly situated persons.

[42] I am aware that in this Court, the applicants took a broader position on the grounds of persecution in Gaza than the RPD considered. The RPD considered persecution from Hamas and other militant groups, whereas the applicants argued here that they would be subject to persecution in Gaza by both Hamas and Israel if they returned there. The potential links to the Convention in both circumstances were either political opinion or religion.

[43] It is not this Court's role to make comments on this application about whether there are in fact meritorious grounds for a claim of persecution as a result of the treatment of similarly situated persons by Hamas and/or other factions, or as a result of actions by Israel, or the cumulative effects of both. It is enough to say that I am not satisfied that the result would necessarily have been the same if the RPD had applied the legal standards required by *Salibian* and the cases that follow it: see *Vangor*, at para 14. That conclusion and the overall result of this application do not endorse a position on the outcome of the applicants' claims.

[44] For these reasons, I conclude that the RPD made a reviewable error in its decision by failing to assess the applicants' claim under *IRPA* section 96 in accordance with the legal principles that constrained it. Applying the principles in *Vavilov*, the decision must be set aside and the matter returned to the RPD for redetermination.

III. Conclusion

[45] The application is therefore allowed. Neither party proposed a question for certification and none will be stated.

JUDGMENT in IMM-4457-19

THIS COURT'S JUDGMENT is that:

1. The application is allowed. The decision of Refugee Protection Division dated May 8, 2019, is set aside and the matter is remitted for redetermination by another panel of the RPD in accordance with the Reasons in this proceeding.
2. No question is certified under paragraph 74(*d*) of the *Immigration and Refugee Protection Act.*

"Andrew D. Little"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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