

Federal Court



Cour fédérale

Date: 20221110

Docket: IMM-1834-22

Citation: 2022 FC 1541

Toronto, Ontario, November 10, 2022

PRESENT: Madam Justice Go

BETWEEN:

ABDUL SALAM ABDUL HAMID

Applicant

and

**MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mr. Abdul Salam Abdul Hamid [Applicant], a citizen of Afghanistan, seeks judicial review of the Refugee Protection Division [RPD]'s decision dated February 2, 2022 to cease his claim for refugee protection [Decision].

[2] In 2001, the United Nations High Commissioner for Refugees found the Applicant to be a Convention refugee. On August 7, 2006, the Applicant was granted refugee status by the Canadian overseas mission in Moscow. The Applicant became a permanent resident [PR] of Canada in November 2006 and moved to Canada with his wife at the time, Fahima Aziz, and their three children.

[3] In 2007, Ms. Aziz was diagnosed with a terminal illness and given only two months to live by a physician in British Columbia. Accompanied by the Applicant, Ms. Aziz went to Uzbekistan in 2008 *via* Afghanistan to seek treatment. The couple stayed in Uzbekistan for three months. Ms. Aziz passed away on November 24, 2012 in Burnaby, B.C.

[4] Between 2008 and 2016, the Applicant made six trips to Afghanistan using his Republic of Afghanistan Passport [Afghani passport], which he renewed to ensure its validity for the purpose of these trips. The Applicant also obtained an Afghani driver's license in Mazar-e-Sharif during one of these trips. While in Afghanistan, the Applicant stayed in hotels in different locations that were guarded by German or NATO forces for security reasons.

[5] On January 29, 2018, the Minister of Citizenship and Immigration [Minister] made an application under paragraph 108(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] to cease the Applicant's refugee protection [Cessation Application]. The RPD found that the Applicant reavailed himself of the protection of his country of nationality, Afghanistan, and allowed the Minister's Cessation Application.

[6] The Decision was made before the Federal Court of Appeal [FCA] issued its decision in *Canada (Minister of Citizenship and Immigration) v Galindo Camayo*, 2022 FCA 50 [*Camayo*].

[7] The RPD did not sufficiently address all of the necessary factors enumerated by the FCA in *Camayo* when it found that the Applicant did not rebut the presumption that he voluntarily reavailed himself of Afghanistan's protection under paragraph 108(1)(a) of *IRPA*. Therefore, I conclude that the Decision was unreasonable.

II. Issues and Standard of Review

[8] The only issue is whether the Decision was unreasonable in light of the applicable legal test for reavilment in the refugee cessation context.

[9] The parties agree that Decision is reviewable on a reasonableness standard.

[10] Reasonableness is a deferential, but robust, standard of review: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 12-13. The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified: *Vavilov* at para 15. 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 and 133-135.

III. Analysis

[11] The relevant provisions are subsections 108(1) to (3), paragraph 46(1)(c.1) and subsection 40.1(1) of the *IRPA*, which are set out in Appendix A.

[12] As noted above, the Decision was issued before the FCA released its decision in *Camayo*. Through no fault of its own, the RPD did not have the benefit of the FCA's guidance. The Respondent agrees that *Camayo* is the binding authority in cessation decisions. However, the Respondent submits that *Camayo* does not call for a wholesale reconsideration of cessation matters. Rather, the three-part cessation test – voluntariness, the intent to reavail, and actual reavailment of protection – remains intact. In this case, the Respondent submits that the RPD undertook the necessary analysis and reasonably assessed the evidence.

[13] While I agree with the Respondent that *Camayo* does not nullify the test that tribunals must follow in assessing cessation matters, I disagree that *Camayo* merely calls for a more “nuanced” approach to consider the evidence.

[14] In my view, *Camayo* represents a considerable development in the law of cessation by mapping out a clearly-articulated, *albeit* non-exhaustive, set of factors that decision-makers must assess to determine whether someone has reavailed themselves of the protection of their country of nationality, and whether that presumption can be rebutted.

[15] Case law confirms that when a refugee has obtained or renewed a passport from the country they fled from, the refugee is presumed to have intended to reavail themselves of the protection of that country. It is further presumed that the refugee has obtained the actual protection of that country when they have used that passport to travel. This presumption is characterized as “particularly strong” when the refugee traveled to their country of nationality with the passport issued by that country: *Seid v Canada (Minister of Citizenship and Immigration)*, 2018 FC 1167 [*Seid*] at para 14.

[16] The presumption to reavail can be rebutted. The question that the RPD is often called upon to decide in cessation applications is whether the presumption of reavailment has been rebutted in any given case. Before *Camayo*, the jurisprudence appeared to suggest that there are limited circumstances under which a refugee can rebut the presumption of reavailment. In *Seid*, the case relied on by the RPD in the Decision, the Court found that the refugee would have to prove that the trip was necessary due to exceptional circumstances to rebut that presumption: *Seid* at para 15, citing *Abadi v Canada (Citizenship and Immigration)*, 2016 FC 29 at para 18.

[17] The effect of *Camayo*, in my view, is to broaden the set of circumstances that must be examined by decision-makers when assessing whether the presumption of reavailment has been rebutted. Instead of focusing narrowly on whether there were exceptional circumstances for the refugee to take the trip(s) in question, the FCA set out a list of factors that decision-makers *should* have regard to, *at a minimum*, when assessing the rebuttal of the presumption of reavailment: *Camayo* at para 84. As the FCA elaborated:

No individual factor will necessarily be dispositive, and all of the evidence relating to these factors should be considered and balanced

in order to determine whether the actions of the individual are such that they have rebutted the presumption of reavailment.

[18] Contrary to the Respondent's submission that the RPD need not consider all of the factors outlined in *Camayo* since "no individual factor is dispositive", the FCA made clear that the RPD must consider *all* of the evidence relating to the enumerated factors: at para 84.

[19] In this case, the RPD simply failed to do so.

[20] Applying the three-step cessation test, the RPD found that the Applicant's actions surrounding his six trips to Afghanistan were voluntary, even as it acknowledged that his first trip – and possibly the second one as well – was related to his first wife seeking medical treatment in Uzbekistan.

[21] With respect to the intent to reavail, the RPD found that the burden of proof was reversed since the Applicant obtained a renewal of his Afghani passport. Absent evidence to the contrary, the RPD found that the Applicant is presumed to have intended to avail himself of the protection of his country of nationality: *Seid* at para 14.

[22] Finally, with respect to actual reavailment of protection, the RPD noted that the refugee is presumed to have obtained the actual protection of their country of nationality once the Minister establishes that the refugee has used their passport to travel: *Seid* at para 14. The RPD found that this presumption was not rebutted since the Applicant travelled on his Afghani passport to Afghanistan.

[23] The RPD concluded the following and allowed the Minister's Cessation Application:

Based on all of the evidence before me, including a copy of the passport and evidence of the six trips to Afghanistan, I find that the Minister's application pursuant to s. 108(1)(a) has been fully made out. I find that the respondent has not met his burden to show that he did not intend to re-avail himself of Afghanistan's protection. Therefore, I find that that he has voluntarily re-availed himself of the protection of his country of nationality. The Minister's application pursuant to s. 108(1)(a) of *IRPA* is, therefore, allowed, and the respondent's refugee protection is ceased.

[24] The Applicant highlights a number of factors in *Camayo* that were ignored by the RPD in the Decision. It is not necessary for me to examine all of these alleged errors. I will instead focus on the following three:

The RPD's failure to assess the state of the Applicant's knowledge with respect to the cessation provisions

[25] Nowhere in the Decision did the RPD assess the Applicant's knowledge with respect to the cessation provisions and his understanding of the consequences of renewing the Afghani passport. The closest that the RPD came to examining this factor was found at paras 29 and 30 of the Decision, where the RPD stated:

[29] The intention or motive must be assessed in order to ascertain whether the passport was acquired for the purpose of obtaining protection from the authorities. The [Applicant] argues that he chose to renew the Afghani passport and travel to his country of nationality because the Canadian travel document issued to him barred him from travelling to Afghanistan. He stated that his intention was never to settle permanently in Afghanistan after obtaining Canadian permanent residency.

[30] I accept that the [Applicant] did not ever intend to permanently move back to Afghanistan, but that is not the test at issue. Applications for the issuance or extension of national passports will normally imply an intention to entrust the protection

of one's interests or extension to or re-establish normal relations with their country of nationality. In *Maqbool v. Canada*, 2016 FC 1146 at paragraph 35 indicates that such actions indicate that an individual, "necessarily intended to re-avail herself of her country's protection by obtaining a passport issued by the authorities since a Canadian travel document would not have allowed her to return to her country of origin". I find that the reasoning of that case is directly applicable here where it's not only the case that the [Applicant] renewed the Afghani passport in question, as in *Maqbool*, he then travelled on that passport to his country of nationality on six occasions.

[26] The Applicant submits that nowhere was the question raised about whether the Applicant understood that his trips to Afghanistan might result in losing the protection offered by his Canadian PR status. Having reviewed the record, including the transcript of the RPD hearing, I agree.

[27] It would appear that the RPD focused its analysis on the Applicant's act of renewing the Afghani passport, without ever examining the Applicant's knowledge of the consequences of his action. There was no evidence before the RPD that the Applicant was ever advised, let alone understood, that by applying to renew the Afghani passport, he would risk losing the protection of his Canadian PR status. My review of the transcript confirms that this question was never raised at the RPD hearing.

[28] The error caused by the RPD's lack of analysis of the Applicant's knowledge with respect to the cessation provisions was compounded by the error in the RPD's engagement with the Applicant's testimony about his fear in Afghanistan. The RPD found at para 31 of the Decision:

[31] The [Applicant] stated that he did not return to Herat where his father lived and where he encountered compelling circumstances of persecution that forced his [sic] to flee Afghanistan. He stated that he would stay in Mazar-e-Sharif and lodge in hotels that were patrolled and guarded by NATO and/or German forces. However, I find that such behaviour is not consistent with a subjective fear of persecution. I accept the submission of counsel for the Minister that one does not return home to Afghanistan on six different occasions for lengthy travels if there is a subject fear of persecution.

[29] It is unclear to me why staying in hotels guarded by NATO forces was “not consistent with a subjective fear of persecution.”

[30] More importantly, I agree with the Applicant that without any credibility finding regarding the Applicant’s testimony about his fear in Afghanistan, the RPD unreasonably concluded that the Applicant’s behaviour was inconsistent with a subjective fear of persecution.

[31] By making this unreasonable finding without any analysis of the Applicant’s understanding of the consequences of renewing and using the Afghani passport, the RPD failed to consider the state of the Applicant’s knowledge with respect to the cessation provisions, as mandated by *Camayo*.

The RPD’s failure to address the Applicant’s personal attributes such as his age, education and level of sophistication

[32] There was evidence before the RPD that the Applicant had received very limited formal education, had been suffering from depression and anxiety since the loss of his first wife, and had been receiving treatment for these medical conditions. Indeed, due to his multiple medical

conditions, the Applicant was designated as a person with disabilities in 2018 by the province of B.C. for the purpose of granting financial and medical assistance.

[33] At the RPD hearing, the Applicant also testified that after his wife passed away and his father was murdered, the pressure on him affected his memory.

[34] The Decision made no mention of these health challenges experienced by the Applicant. The Applicant submits, and I agree, that his personal attributes are relevant to assessing his intention to reavail. More specifically, the Applicant's medical conditions and minimal education could well have a bearing on the Applicant's understanding of the consequences of his actions leading to the loss of his protection in Canada. The RPD's failure to assess these attributes, and the implications of these attributes on the intent to reavail, constitutes yet another reviewable error.

The RPD failed to consider the severity of the consequences for the Applicant

[35] Both *Camayo* at para 84 and *Vavilov* at paras 133 to 135 compel decision-makers to consider the severity of the consequences of their decisions. In the context of a cessation application, the consequences are severe. As I noted in *Omer v Canada (Immigration, Refugees and Citizenship)*, 2022 FC 1295 at para 39, a finding that the Applicant has voluntarily reavailed himself of the protection of his country of nationality will not only result in the cessation of his Convention refugee status, but also the loss of his PR status in Canada.

[36] As the FCA explained in *Camayo*:

[51] In this case, the seriousness of the impact of the RPD's decision on Ms. Galindo Camayo increases the duty on the RPD to explain its decision. Specifically:

a) The loss of refugee or protected person status unquestionably has serious consequences for the affected individual and persons like her, and legislative changes have made those consequences harsher in the last decade. In the past, protected persons who became permanent residents and who were then subject to cessation findings were able to maintain their permanent resident status in Canada. However, with changes brought about by the *Protecting Canada's Immigration System Act*, S.C. 2012, c. 17, sections 18 and 19, this is no longer the case.

b) Moreover, a cessation finding cannot be appealed to either the Immigration Appeal Division or the Refugee Appeal Division of the Immigration and Refugee Board: *IRPA*, subsections 63(3) and 110(2). Individuals whose refugee protection has been ceased are also barred from seeking a Pre-removal Risk Assessment or an application for permanent residence on humanitarian and compassionate grounds for at least one year: *IRPA*, sections 25(1.2)(c)(i), 40.1, 46(1)(c.1), 63(3), 101(1)(b), 108(3), 110(2), and 112(2)(b.1). They are also inadmissible to Canada for an indeterminate period: *IRPA*, subsection 40.1(2) and paragraph 46(1)(c.1), and are subject to removal from Canada "as soon as possible": *IRPA*, subsection 48(2).

[37] In addition to the legal consequences, there are also potential consequences to the Applicant's state of health following a granting of the Cessation Application in light of his pre-existing medical conditions.

[38] The Decision was completely silent as to any of these serious consequences, which is yet another error committed by the RPD that warrants intervention from the Court.

Matter should be returned for redetermination due to RPD's inadequate analysis

[39] The Respondent does not dispute that the RPD failed to assess the state of the Applicant's knowledge with respect to the cessation provisions and the Applicant's personal attributes, or that it failed to consider the severity of the consequences for the Applicant. Rather, the Respondent asserts that the RPD understood the case law and the concept of cessation, which it applied properly. Further, the Respondent submits that the RPD considered the evidence before it and conducted an appropriate balancing. The Respondent maintains that while the Decision may not be the one that the Court would have made, it was based on an internally coherent and rational chain of analysis and was thus reasonable.

[40] With respect, I cannot accept the Respondent's arguments. In light of the factors set out by the FCA in *Camayo*, the absence of any analysis with respect to several of the key factors by the RPD renders the Decision unreasonable. I acknowledge that the RPD may well have reached the same conclusion if it had the benefit of the *Camayo* decision and properly applied the analysis. However, the fact that the necessary analysis was not conducted in the first place means that the Decision cannot be allowed to stand.

IV. Conclusion

[41] The application for judicial review is granted.

[42] There is no question for certification.

JUDGMENT in IMM-1834-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.
2. The matter is returned for redetermination by a differently constituted panel of the RPD.
3. There are no questions to certify.

"Avvy Yao-Yao Go"

Judge

APPENDIX A

Immigration and Refugee Protection Act (SC 2001, c 27)
Loi sur l'immigration et la protection des réfugiés (LC 2001, ch 27)

<p>Cessation of Refugee Protection Rejection</p> <p>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:</p> <ul style="list-style-type: none"> (a) the person has voluntarily reavailed themselves 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. <p>Cessation of refugee protection</p> <p>(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).</p> <p>Effect of decision</p> <p>(3) If the application is allowed, the claim of the person is deemed to be rejected.</p>	<p>Perte de l'asile Rejet</p> <p>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 :</p> <ul style="list-style-type: none"> 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. <p>Perte de l'asile</p> <p>(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).</p> <p>Effet de la décision</p> <p>(3) Le constat est assimilé au rejet de la demande d'asile.</p>
<p>Loss of Status Permanent resident</p> <p>46 (1) A person loses permanent resident status</p> <p>...</p>	<p>Perte du statut Résident permanent</p> <p>46 (1) Emportent perte du statut de résident permanent les faits suivants :</p> <p>...</p>

<p>(c.1) on a final determination under subsection 108(2) that their refugee protection has ceased for any of the reasons described in paragraphs 108(1)(a) to (d);</p> <p>...</p>	<p>c.1) la décision prise, en dernier ressort, au titre du paragraphe 108(2) entraînant, sur constat des faits mentionnés à l'un des alinéas 108(1)a) à d), la perte de l'asile;</p> <p>...</p>
<p>Cessation of refugee protection — foreign national</p> <p>40.1 (1) A foreign national is inadmissible on a final determination under subsection 108(2) that their refugee protection has ceased.</p>	<p>Perte de l'asile — étranger</p> <p>40.1 (1) La décision prise, en dernier ressort, au titre du paragraphe 108(2) entraînant la perte de l'asile d'un étranger emporte son interdiction de territoire.</p>

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SOLICITORS OF RECORD

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