Federal Court Cour fédérale

Date: 20200507

Docket: IMM-2955-19

Citation: 2020 FC 600

Ottawa, Ontario, May 7, 2020

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

SANTA BAHADUR THAPACHETRI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This case concerns the decision of the Refugee Protection Division ("RPD"), wherein the RPD allowed the Minister's application to cease the Applicant's refugee protection. The Applicant is a Nepalese citizen who obtained Convention refugee status on April 27, 2010, after claiming for refugee protection on the basis of his fear of the Young Communist League and

affiliated Maoist Cadres, non-state actors in Nepal. Subsequently, the Applicant obtained permanent residence in July 2011.

[2] On this application for judicial review, the Applicant submits that the RPD erred by failing to consider the Applicant's arguments regarding the fact that the agent of persecution in his refugee claim had been a non-state actor.

[3] For the following reasons, this application for judicial review is granted.

II. **Facts**

[4] Mr. Santa Bahadur Thapachetri (the "Applicant") is a Nepalese citizen and a permanent resident of Canada. In May 2007, the Applicant made a claim for refugee protection in Canada, on the basis of his fear of the Young Communist League ("YCL") and affiliated Maoist Cadres—non-state actors in Nepal. On April 27, 2010, the RPD determined that the Applicant was a Convention refugee. In July 2011, the Applicant obtained his permanent residence.

[5] On August 17, 2015, the Minister applied to the RPD for a determination that the Applicant's refugee protection had ceased on the ground of reavailment.

[6] On April 16, 2019, the RPD allowed the Minister's application to cease the Applicant's status as a Convention refugee. In its reasons, although the RPD found that the Applicant made four return trips to Nepal since becoming a Convention refugee, I note that the Applicant only made three return trips to Nepal between 2011 and 2015.

[7] The RPD found that a consideration of the Applicant's first return trip to Nepal in November 2011 was sufficient to dispose of the matter. The RPD rejected the Applicant's suggestion that he was compelled to return to Nepal to care for his ailing mother. The RPD found that, although the Applicant testified having taken precautions to avoid the agents of persecution, the Applicant did not keep a sufficiently low profile to establish that he returned to Nepal out of necessity. In particular, the RPD noted that the Applicant had used the occasion of his return to get married, and in preparation for the wedding, the Applicant had made trips out of the house. The RPD also found that the Applicant's use of government services—the registration of his marriage with Nepalese officials—demonstrated an intention to reavail himself of Nepal's state protection.

[8] As such, the RPD concluded that the Applicant had voluntarily reavailed himself of Nepal's protection under subsection 108(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*"). Thus, the RPD granted the Minister's application for cessation of the Applicant's refugee protection.

III. **Issues and Standard of Review**

[9] The following issues arise on this application for judicial review:

A. Did the RPD err by failing to consider the Applicant's arguments regarding the fact that the agent of persecution was a non-state actor?

B. Did the RPD err in its interpretation and finding of "reavailment" where the agent of persecution is a non-state actor?

[10] Prior to the Supreme Court's recent decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (CanLII) [*Vavilov*], the reasonableness standard applied to the review of the RPD's decision on a cessation application: *Norouzi v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 368 (CanLII) [*Norouzi*] at para 18; *Balouch v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 765 (CanLII) [*Balouch*] at para 9; *Nsende v Canada (Minister of Citizenship and Immigration)* (FC), 2008 FC 531 (CanLII) [*Nsende*] at para 9. There is no need to depart from the standard of review followed in previous jurisprudence, as the application of the *Vavilov* framework results in the same standard of review: reasonableness.

[11] As noted by the majority in *Vavilov*, "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). Furthermore, "the reviewing court must be satisfied that 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).

IV. **<u>Relevant Legislative Framework</u>**

[12] The cessation criteria in Article 1C of the *1951 Convention relating to the Status of Refugees* (the "*Refugee Convention*") have been incorporated into the *IRPA* through section 108.

Section 108(2) of the *IRPA* permits the Minister to apply to the RPD for a determination that a person's refugee protection has ceased for any of the reasons described in section 108(1) of the *IRPA*. Sections 108(1), 108(2), and 108(3) of the *IRPA* read as follows:

Rejection

108 (1) A claim for refugee protection shall be rejected, and a person is not a Convention refugee or a person in need of protection, in any of the following circumstances:

> **(a)** the person has voluntarily reavailed themself of the protection of their country of nationality;
> **(b)** the person has voluntarily reacquired their nationality;
> **(c)** the person has acquired a new nationality and enjoys the protection of the country of that new nationality;
> **(d)** the person has voluntarily become re-established in the country that the person left or remained outside of and in respect of which the person claimed refugee protection in Canada; or
> **(e)** the reasons for which the person sought refugee protection have ceased to exist.

Cessation of refugee protection

108 (2) On application by the Minister, the Refugee Protection Division may determine that refugee protection referred to in subsection 95(1) has ceased for any of the reasons described in subsection (1).

Effect of decision

108 (3) If the application is allowed, the claim of the person is deemed to be rejected.

Rejet

108 (1) Est rejetée la demande d'asile et le demandeur n'a pas qualité de réfugié ou de personne à protéger dans tel des cas suivants :

> **a)** il se réclame de nouveau et volontairement de la protection du pays dont il a la nationalité;
> **b)** il recouvre volontairement sa nationalité;
> **c)** il acquiert une nouvelle nationalité et jouit de la protection du pays de sa nouvelle nationalité;
> **d)** il retourne volontairement s'établir dans le pays qu'il a quitté ou hors duquel il est demeuré et en raison duquel il a demandé l'asile au Canada;
> **e)** les raisons qui lui ont fait demander l'asile n'existent plus.

Perte de l'asile

108 (2) L'asile visé au paragraphe 95(1) est perdu, à la demande du ministre, sur constat par la Section de protection des réfugiés, de tels des faits mentionnés au paragraphe (1).

Effet de la décision

108 (3) Le constat est assimilé au rejet de la demande d'asile.

[13] Pursuant to sections 40.1 and 46 of the *IRPA*, a permanent resident is inadmissible and loses permanent resident status upon a final determination that their refugee status has ceased under section 108(2) of the *IRPA*.

V. **Analysis**

A. *Did the RPD err by failing to consider the Applicant's arguments regarding the fact that the agent of persecution was a non-state actor?*

[14] The Applicant submits that the RPD erred by failing to consider the Applicant's arguments regarding the fact that the agent of persecution was a non-state actor. For the cessation application, the Applicant had argued that reavailment did not apply to him because he never had any state protection to begin with, i.e. that he had *not availed* himself of the state protection in Nepal, at the time of his initial refugee claim. As such, the Applicant argued that his refugee protection could not have ceased from the reavailment of state protection.

[15] The Applicant submits that for reavailment to occur, there must be evidence that state protection was previously available—that the Applicant had previously availed himself of state protection. The Applicant argues that in cases where state protection is found to be absent, if a refugee returns to their country of origin and obtains state protection, they would have obtained it for the first time—therefore, there can be <u>no reavailment</u>.

[16] The Applicant relies on the plain and ordinary meaning of "re-avail", which means to "accept something again". The Applicant also submits that for this interpretation, he relied on

the structure and language of section 108 of the *IRPA* as a whole, which distinguishes between the terms "avail" (under section 108(4) of the *IRPA*) and "reavail" (under subsection 108(1)(a) of the *IRPA*). The Applicant maintains that Parliament would have used the term "availed" and not "reavailed", if it had intended for subsection 108(1)(a) to capture individuals who had merely "availed" themselves of the protection of their country of nationality—for the first time.

[17] Furthermore, the Applicant had submitted that the basis of his refugee claim could be reasonably inferred from his Personal Information Form ("PIF"), which indicated that the Applicant's fear of persecution was based on the YCL and affiliated Maoist cadres. The Applicant notes that it raised the importance of the non-state character of the agent of persecution directly in the submissions; he had submitted documentary evidence in support of his contention that the YCL and Maoist cadres were not a part of the state. However, as the RPD did not address these arguments, the Applicant submits that this renders the RPD's decision unjustified and opaque.

[18] The Respondent submits that the RPD's decision is reasonable. The Respondent cites *Vavilov* at paras 127 and 128, where the Supreme Court found that, "a decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it," and submits that the RPD did <u>not</u> fail to meaningfully grapple with the key issues, but was alert and sensitive to the matter before it.

[19] The Respondent submits that the Applicant's argument lacks merit because the RPD's reasons demonstrate that it took into account that the Applicant feared Maoists in his villages. However, the Respondent argues that this did not absolve the Applicant of his burden to rebut the presumption that he had availed himself of Nepal's protection by obtaining a passport and travelling there with it.

[20] In my view, the RPD failed to consider the Applicant's argument regarding the fact that the agent of persecution was a non-state actor. I am not satisfied that the RPD's decision exhibits "the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100) as required under the reasonableness review. I acknowledge that the RPD appropriately undertook an analysis on the three requirements to establish reavailment: a claimant's reavailment must constitute voluntariness, intention, and actual reavailment (See *Siddiqui v Canada (Citizenship and Immigration)*, 2016 FCA 134 (CanLII) at para 6; *Nsende* at paras 12-13). However, what is notably missing from the RPD's analysis is a key argument advanced by the Applicant against the cessation application—that the concept of "reavailment" did not apply to the Applicant because the agent of persecution was a non-state actor and he had thus not availed himself of Nepal's state protection. As stated by the Supreme Court in *Vavilov* at para 127 (emphasis added):

> The principles of justification and transparency require that an administrative decision maker's reasons meaningfully account for the central issues and concerns raised by the parties. The principle that the individual or individuals affected by a decision should have the opportunity to present their case fully and fairly underlies the duty of procedural fairness and is rooted in the right to be heard: *Baker*, at para. 28. The concept of responsive reasons is inherently bound up with this principle, because reasons are the

> primary mechanism by which decision makers demonstrate that they have actually *listened* to the parties.

[21] Although reviewing courts cannot expect administrative decision makers to “respond to every argument or line of possible analysis” (*Vavilov* at para 128 citing *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 (CanLII) at para 25), the Supreme Court further affirms that:

> However, a decision maker’s failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it. In addition to assuring parties that their concerns have been heard, the process of drafting reasons with care and attention can alert the decision maker to inadvertent gaps and other flaws in its reasoning: *Baker*, at para. 39.
>
> (*Vavilov* at para 128)

[22] In the present case, the RPD failed to meaningfully grapple with the Applicant’s key argument that the concept of “reavailment” under subsection 108(1)(a) of the *IRPA* did not apply to him, based on the principles of statutory interpretation. Given the severity of the interests at stake—the cessation of the Applicant’s refugee status—it is all the more important that the decision-making process and determination reflect a careful consideration of the issues raised in the present case (See also *Tung v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 917 (CanLII)).

[23] However, without reasons on the record, we remain in the dark as to whether the RPD had been "alert and sensitive" to the issues raised by the Applicant. This forms a reviewable error that must be considered on redetermination.

B. *Did the RPD err in its interpretation and finding of "reavailment" where the agent of persecution is a non-state actor?*

[24] Given that the RPD's decision is rendered unreasonable on the first issue, I do not find it necessary to consider the second issue.

VI. **Conclusion**

[25] Neither party proposed any questions for certification, and none arises.

[26] The RPD erred in failing to grapple with a key issue raised by the Applicant that he could not "reavail" himself of the protection of a country where he previously had not "availed" of its protection. I find that the RPD's reasons lack the "requisite degree of justification, intelligibility and transparency," (*Vavilov* at para 100).

[27] The RPD's decision is unreasonable, and as such, this application for judicial review is granted.

JUDGMENT in IMM-2955-19

THIS COURT'S JUDGMENT is that:

1. The decision is set aside and the matter referred back for redetermination by a different decision-maker.

2. There is no question to certify.

"Shirzad A."

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Lorne Waldman	FOR THE APPLICANT
David Knapp	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Waldman & Associates Barristers & Solicitors Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT