Federal Court  Cour fédérale

Date: 20230321

Docket: IMM-3358-22

Citation: 2023 FC 383

Ottawa, Ontario, March 21, 2023

PRESENT: The Hon Mr. Justice Henry S. Brown

BETWEEN:

TILAL HABIB ABDALLA ALI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review of a decision by the Refugee Protection Division [RPD], dated February 28, 2022, which found that the Applicant voluntarily sought and obtained the diplomatic protection of the Sudanese government and reavailed himself of Sudan's protection; this, in turn, led the RPD to find the that Applicant's refugee protection ceased per

paragraph 108(1)(a) and subsection 108(2) of the *Immigration and Refugee Protection Act* (S.C. 2001, c. 27) [IRPA].

II. Facts

[2] The Applicant is a 53-year-old citizen of Sudan and permanent resident of Canada who filed a refugee claim from Sudan as a young man on June 7, 2000. The Applicant was granted refugee status on March 22, 2001, under the former *Immigration Act*, 1976-77, c. 52, s. 1. Under IRPA he has the status of a protected person. The official reasons for that refugee decision apparently are no longer available. However, the Applicant testified at the RPD hearing that the basis of his claim concerned his being persecuted and tortured by the former government of Omar al-Bashir because of his refusal to be recruited into the military. The Applicant became a permanent resident of Canada on March 21, 2022.

[3] Since then, the Applicant has obtained three Sudanese passports, renewed the validity of one of the passports four times, used his Sudanese passports to travel to multiple third countries, and returned to Sudan approximately 15 times between 2006 and 2020. He has spent 3.5 years in Sudan out of the 15 years or so before his hearing at the RPD.

[4] As a result, the Respondent Minister instituted proceedings before the RPD alleging the Applicant voluntarily reavailed himself of the protection of his country of nationality, Sudan, and therefore meets the criteria for cessation set out in paragraph 108(1)(a) of IRPA:

> **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; […]

[5] At the RPD, the Applicant claimed, as he does here, that he did not voluntarily intend to seek the protection of the Sudanese government nor did he actually obtain such protection.

III. Decision under review

[6] The RPD found that the Applicant voluntarily sought and obtained the diplomatic protection of the Sudanese government, and therefore reavailed himself of Sudan's protection pursuant to paragraph 108(1)(a) of IRPA. Ultimately, the Applicant's refugee protection was found to have ceased.

[7] As a consequence, and by uncontested operation of law, the Applicant has lost his permanent resident status.

A. *Preliminary issue: Procedural fairness*

[8] The RAD first considered whether it was procedurally fair to assess the Applicant's behaviour without the original RPD decision granting his protection. The Applicant argued in the absence of those reasons, it is impossible for the RPD to determine whether the Applicant's behaviour demonstrates an ongoing fear or Sudan's state authorities. Ultimately, the RAD found

there was no breach of the Applicant's procedural fairness rights. Specifically, the RPD noted the underlying application was not based on whether the reasons for the Applicant's refugee claim have ceased to exist, but rather whether the Applicant's behaviour after this claim constitutes reavailment of Sudanese diplomatic protection. Moreover, the RPD noted the Applicant provided no specifics as to how the RPD's reavailment analysis would depend in any way on the reasons for which he initially sought protection. That said, the RPD accepted the Applicant's testimony establishing the original persecution he faced in Sudan at the time he left the country based on his unwillingness to join the Sudanese military. In the RPD's view, the Applicant did not face any prejudice in the absence of the original reasons because there was no dispute over what those reasons were; they were as described by the Applicant himself.

B. *Voluntariness*

[9] The RPD found, firstly, the Applicant's acquisition of multiple Sudanese passports and his visits to Sudan were voluntary. Specifically, the RPD noted such behaviour creates a presumption of reavailment that the Applicant must rebut, as per this Court's decision in *Abadi v Canada (Citizenship and Immigration)*, 2016 FC 29 [*Abadi*]. In *Abadi*, Justice Fothergill found only "exceptional circumstances" while travelling to a country on that country's passport would fail to constitute reavailment.

[10] The RPD rejected the Applicant's assertion his behaviour was not voluntary because he required emotional support and attended for necessary reasons, such as caring for his family and attending his father's funeral. The RPD found these claims not supported by the evidence. The RPD noted that in his testimony, the Applicant stated that he only provided moral support; he

could not attend his wife at the hospital because he was afraid to leave his house and communicated with her by telephone, which is something that could be done from outside Sudan. Moreover, there was no evidence to establish the Applicant's visits were to assist ailing relatives; rather, he testified that due to his depression, it was his family who felt it was important for him to visit and spend time together. In the RPD's view, the supposed necessity of the Applicant's trips was also undercut by his testimony that had he known he would lose Canadian permanent residence status, he would not have returned and found other ways to connect with his family. The RAD concluded that if alternative avenues were available to the Applicant to accomplish the same objectives he achieved by visiting Sudan, and if he would have used those avenues if he knew that his status in Canada was at risk, then his decision to travel to Sudan represents a voluntary choice.

[11] Secondly, the RPD found the Applicant's travel to third countries with a Sudanese passport rather than a Canadian refugee travel document was voluntary. The RPD notes the Applicant's argument did not address his use of Sudanese passports to visit third countries, which is something he could have done with a Canadian refugee travel document. The Applicant had argued a previously obtained refugee travel document was seized by the Canadian government. The RPD considered this argument entirely implausible. In the RPD's view, the express purpose of a refugee travel document is to permit a refugee to travel; it is not plausible then that the Applicant would have had his document seized and be told that the document is only for a single trip.

C. *Intention to reavail*

[12] In broad strokes, the RPD concluded the Applicant had failed to rebut the presumption of reavailment based on: the cumulative number and length of trips to Sudan, the inability to give specific explanations for many of the trips, his inability to provide corroborating evidence, his attendance at a public wedding registered with the Sudanese authorities with many guests, his failure to explore alternative avenues such as family visiting Canada or spending time in third countries, and his decisions to use his Sudanese passport to travel to other countries without a credible explanation for his failure to use Canadian travel documentation. Considering these factors, the RPD found the Applicant travelled on a Sudanese passport, including to Sudan itself, because he intended to put his trust in the diplomatic protection of Sudan.

[13] Furthermore, the RPD found the Applicant's use of this Court's decision in *Cerna v Canada (Citizenship and Immigration)*, 2015 FC 1074 [*Cerna*], to be misplaced. In *Cerna*, Justice O'Reilly considered that many "Canadian permanent residents will assume that their status would allow them to turn to Canada for protection even when travelling to their countries of origin" (see *supra*, at para 19).

[14] The RPD accepted the Applicant did not understand the panel's proceedings could lead to the loss of his permanent resident status and deportation; however, the RPD noted this Court's jurisprudence on this issue is not entirely consistent. For example, the RPD notes that in *Abadi*, the Court stated that a protected person's intention to retain Canadian permanent residence is

relevant to the question of whether they intend to become re-established in a country under paragraph 108(1)(d) not whether they have reavailed under paragraph 108(1)(a).

[15] Ultimately, the RPD concluded the Applicant's genuine belief that he would not lose his Canadian permanent residence does not change the RPD's conclusion about his intentions. In the RPD's view, the Applicant made a voluntary choice to use the protection of the Sudanese rather than Canadian government while travelling abroad and chose to reunite with family members in Sudan rather than Canada or a third country. Moreover, the RPD notes the fact that the Applicant would have made different choices if he knew his permanent residence was at risk does not mean that he did not seek diplomatic protection from the Sudanese government. Rather, in the RPD's view, it only means that he did not want to permanently re-establish himself in Sudan and would have foregone Sudan's diplomatic protection if he had known his travel to Sudan would ultimately force his permanent return there.

D. *Actual reavailment*

[16] In addition, the RPD concluded on a balance of probabilities the Applicant actually obtained the diplomatic protection of Sudan and therefore reavailed to his home country. In the RPD's view, there is strong evidence the Applicant actually obtained Sudan's diplomatic protection. The RPD rejected the Applicant's testimony he was hiding for the more than three years he spent in Sudan. The RPD found the Applicant failed to provide the expected corroboration, went to at least one public event, and used Sudan's diplomatic protection to travel to third countries despite knowing that he could have done so using a Canadian document. Given this evidence, the RPD found the Applicant's testimony alone to the effect that he felt he had no

choice and spent the entire time in hiding, to be insufficient to rebut the presumption of reavailment.

[17] The RPD also rejected the Applicant's argument he did not obtain Sudan's legal protection because diplomatic protection is a legal fiction, and that his being wanted by Sudanese authorities rebutted any reavailment that might otherwise be inferred from the evidence. On this, the RPD found its assessment is of diplomatic protection, not forward-looking risk. In the RPD's view, this argument would be better served by a Pre-Removal Risk Assessment [PRRA].

[18] Moreover, the RPD rejected his argument that his safety during some visits to Sudan does not mean that he would be safe if he returned there permanently. In the RPD's view, this argument vastly understates the nature of the respondent's returns to Sudan. The RPD's notes the Applicant has not merely visited Sudan but spent about a quarter of his life in Sudan over the course of a dozen separate trips. The RPD found that at a fundamental level, this is behaviour inconsistent with an inability to place trust in the Sudanese government to protect him.

IV. Issues

[19] The Applicant submits the following issues:

1) Whether the panel breached of procedural fairness to have proceeded with the cessation hearing without providing reasons for the 2001 RPD determination that the Applicant is a Convention Refugee?

2) Whether the panel erred in finding that the Applicant reavailed himself of Sudan's diplomatic protection.

3) Whether the RPD erred when assessing the credibility of the Applicant?

4) Whether the RPD erred in finding that there was no corroborating evidence regarding the Applicant's activities in Sudan?

[20] The Respondent submits the following issue:

1) Has the Applicant raised an arguable issue of law, or mixed fact and law on which the proposed application for leave and for judicial review might succeed?

[21] Respectfully, the primary issue is whether the RPD's decision was reasonable. Where concerns about procedural fairness arise, they will be addressed.

V. Standard of Review

A. *Reasonableness*

[22] The parties agree, as do I, that the applicable standard of review for the primary issue is reasonableness. In *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, issued at the same time as the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], the majority per Justice Rowe explains what is required for a reasonable decision, and what is required of a court reviewing on the reasonableness standard:

> [31] 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). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons

> provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
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> [32] A reviewing court should consider whether the decision as a whole is reasonable: "what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). The reviewing court must ask "whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para. 99, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).
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> [33] Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*, at para. 100). The challenging party must satisfy the court "that any shortcomings or flaws relied on ... are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at para. 100).
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> [Emphasis added]

[23] That said, the Supreme Court of Canada in *Vavilov* makes it clear the role of this Court is not to reweigh and reassess the evidence unless there are "exceptional circumstances". No such circumstances exist in the case at bar. The Supreme Court of Canada instructs as follows:

> [125] It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker": *CHRC*, at para. 55; see also *Khosa*, at para. 64; *Dr. Q*, at paras. 41-42. Indeed, many of the same reasons that support an appellate court's deferring to a lower court's factual findings, including the need for judicial efficiency, the importance of preserving certainty and public confidence, and the relatively advantageous position of the first instance decision maker, apply equally in the context of judicial

> review: see *Housen*, at paras. 15-18; *Dr. Q*, at para. 38; *Dunsmuir*, at para. 53.
>
> [Emphasis added]

[24] In addition, the Federal Court of Appeal recently held in *Doyle v Canada (Attorney General)*, 2021 FCA 237 [*Doyle*] that the role of this Court is not to reweigh and reassess the evidence:

> [3] In doing that, the Federal Court was quite right. Under this legislative scheme, the administrative decision-maker, here the Director, alone considers the evidence, decides on issues of admissibility and weight, assesses whether inferences should be drawn, and makes a decision. In conducting reasonableness review of the Director's decision, the reviewing court, here the Federal Court, can interfere only where the Director has committed fundamental errors in fact-finding that undermine the acceptability of the decision. Reweighing and second-guessing the evidence is no part of its role. Sticking to its role, the Federal Court did not find any fundamental errors.
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> [4] On appeal, in essence, the appellant invites us in his written and oral submissions to reweigh and second-guess the evidence. We decline the invitation.
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> [Emphasis added]

B. *Procedural fairness*

[25] Questions of procedural fairness are reviewed on the correctness standard: *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, per Binnie J at para 43. That said, I note in *Bergeron v Canada (Attorney General)*, 2015 FCA 160, per Stratas JA at para 69, the Federal Court of Appeal says a correctness review may need to take place in "a manner 'respectful of the [decision-maker's] choices' with 'a degree of deference': *Re: Sound v Fitness Industry Council of Canada*, 2014 FCA 48, at paragraph 42." But see: *Canadian Pacific Railway*

Company v Canada (Attorney General), 2018 FCA 69 [per Rennie JA]. In this connection I also note the Federal Court of Appeal's recent decision holding judicial review of procedural fairness issues is conducted on the correctness standard: see *Canadian Association of Refugee Lawyers v. Canada (Immigration, Refugees and Citizenship*), 2020 FCA 196 per de Montigny JA [Near and LeBlanc JJA concurring]:

> [35] Neither *Vavilov* nor, for that matter, *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, have addressed the standard for determining whether the decision-maker complied with the duty of procedural fairness. In those circumstances, I prefer to rely on the long line of jurisprudence, both from the Supreme Court and from this Court, according to which the standard of review with respect to procedural fairness remains correctness.

[26] I also understand from the Supreme Court of Canada's teaching in *Vavilov* at paragraph 23 that the standard of review for procedural fairness is correctness:

> [23] Where a court reviews the merits of an administrative decision (i.e., judicial review of an administrative decisions <u>other than a review related to a breach of natural justice and/or the duty of procedural fairness</u>), the standard of review it applies must reflect the legislature's intent with respect to the role of the reviewing court, except where giving effect to that intent is precluded by the rule of law. The starting point for the analysis is a presumption that the legislature intended the standard of review to be reasonableness.
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> [Emphasis added]

[27] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 50, the Supreme Court of Canada explains what is required of a court reviewing on the correctness standard of review:

> [50] When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the

> determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

VI. Analysis

A. *Test for reavailment*

[28] Before I assess the parties' submissions, it is important to outline the test for reavailment, found in paragraph 108(1)(a) of the IPRA which finds weight and guiding principles in the UNHCR Handbook. These principles were most recently outlined in this Court's decision in *Chowdhury v. Canada (Citizenship and Immigration)*, 2021 FC 312, per Justice Fuhrer:

> [8] The Federal Courts have recognized the three-part test for reavailment under the United Nations Convention relating to the Status of Refugees, as reflected in the *IRPA* s 108(1)(a). The elements of the test are: 1) voluntariness, in that the refugee must not be coerced; 2) intention, meaning the refugee must intend by their actions to reavail themselves of the protection of the country of their nationality; and 3) reavailment, in the sense that the refugee must actually obtain such protection: *Nsende v Canada (Minister of Citizenship and Immigration)* (FC), 2008 FC 531 [*Nsende*] at para 13, [2009] 1 FCR 49*; Siddiqui v Canada (Citizenship and Immigration)*, 2016 FCA 134 [*Siddiqui*] at para 6, citing *Nsende; Jing v Canada (Citizenship and Immigration)*, 2019 FC 104 [*Jing*] at para 16, citing *Siddiqui*. […]

[29] The Applicant also points to this Court's decision in *Abadi*, where Justice Fothergill clarified the presumption of reavailment in relation to the acquisition of passports from one's country of nationality:

> [16] […] When a refugee applies for and obtains a passport from his country of nationality, it is presumed that he intended to re-avail himself of the diplomatic protection of that country (Handbook and Guidelines on Procedures and Criteria for

> Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees at para 121 [*Refugee Handbook*]; *Nsende v Canada (Minister of Citizenship and Immigration)*, 2008 FC 531 at para 14). The presumption of re-availment is particularly strong where a refugee uses his national passport to travel to his country of nationality. It has even been suggested that this is conclusive (Guy Goodwinn-Gill and Jane McAdam, *The Refugee in International Law*, 3rd ed., at page 136).
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> [17] However, the prevailing view is that the presumption of re-availment may be rebutted with evidence to the contrary (*Refugee Handbook* at para 122). The onus is on the refugee to adduce sufficient evidence to rebut the presumption *(Canada (Minister of Citizenship and Immigration) v Nilam*, 2015 FC 1154 at para 26 [*Nilam*], citing *Li v Canada (Minister of Citizenship and Immigration)*, 2015 FC 459 at para 42).
>
> [18] It is only in "exceptional circumstances" that a refugee's travel to his country of nationality on a passport issued by that country will not result in the termination of refugee status (Refugee Handbook at para 124). […]
>
> [Emphasis added]

B. *Parties' submissions and analysis*

(1) Procedural fairness

[30] The Applicant submits it is a breach of procedural fairness to hold a hearing based on reavailment without the RPD's reasons for granting protection because the basis for granting the Applicant's *Convention* status informed the RPD's ability to determine whether or not their behaviour was tantamount to satisfying the second prong of the test. Specifically, the Applicant takes issue with an assessment of whether or not their behaviour demonstrated an ongoing intention to reavail themselves of the diplomatic protection of Sudan and whether they did, in

fact, avail themselves of such protection, or, in contrast, whether their behaviour and circumstances demonstrate an ongoing fear of Sudan's state authorities.

[31] In the Applicant's view, it is his right to a fair hearing to have the entire file and reasons upon which their cessation is based, in full. The Applicant suggests that without this context the RPD member adjudicating the cessation hearing is required to assess the facts in a vacuum. Moreover, the Applicant suggests that the RPD in the underlying decision would be incapable of knowing upon which facts the former RPD panel based its decision and whether the facts and corresponding reasons for rendering a positive decision in the claim still exist.

[32] The Applicant notes that the RPD in this case operated without any knowledge as to whether or not the behaviour of the Applicant post-refugee status was in keeping with or in contrast to the facts as accepted by the original RPD panel in relation to an actual intention to reavail. The Applicant asserts that since we are not able to reference the reasons behind his positive determination of refugee status, we do not know whether or not the Applicant's allegations of detention were a determinative aspect of their claim. Therefore, in the Applicant's view, it would be unreasonable and a breach of procedural fairness for the RPD member to rely upon this fact in its decision.

[33] With respect, there is no merit in these submissions. Notably, as pointed out by the Respondent, the Applicant cites to no jurisprudence in support of these claims, and did not reconcile these arguments with his testimony that his persecutor was the former Sudanese

government because of his reluctance to enter into compulsory military service. There was evidence on why he was granted refugee status, provided by the Applicant himself.

[34] I also agree with the Respondent that the original reasons for refugee protection are unnecessary because the issue before the RPD was paragraph 108(1)(a) of IRPA and whether the Applicant's actions after his refugee claim was granted constituted a reavailment to Sudanese diplomatic protection, and not whether the reasons for his original refugee claim ceased to exist. Notably also, at his cessation hearing the Applicant could not provide any specifics as to why the tribunal's analysis depended on the reasons for which he was granted protection.

(2) Test for reavailment

(a) *Voluntariness*

[35] The Applicant submits his behaviour in returning to Sudan was not voluntary. Rather, the Applicant submits that the reason he returned home was because he felt it necessary for emotional support, to care for family members and to attend his father's funeral.

[36] Moreover, the Applicant alleges vulnerability due to an ongoing struggle with disability, suicidal thoughts, depressive episodes and panic attacks. The Applicant further reaffirmed his memory issues, noting it is not implausible these issues might affect his capacity and cause him to have difficulty recalling the circumstances surrounding his immigration status.

[37] The Applicant also argues that contrary to the RPD's findings, the Applicant's presence was necessary for the care of his family members, even if it was only for moral support. The Applicants explains that his other family members could not attend to their elderly father because they are married and had their own families.

[38] Furthermore, the RPD had reasoned that the Applicant's attendance at his own wedding was evidence of his lack of fear of being found in Sudan. The Applicant submits his attendance at his own wedding, a space full of his close family and friends, people whom he trusts, in an invite-only event for only a short period of time as he explained during his hearing, is not sufficient to lead to the conclusion that he believes himself to be safe.

[39] The Applicant further submits that just because he felt safe visiting the country, does not mean that there would not be a longer-term risk to him were he to stay in a country where he faced such horrific abuse.

[40] I disagree.

[41] To begin with, as noted at the hearing and again here, these issues are factually suffused considerations. No part of the role of this Court on judicial review is to reweigh and reassess the evidence and inferences particularly in the detailed and careful reasons of the RPD, yet despite his protestations to the contrary, that is what the Applicant asks the Court to do. See *Vavilov* and *Doyle* cited above.

[42] Importantly, the Applicant does not dispute he voluntarily obtained three Sudanese passports, nor that he renewed their validity four times, nor that he used them to travel to Sudan and third countries multiple times. In the Respondent's view, this behaviour established a rebuttable presumption of reavailment. With respect, I agree. The law is settled in *Abadi* and I see no reason to interfere with RPD's conclusions based as they are on constraining law and its weighing and assessing of the evidence and inferences.

[43] I note as well that while the Applicant testified that he provided his wife with moral support when she was in the hospital, in fact he provided this support by telephone which he could have done from Canada. The Applicant's evidence was also inconsistent– while he says he travelled to Sudan to care of ailing relatives, he testified he went due to depression. The alleged purposes of his visits was also undercut by his testimony he would not have gone to Sudan, and would have found other ways to connect with his family had he known that by returning he could jeopardize his Canadian status. Notably also, the Applicant fails to address this finding and the findings concerning his travel to third countries with a Sudanese passport instead of Canadian documents. The Applicant also alleges memory loss. The RPD found he was able to remember other specific details about his various travels to Sudan, and that his testimony did not demonstrate any lack of cognitive ability. Notably also, there is no medical evidence of memory loss in the record.

[44] The RPD reasonably concluded his reavailment was voluntary.

(b) *Intention*

[45] The Applicant submits pursuant to *Cerna*, the RPD erred in not finding the Applicant's genuine surprise about the cessation proceedings indicative of his subjective intentions. The Applicant notes his circumstances are distinguishable from those in *Cerna*, but the case still stands from the proposition that that the subjective intention of the refugee must be taken into account.

[46] I again decline the Applicant's invitation to reweigh and reassess the evidence in this connection in terms of attending a public wedding with notice to Sudanese authorities, the Applicant submitted no corroborating evidence of his activities in Sudan, and the cumulative number and length of trips the Applicant took to Sudan, and his inability to explain why they were necessary.

[47] All of these speak to his intent to reavail. Sometimes lawyers and judges have difficulty determining a person's intention. Intention is primarily a factual determination and lies within the purview of the trier of fact. The triers of fact in this case are the RPD and RAD and in criminal cases, for example it is the jury if there is one, or the trial judge if there is no jury. The rules of evidence in terms of determining intention are generally the same across all fields of law, absent legislative or judicial intervention. In this connection, it is well established that a party's intent may be determined based on the inference a trier of fact may draw from the evidence that people "intend the natural and probable consequences of their actions." This is a

rule of evidence and a matter of common sense as stated by Cory J for the Supreme Court of Canada in *R v Seymour*, [1996] 2 SCR 252 at paragraph 19:

> [19] When charging with respect to an offence which requires proof of a specific intent it will always be necessary to explain that, in determining the accused's state of mind at the time the offence was committed, jurors may draw the inference that sane and sober persons intend the natural and probable consequences of their actions. Common sense dictates that people are usually able to foresee the consequences of their actions. Therefore, if a person acts in a manner which is likely to produce a certain result it generally will be reasonable to infer that the person foresaw the probable consequences of the act. In other words, if a person acted so as to produce certain predictable consequences, it may be inferred that the person intended those consequences.
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> [Emphasis added]

[48] Notably also, as the Respondent submits, the RPD reasonably drew a negative inference from the lack of corroborating evidence. For example, the Applicant submitted no letters or affidavits from friends or family members in support of his claim that he took all available precautions while in Sudan. The RPD and Respondent acknowledge that corroboration is not generally required, but assert where credibility is at issue, the absence of reasonably expected corroboration could further undermine credibility. I agree. Moreover, the Respondent submits that no weight should be given to the Applicant's argument that "it is unclear why the RPD accepted the Applicant's version of events, including the number of guests at the wedding, without corroborative evidence, yet found that the Applicant did not rebut the presumption of reavailment due to the lack of corroborative evidence". As the Respondent notes, the former is a finding of fact, and the later a legal determination based on the lack of facts (corroborating evidence).

[49] I also note while the RPD acknowledges the jurisprudence was mixed as to whether they intended to reavail themselves under paragraph 108(1)(a) of the IRPA, on redetermination of his claim Mr. Cerna was found once again to have reavailed himself. The Federal Court upheld this decision (*Cerna v Canada (Citizenship and Immigration)*, 2021 FC 973), indicating that an individual's intention to maintain their Canadian permanent residence is a relevant but not determinative factor in the application of paragraph 108(1)(a) of IRPA. The RPD put it this way, and I agree:

> [24] The respondent also relies on *Cerna v Canada (Citizenship and Immigration)*, arguing that he did not intend to reavail because he believed himself to be protected by his Canadian permanent residence. I do accept, based on the respondent's genuine surprise the first time he attended this cessation hearing, that he did not understand that this proceeding could lead to the loss of his permanent residence and his deportation from Canada. That being said, I find the respondent's reliance on *Cerna* to be misplaced. First, I note that the Federal Court's jurisprudence on this issue is not entirely consistent. For example, in *Abadi v Canada (Citizenship and Immigration)*, the Court stated that a protected person's intention to retain Canadian permanent residence is relevant to the question of whether they intend to become re-established in a country under paragraph 108(1)(d) not whether they have reavailed under paragraph 108(1)(a).
>
> [25] Moreover, I note that notwithstanding the Federal Court's original decision, on re-determination, Mr. Cerna was once again found to have reavailed and this decision was upheld, in part because of several more trips to Peru than had been in evidence at the original cessation hearing. From this I conclude that while a belief in the protection of Canadian permanent residence may be a factor to consider in the question of reavailment, it is not necessarily determinative. There may be situations where someone's use of a country's passport does not constitute reavailment because they believe they can safely return to that country while benefitting from the protection of Canadian permanent residence. But that does not mean the test for intentional reavailment is whether the respondent intended to relinquish his permanent residence. One can intend to keep Canadian permanent residence while also intending to use the diplomatic protection of a foreign state out of an erroneous belief that the reavailment will not cause the loss of permanent residence.

> [26] In my view, the respondent's genuine belief that he would not lose his Canadian permanent residence does not change my conclusion about his intentions. He spent a prolonged period of time, on several occasions, in Sudan on a Sudanese passport. He did so in circumstances where, if the Sudanese government did decide to persecute him, he would not be in any way assisted by his Canadian permanent residence. He made a voluntary choice to use the protection of the Sudanese rather than Canadian government while travelling abroad. And he chose to reunite with family members in Sudan rather than Canada or a third country. That he would have made different choices if he knew his permanent residence was at risk does not mean that he did not seek diplomatic protection from the Sudanese government. Rather, it only means that he did not want to permanently re-establish himself in Sudan and would have foregone Sudan's diplomatic protection if he had known that his travel to Sudan would ultimately force his permanent return there.
>
> [Footnotes omitted]

[50] I am not persuaded of unreasonableness in this aspect of the Decision.

(c) *Actual reavailment*

[51] The Applicant submits that because diplomatic protection is, in and of itself, a "legal fiction, allowing a state to assert its own rights in the person of an aggrieved national, [as] the traditional avenue of redress for [human rights] violations", therefore the Minister must prove, on a balance of probabilities, the Applicant actually acquired diplomatic protection as it is applied in international law (See Application Record, Tab 3, Affidavit of Josef Brown, Exhibit "F" Harvard International Law Journal Online, "Diplomatic Protection and Individual Rights: A Complementary Approach", David Leys, Volume 57, Online, January 2016 at 1-2). For this reason, the Applicant submits the third part of the reavailment test is not satisfied.

[52] I am unable to agree. Again, the Applicant cites no authorities for his submission. The Applicant submits the mere fact he is wanted or might be wanted by the authorities rebuts the presumption of intention to reavail. But this invites the RPD and now this Court to engage in a forward-looking risk assessment, which is not part of the revailment process. To the extent the Applicant faces risk of harm on return, that matter is to be assessed by the Minister acting through delegated authority when conducting a PRRA.

[53] The findings of the RPD on actual reavailment rely to a great extent on the same evidence already referred to, and I am not persuaded it is necessary to engage in its reweighing and reassessing. As a consequence I find the RPD's conclusions on actual reavailment reasonable and without reviewable error.

VII. Conclusion

[54] There being no unreasonableness, nor breach of procedural fairness, this application for judicial review will be dismissed.

VIII. Certified Question

[55] The Applicant asked the Court to certify a question of general importance, which it declines to do. No written submissions were made on this issue, nor was the Court or the Respondent supplied with a draft in advance as is or should be the practice in such matters. Rather it was raised by counsel in oral submissions who was initially unsure but in Reply made a definite request for a certified question.

[56] As I understood it, the question would be whether the Federal Court of Appeal's decision in *Canada (Citizenship and Immigration) v. Galindo Camayo*, 2022 FCA 50 [*Camayo*] summarized the law or whether *Camayo* was intended to change the law to require tribunals assessing cession to consider the factors mentioned enumerated at paragraphs 83 and following of the Federal Court of Appeal's Reasons:

> [83] Moreover, as the Federal Court observed in this case, the outcome in each cessation proceeding will be largely fact-dependent. I further agree with the submission of the intervener, United Nations High Commissioner for Refugees, that the test for cessation should not be applied in a mechanistic or rote manner. The focus throughout the analysis should be on whether the refugee's conduct—and the inferences that can be drawn from it—can reliably indicate that the refugee intended to waive the protection of the country of asylum.
>
> [84] Thus, in dealing with cessation cases, the RPD should have regard to the following factors, at a minimum, which may assist in rebutting the presumption of reavailment. 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.
>
> - The provisions of subsection 108(1) of *IRPA*, which operate as a constraint on the RPD in arriving at a reasonable decision: *Vavilov* SCC, above at paras. 115-124;
>
> - The provisions of international conventions such as the *Refugee Convention* and guidelines such as the *Refugee Handbook*, as international law operates as an important constraint on administrative decision makers such as the RPD. Legislation is presumed to operate in conformity with Canada's international obligations, and the legislature is "presumed to comply with ... the values and principles of customary and conventional international law": *Vavilov* SCC, above at para. 114, citing *R. v. Hape*, 2007 SCC 26 at para. 53; *R. v. Appulonappa*, 2015 SCC 59 at para. 40; see also *IRPA*, paragraph 3(3)(*f*).

- The severity of the consequences that a decision to cease refugee protection will have for the affected individual. Where the impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes: *Vavilov* SCC, above at paras. 133-135;

- The submissions of the parties. The principles of justification and transparency require that an administrative decision maker's reasons meaningfully engage with the central issues and the concerns raised by the parties: *Vavilov* SCC, above at paras. 127-128;

- 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;

- Whether the obtaining of a passport from the country of origin is done voluntarily;

- Whether the individual actually used the passport for travel purposes. If so, was there travel to the individual's country of nationality or to third countries? Travel to the individual's country of nationality may, in some cases, be found to have a different significance than travel to a third country;

- 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;

- Whether the actions of the individual demonstrate that she no longer has a subjective fear of persecution in the country of nationality such that surrogate protection may no longer be required; and

- Any other factors relevant to the question of whether the particular individual has rebutted the presumption of reavailment in a given case.

- The frequency and duration of the travel.

[57] The Respondent opposed certification. The Court declines to certify a question. The Federal Court of Appeal has spoken and very recently on this point. It is up to the RPD, RAD,

other decision makers, counsel and the Courts to determine the meaning of *Camayo's* reasons and conclusions. These may or may not give rise to further questions to consider for certification in another case. However, in my view that should wait until the law and practice becomes more settled. In addition, I do not consider this question determinative, nor does it arises from this case. Nor was this issue central to the manner in which this application proceeded.

[58] Therefore, no question of general importance will be certified.

JUDGMENT in IMM-3358-22

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed, no question of general importance is certified, and there is no order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Ariel M. Hollander	FOR THE APPLICANT
Monmi Goswami	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Lewis & Associates Barrister & Solicitor Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT