Federal Court  Cour fédérale

Date: 20240628

Docket: IMM-7288-23

Citation: 2024 FC 1013

Toronto, Ontario, June 28, 2024

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

JULIE KAREN MILLER
TYRSON EDWARD JAMES WIDNER
ISABELLA VON FREYJA GROAT

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision of the Refugee Appeal Division [RAD] dated May 17, 2023 [Decision], in which the RAD confirmed the decision of the Refugee Protection Division [RPD] that the Applicants are neither Convention refugees nor persons in need of protection under the *Immigration and Refugee Protection Act,* SC 2001, c 27 [Act].

[2] The RAD found that the Principal Applicant [PA] is excluded under Article 1(F)(b) of the United Nations *Convention Relating to the Status of Refugees* [Convention] for committing the serious non-political crime of abduction. For the remaining Applicants (who are the PA's children), and in the alternative concerning the PA, the RAD found that they do not face a forward-looking risk in their country of nationality, the United States [US], and that they failed to rebut the presumption of US state protection.

[3] As explained below, this application is dismissed, because the Applicants' arguments do not undermine the reasonableness of the RAD's determinative finding that the Applicants had not rebutted the presumption that state protection was available to them in the US.

II. Background

[4] The Applicants are US citizens. The PA is the mother of the two other Applicants, her son (referred to in the Decision as the Minor Appellant or MA) and her daughter (referred to in the Decision as the Associate Appellant or AA). They arrived and claimed refugee protection in Canada in 2016. They claim to fear the PA's ex-husband (referred to in the Decision as BW) and his former and current associates in US white supremacist movements. BW is the father of the MA.

[5] The PA and BW were white supremacists in the early 2000s and members of a US white supremacist group known as the National Alliance. Their renunciation of white supremacy in 2006 later became the subject of a documentary ("Erasing Hate" in 2011) and film ("Skin" in 2018). Following their departure from the National Alliance, the Applicants and BW faced death

threats by white supremacists and received temporary protection from the US Federal Bureau of Investigation (FBI).

[6] In 2012, BW was arrested for assaulting the PA and spent four days in jail. Although the charges were dropped, the abuse continued. In 2014, the couple divorced and the PA obtained a No Contact Court Order against BW. Since then, the PA has obtained further protection orders against BW, which she claims he violated, and the Applicants relocated to different states.

[7] In May 2016, BW sought a court order granting him visitation rights to see the MA. An Arizona family court granted him a temporary three-week access to the MA on June 20, 2016. Two days later, the PA, without permission, took the other Applicants and left Arizona for Michigan, before fleeing to Canada on June 24, 2016. Upon entering Canada, an arrest warrant was issued in the US against the PA on the grounds that she had abducted the MA, who was then 9-years-old, in contravention of the Arizona court order.

[8] The RPD accepted that the PA was in an abusive relationship with BW and that their relationship negatively affected their children's well-being. It ultimately found, however, that the PA was excluded from refugee protection under Article 1F(b) due to having committed the serious non-political crime of abduction. It also found that the Applicants failed to rebut the presumption of available state protection in the US.

[9] The RAD initially granted the Applicants' appeal. However, on July 28, 2022, Justice McDonald writing for this Court overturned the RAD's decision, finding that, among other things, the RAD conflated perfect state protection with adequate state protection (*Canada (MCI)*

v Miller, 2022 FC 1131 [*Miller*] at para 69). She remitted the matter back to the RAD for re-determination, which resulted in the Decision now under review.

III. Decision under Review

[10] In the Decision, the RAD confirmed the RPD's finding that the PA was excluded from refugee protection under Article 1F(b) for committing the serious non-political crime of child abduction. It further found that the Applicants do not face a forward-looking risk from BW or white supremacists, and that they failed to rebut the presumption of state protection in the US.

[11] The RAD first considered the admissibility, under subsection 110(4) of the Act, of the Applicant's newly tendered evidence that was not before the RPD. While it allowed most of this evidence, it rejected the following:

A. Two undated documents from the Southern Poverty Law Center [SPLC] regarding the "National Alliance" and the "Fraternal Order of Alt-Knights";

B. Psychotherapy Assessment Reports of the Applicants;

C. A video of BJ, an alleged friend and associate of BW, explaining his accolades and involvement in the far right movement;

D. Letters from the PA's brother and sister describing the PA's upbringing and character; and

E. Evidence regarding the production of "Skin", including a contract sent to the PA by the film's producer, and email correspondence between the two.

[12] In addition, the RAD only partially accepted a letter from the PA's daughter, accepting only a sentence stating that the recent release of "Skin" put the Applicants at risk.

[13] The RAD declined to convene an oral hearing as it found that the accepted new evidence did not raise any serious issues with respect to the Applicants' credibility and was not central to adjudicating the Applicants' claims. It therefore found that the requirements of subsection 110(6) of the Act to hold an oral hearing were not met.

[14] On the merits, the RAD found that the RPD correctly assessed the operation of section 98 of the Act and Article 1F(b) of the Convention. That is, it agreed that there were serious reasons for considering that the PA committed the serious non-political crime of parental abduction, equivalent to sections 282 and 283 of the *Criminal Code*, RSC 1985, c C-46, and that the Applicants did not establish imminent harm to the children under the necessity defence codified in section 285. The RAD found that the PA's actions indicated that there was planning and premeditation involved in contravening the court order for access. It also found that, while she is a victim of domestic violence at the hands of BW, the evidence did not establish that he physically abused the MA or any other basis for a real risk of imminent harm.

[15] Finally, the RAD found that the Applicants failed to establish a well-founded fear of BW, his family, or his alleged associates; fear of white supremacists generally; or risk due to the PA's sexual identity as pansexual. Like the RPD, the RAD acknowledged the past acts of harm and violence experienced by the PA, and that the other Applicants likely faced some psychological harm. It nonetheless found that the Applicants failed to establish a forward-looking fear due to a lack of sufficient credible evidence supporting their allegations.

[16] The RAD also found that the Applicants failed to rebut the presumption of state protection in the US, which it noted is a high burden considering that the US is a democratic country. It provided multiple examples of where they successfully obtained state assistance, even if such assistance did not meet their personal standard of how they believed the authorities should have acted. Overall, the RAD found that, while perhaps not perfect, the Applicants do have adequate state protection available to them in the US and that this alone was dispositive of their claim for refugee protection.

IV. Issues and Standard of Review

[17] The Applicants articulate the following issues for the Court's determination:

A. Did the RAD err in excluding some of the new evidence corroborating the Applicants' well-founded fear of persecution?

B. Did the RAD err in determining that the PA is excluded from protection pursuant to Article 1F(b) of the Act and section 98 of the Convention?

C. Did the RAD err in finding that the Applicants have not established a well-founded fear of persecution and that the Applicants have not rebutted the presumption of state protection in the US?

[18] The parties agree, and I concur, that these issues are reviewable on the standard of reasonableness, as articulated by the Supreme Court in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[19] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13). It is the reviewing court's task to assess whether the Decision as a whole is reasonable—that is, a decision 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).

V. Analysis

A. *New Evidence*

[20] The Applicants argue that the RAD erred in failing to admit the following items of new evidence:

A. The two articles from the SPLC regarding the National Alliance and the Fraternal Order of Alt-Knights; and

B. The video of BJ.

[21] Concerning the two SPLC articles, the RAD concluded that, as they were undated, the Applicants failed to establish that they were published, or that the information within them arose, after the RPD rejected their claim. Also, the Applicants did not explain why this information was not reasonably available, or why they could not have reasonably been expected to have provided this information to the RPD, before it rejected their claim. The RAD noted that the Applicants previously provided information regarding the National Alliance to the RPD.

[22] Concerning the video of BJ, the RAD noted the PA's explanation of BJ's relationship with BW and her allegation that BJ hated her because he blamed her for taking BW away from the far right movement. However, it found that the Applicants provided no information regarding

when this video, or the information in it, arose, and therefore had not discharged their burden to establish that the video should be admitted under subsection 110(4) of the Act.

[23] Noting further the Applicants' statement that they had only recently discovered the video, the RAD concluded that this did not establish that it was not reasonably available to them prior to the RPD's decision, especially given the Applicants' allegations before the RPD that they feared BW's associates including BJ.

[24] In support of their position that the RAD erred in these analyses, the Applicants rely on the PA's affidavit, in which she explains the reason for wanting to introduce this evidence. That is, because her refugee claim, in which she alleged fear of white supremacist groups, was reported in the *National Post*, she fears that such groups (including BJ) will perceive her as a "race-traitor", thereby increasing her and her family's risk of being targeted.

[25] As the articles are undated, the Applicants submit that the RAD unreasonably speculated that they do not postdate the RPD's decision. Moreover, they argue that the specific risks to which the disputed evidence is relevant arose following the RPD's decision, after the *National Post* published information about their refugee claim on August 4, 2022.

[26] I find these submissions are meritless. The RAD's reasons for rejecting this evidence, *i.e.*, uncertainty surrounding its availability and the fact that it relates to risk allegations that the Applicants advanced before the RPD, are intelligible and rational as required by *Vavilov* to withstand reasonableness review.

B. *Merits of the Decision*

[27] The Applicants challenge the RAD's exclusion analysis under Article 1F(b) of the Convention, as well as its analysis of whether they face a well-founded fear of persecution or risk under section 97 of the Act if they were to return to the US, including the RAD's finding that they failed to rebut the presumption of US state protection. However, I agree with the Respondent's position that, if reasonable, the state protection finding is determinative and precludes the Applicants' success in this application for judicial review. As explained below, I find that the RAD's state protection finding is indeed reasonable.

[28] The Applicants submit that the RAD erred in failing to consider new and compelling evidence that they would not be able to obtain state protection in the US. Specifically, they refer to evidence on US white supremacist movements, including the National Alliance, which they submit supports the conclusion that the PA would likely be viewed and targeted as a race-traitor. The Applicants note that the RAD accepted that they were targeted for leaving the National Alliance in the early 2000s.

[29] The Applicants further submit that the evidence establishes the increasing prevalence of violence by white supremacist groups in the US. They note, for instance, evidence demonstrating that such groups constitute the majority of domestic terrorism in the US, that they have been responsible for the most deadly attacks in the US over the last decade, and that they are widespread across the US.

[30] The Applicants argue that they presented sufficiently compelling evidence of the risk they face from white supremacist groups such that the Court should conclude that they rebutted

the presumption of US state protection and the RAD's state protection finding is therefore unreasonable.

[31] As the Respondent submits, there is a presumption that states are capable of protecting their own citizens (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at 725). The Applicants indeed face a very strong presumption that state protection is available to them in the US because it is a democracy with functioning infrastructure including numerous agencies devoted to law enforcement (*Kadenko v Canada (Citizenship and Immigration)* (1996), 143 DLR (4th) 532 at para 5; *Hinzman v Canada (Citizenship and Immigration)*, 2007 FCA 171 at para 46).

[32] In addition to this strong presumption, I note that the RAD analysed evidence of actual protection granted to the Applicants by the US. On multiple occasions where they sought protection against BW, the US authorities responded appropriately. In *Miller* at paragraph 68, Justice McDonald made a similar finding of 21 instances where state protection was afforded to the Applicants. The RAD also considered the documentary evidence upon which the Applicants relied, including their assertions that the police, military, and legal profession are not free from infiltration by white supremacist groups (an assertion with which the RAD did not disagree). However, noting that this evidence was largely generalized country condition documentation, the RAD was not persuaded that this evidence established that they would not obtain effective state protection from these groups.

[33] In my view, the Applicants' arguments amount to a request that the Court reweigh the evidence considered by the RAD in conducting its state protection analysis. This is not the Court's role in judicial review. The RAD's analysis is intelligible under the principles explained

in *Vavilov*, is based on the evidence before it, and is therefore reasonable. There is no basis for the Court to intervene.

[34] As explained above, the reasonableness of the RAD's determinative state protection finding is dispositive of this application for judicial review. Neither party proposed any question for certification for appeal. My Judgment will therefore dismiss this application and state no certified question.

JUDGMENT IN IMM-7288-23

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. No question is certified for appeal.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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