

Federal Court



Cour fédérale

Date: 20230704

Docket: IMM-8481-21

Citation: 2023 FC 920

Ottawa, Ontario, July 4, 2023

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

XING LI YAO

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] Xing Li Yao [Applicant] seeks judicial review of the Refugee Protection Division's [RPD] October 18, 2021 decision allowing an application from the Minister of Public Safety and Emergency Preparedness [Minister] for the cessation of the Applicant's refugee protection pursuant to subsection 108(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] [Decision].

[2] The application for judicial review is allowed.

II. Background

[3] The Applicant is a 54-year-old citizen of China and permanent resident of Canada. Facing persecution as a member of a “Shouters” church, the Applicant fled China for Canada in 2008. He was granted refugee protection in November 2010 and obtained permanent resident status in September 2011.

[4] In December 2011, while in Canada, the Applicant renewed his Chinese passport, which he used to travel between Canada and the United States [US]. In June 2013, the Applicant learned his mother was ill. He travelled to Hong Kong in early July 2013 to visit her but then learned that her health improved. Instead, he travelled around Hong Kong and Macau. Later that month, the Applicant travelled to China and visited his mother, staying until August 10, 2013. The Applicant’s mother passed away shortly thereafter. In February 2014, the Applicant returned to China to make funeral arrangements.

[5] In September 2018, the Applicant travelled to China to help his elderly parents-in-law travel to Canada. Upon his return to Canada, a Canadian Border Services Agency officer [CBSA Officer] questioned the Applicant. The Applicant explained that he knew that travelling to China could jeopardize his status in Canada, but that he did not go anywhere while in China. However, the CBSA Officer found photos of the Applicant sightseeing and attending parties on the Applicant’s cell phone, including attending a school reunion. When the CBSA Officer asked the

Applicant why he lied about not having gone anywhere, the Applicant explained that he was staying in the mountains of Fujian.

[6] In March 2021, the Minister applied to the RPD for the cessation of the Applicant's refugee protection.

III. The Decision

[7] The RPD allowed the Minister's cessation application and deemed the Applicant's refugee claim rejected, finding the Applicant voluntarily re-availed himself of the protection of China. The RPD laid out the three-part test for re-availment: the Applicant must have 1) acted voluntarily; 2) intended to re-avail himself of China's protection; and 3) actually obtained such protection. The RPD stated that the three elements must be considered cumulatively (*Canada (Public Safety and Emergency Preparedness) v Bashir*, 2015 FC 51 at para 72 [*Bashir*]).

[8] On the first part of the test, the RPD concluded the Applicant's actions were voluntary, noting that while it was understandable the Applicant wanted to visit his ill mother; he has a brother-in-law in China who could care for her in his absence. Even if the Applicant's trip to visit his mother was compulsory, this did not explain his tourist activities in Hong Kong or Macau in 2013, his trip to assist his parents-in-law in 2018, or the school reunion he attended while in China.

[9] On the second part of the test, the RPD noted there is a rebuttable presumption of re-availment where a refugee obtains a passport from their country of nationality, and that this

presumption is especially strong where the refugee uses that passport to travel to their country of nationality (*Abadi v Canada (Citizenship and Immigration)*, 2016 FC 29 at paras 16, 18 [*Abadi*]). The RPD found that the Applicant did not rebut this presumption. While the Applicant testified that he was afraid while visiting, his sightseeing and attendance at a social gathering indicated that his fear level was not high. Further, the Applicant presented himself to Chinese authorities each time he entered the country, despite the fact his refugee claim was based on his fear of Chinese authorities.

[10] On the third part of the test, the RPD found that the Applicant had actually obtained Chinese state protection. The Applicant repeatedly travelled to the US on a Chinese passport, and thus under China's diplomatic protection. The Applicant also repeatedly travelled to China on the same passport.

IV. Issues and Standard of Review

[11] After considering the submissions of the parties, the sole issue is whether the Decision was reasonable. This involves a consideration of whether the RPD erred in applying the test for re-availment.

[12] I agree with the parties that the appropriate standard of review for the merits of the Decision is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]). In the present matter, the presumption of reasonableness is not rebutted by the exceptions outlined in *Vavilov* (at paras 16-17). A reasonableness review requires a court to consider both the underlying rationale and the outcome of the decision in assessing whether the

decision, as a whole, bears the hallmarks of reasonableness – justification, transparency and intelligibility (*Vavilov* at paras 15, 99). 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). Reasonableness review is not a “line-by-line treasure hunt for error”, and the decision must not be assessed against a standard of perfection (*Vavilov* at paras 91, 102). The decision maker need not “respond to every argument or line of possible analysis” or “make an explicit finding on each constituent element, however subordinate, leading to its final conclusion” (*Vavilov* at para 128). It is not for this Court to reweigh and reassess the evidence (*Vavilov* at para 125). The burden to demonstrate the unreasonableness of the decision rests with the party challenging the decision (*Vavilov* at para 100).

V. The Parties’ Submissions

[13] The determinative issue in this application is the RPD’s application of the second part of the test, being the Applicant’s intention to re-avail himself of the protection of China. Nevertheless, the parties’ submissions on each part of the test are summarized below.

A. *Did the RPD reasonably find the Applicant acted voluntarily?*

(1) Applicant’s Position

[14] The Applicant’s travel to China was not voluntary. He was duty-bound to visit his ailing mother and make funeral arrangements. His 2013 trip to Hong Kong demonstrates that, after

learning of his mother's improved condition, he returned to Canada without visiting his mother because he knew it would be dangerous for him to go to China.

(2) Respondent's Position

[15] The presumption of re-availment is particularly strong when refugees travel to their country of nationality on a passport issued by that country, as they are not only under that country's diplomatic protection, but they are also entrusting their safety to governmental authorities upon their arrival (*Canada (Citizenship and Immigration) v Galindo Camayo*, 2022 FCA 50 at para 63 [*Camayo FCA*]).

B. *Did the RPD reasonably find the Applicant intended to re-avail himself of China's protection?*

(1) Applicant's Position

[16] The RPD's conclusion lacks the analysis required by this Court's jurisprudence. Further, the RPD failed to consider that the Applicant could not have intentionally or actually re-availed himself of China's protection if he was actively avoiding and fearing state agencies.

[17] There is no automatic linkage between the issuance or renewal of a passport and the granting of protection. The decision maker must consider the real reason the passport is being sought. Unless the refugee's motive is genuinely to entrust their interests to the protection of their state of nationality, the requisite intent is absent (*Nsende v Canada (Citizenship and Immigration)*, 2008 FC 531 at para 18 [*Nsende*], citing James C Hathaway, *The Law of Refugee*

Status (Toronto: Butterworths, 1991) at 193-95 [*The Law of Refugee Status*]; *Bashir* at para 70).

The decision maker must consider the refugee's subjective intentions before concluding they have availed themselves of their country of nationality's protection. In particular, they must consider whether the evidence relating to the refugee's subjective understanding of the benefits of their permanent resident status rebut the presumption they intended to obtain state protection (*Camayo v Canada (Citizenship and Immigration)*, 2020 FC 213 at para 43 [*Camayo FC*], aff'd *Camayo FCA*).

[18] A refugee cannot be found to have intentionally and actually re-availed themselves of state protection if they are actively avoiding and fearing state agencies. The refugee's efforts to hide from their agents of persecution are relevant to the intention stage of the re-availment test (*Peiqrishvili v Canada (Immigration, Refugees and Citizenship)*, 2019 FC 1205 at paras 21, 24 [*Peiqrishvili*]). Further, a refugee returning to their country of persecution does not necessarily demonstrate intention to re-avail themselves of state protection, especially where that protection is not available (*Din v Canada (Citizenship and Immigration)*, 2019 FC 425 at paras 37, 41, 45 [*Din*]).

(2) Respondent's Position

[19] Where a protected person in Canada needs to travel, they may obtain a refugee travel document. However, a refugee cannot use this travel document to travel to their country of nationality or country of claimed persecution. The Applicant's choice to travel to China was significant.

[20] Further, the Applicant acknowledged that he was jeopardizing his immigration status in Canada and attempted to justify this by claiming that he stayed in hiding in Fujian. The photos of the Applicant sightseeing contradicted this claim. Since the Applicant voluntarily presented himself to Chinese authorities each time he entered and left China, there was little to rebut the presumption that he intended to avail himself of China's protection.

[21] The Applicant's case is distinguishable from *Camayo FCA*, where the claimant lacked actual knowledge of the immigration consequences of their actions (*Camayo FCA* at para 70). Here, the Applicant did not claim he was unaware that he was risking his status in Canada by returning to China, nor did the evidence indicate that he did not go out in China.

C. *Did the RPD reasonably find the Applicant obtained China's protection?*

(1) Applicant's Position

[22] The RPD unreasonably concluded that the Applicant obtained China's protection. According to the country conditions documents, state protection is not available in China to followers of the Church of Shouters. The RPD failed to conduct an analysis regarding the actual availability of state protection. Further, the RPD failed to consider the precautionary measures the Applicant took while in China.

(2) Respondent's Position

[23] The RPD reasonably found the Applicant actually obtained China's protection. The Applicant travelled to the US and China as a Chinese national on the strength of his Chinese

passport. It was reasonable for the RPD to find the Applicant had chosen to benefit from China's diplomatic protection (*Tung v Canada (Citizenship and Immigration)*, 2018 FC 1224 at paras 42-44).

VI. Analysis

[24] In my view, the RPD's analysis at the second stage of the re-availment test was unreasonable.

[25] It is well established that a refugee travelling on a passport issued by their country of nationality creates a rebuttable presumption that they intended to avail themselves of the country's protection. This presumption is particularly strong when the refugee travels to the country of nationality using a passport issued by that country (*Abadi* at para 16; *Camayo FCA* at para 63). The Federal Court of Appeal has held, however, that the intention analysis must consider evidence regarding whether, in obtaining the passport from the country of origin or travelling to that country, the refugee actually had the subjective intention to avail themselves of the country of origin's protection (*Camayo FCA* at paras 66-68).

[26] When the RPD relies on certain facts to find that a refugee acted voluntarily or actually availed themselves of state protection, it cannot use the same facts to find the refugee intended to avail themselves of such protection without examining whether the refugee actually had such an intention (*Camayo FC* at paras 47-50; *Camayo FCA* at para 72). The analysis must consider the refugee's evidence, including testimony, of their intention in obtaining the passport or travelling to the country of origin. One factor to consider is whether the refugee was subjectively aware of

the immigration consequences of their actions (*Cerna v Canada (Citizenship and Immigration)*, 2015 FC 1074 at paras 18-20; *Camayo FC* at paras 50-52; *Camayo FCA* at paras 66-71).

[27] I note that the Federal Court of Appeal's caution that "the question of whether one intended to re-avail oneself of the protection of one's country of origin has nothing to do with whether the motive for travel was necessary or justified" (*Camayo FCA* at para 72). I also note that while the Applicant did acknowledge to the CBSA Officer that he was jeopardizing his refugee status in Canada by travelling to China, the RPD was required to account for the state of the Applicant's actual knowledge and intent before concluding that he had intended to re-avail himself of China's protection (*Camayo FCA* at para 71). The RPD's analysis fell short.

[28] At the third stage of the test, it is relevant to consider the steps the refugee took to avoid being discovered by the agents of persecution (*Peiqrishvili* at paras 19-25; *Yuan v Canada (Citizenship and Immigration)*, 2015 FC 923 at paras 35-36). Evidence that state protection is not available to someone of the refugee's profile is also relevant (*Din* at paras 40-46; *Gabor v Canada (Citizenship and Immigration)*, 2022 FC 150 at para 67).

[29] The Federal Court in *Camayo FC* explained the problem arising with conflating the analyses at the three stages of the re-availment test:

[47] In my view, the UNHCR Handbook reasonably establishes, as interpretative guidance, that actions such as acquiring and using a passport are enough to trigger the presumption. Given the narrow interpretation applicable to IRPA section 108, however, and that the act of acquiring and/or relying on ones' passport is considered under the voluntariness and actual availment elements of the availment test, in my view it was unreasonable for the RPD to use this same set of facts to find she intended to avail, without

examining whether she actually had such an intention. This is evident from the following finding of the RPD in its decision: “While the action of obtaining the Colombian passport may not be evidence of her intent for the use of the passport, her travel and use of the passport on so many occasions demonstrates her intent to re-avail herself of protection from the Colombian government.”

[48] Interpreting her use of her passport in itself as satisfying all three essential and conjunctive elements of availment (voluntary, intentional, and actual availment) leaves no room for Ms. Galindo Camayo to demonstrate that despite her acquiring and using her passport, she did not intend to avail herself of state protection. This approach was rejected in *Bashir*, above at paras 67-69, and as noted in para 67: “an additional, irrebutable presumption of intention of reavailment as soon as a refugee intends to travel abroad with a national passport, without any regard to the specific circumstances of each case... is not provided for in the UNHCR Handbook.”

[Emphasis added.]

[30] In *Camayo FCA*, the Court of Appeal similarly explained:

[79] Before concluding this portion of these reasons, I would note that the RPD appears to have considered Ms. Galindo Camayo’s use of her passport to travel to Colombia as satisfying all three elements of the test for reavailment (voluntary, intentional, and actual reavailment). This is evident from paragraph 22 of its reasons, where it found that Ms. Galindo Camayo’s use of her Colombian passport for travel was *voluntary*. Similarly, at paragraph 31 of its reasons the RPD found that Ms. Galindo Camayo’s use of her Colombian passport showed her *intention* to travel under the protection of Colombia, and paragraph 34 of its reasons, where the RPD found that Ms. Galindo Camayo’s use of her Colombian passport to travel to Colombia and elsewhere was evidence of actual reavailment. This approach left little room for Ms. Galindo Camayo to demonstrate that even though she had used her Colombian passport for travel, she did not intend to avail herself of the protection of that country.

[Emphasis in original.]

[31] In the present matter, the RPD's analysis of all three steps of the test relied on the same facts. On voluntariness, the RPD noted:

- A. The Applicant renewed his Chinese passport to repeatedly travel to the US; and
- B. The Applicant repeatedly travelled to China, not all of which were to visit his ill mother. He also attended a school reunion and went sightseeing in Hong Kong and Macau.

[32] Regarding the Applicant's intention to avail himself of China's protection, the RPD relied on the following facts:

- A. The Applicant renewed his Chinese passport to travel to the US. He also used it to make various trips to China;
- B. The Applicant attended a social gathering and went sightseeing; and
- C. The Applicant presented himself to Chinese authorities when entering and exiting China.

[33] Regarding whether the Applicant actually obtained state protection, the RPD relied on the following facts:

- A. The Applicant travelled to the US and China on his Chinese passport; and
- B. The Applicant presented himself to Chinese authorities to enter and exit the country.

[34] There is no indication that the RPD considered the Applicant's intention in obtaining a Chinese passport or travelling to China. At the RPD hearing, the Applicant testified that he wanted to travel to the US and, shortly after obtaining his permanent resident card, he asked the Citizenship and Immigration Canada [CIC] passport office whether he could travel to the US using his landing documents or his permanent resident card. He was told that he could not and that he needed a passport.

[35] The Court in *Nsende* held:

[22] It is unclear to the Court why the Board believed that the applicant's explanation with respect to why he obtained a Congolese passport was insufficient. This conclusion may have been open to the Board to make; however, the Court finds it unreasonable that the Board failed to indicate why this explanation was insufficient. If the Board did not believe the applicant's explanation and found him not to be credible then it should have said so. If it had another reason for not finding the explanation sufficient, it should have stated so as well, especially with the type of explanations provided here by the applicant to rebut his presumed intention "to avail himself of the protection of the country of his nationality."

[36] Several cases have referred to the following excerpt from *The Law of Refugee Status* as useful guidance (*Nsende* at para 18; *Bashir* at para 70; *Camayo FC* at para 49; *Chandrakumar v Canada (Employment and Immigration)*, [1997] FCJ No 615 at para 4, 71 ACWS (3d) 547 (FC) [*Chandrakumar*]):

Since there is not automatic linkage between the issuance or renewal of a passport and the granting of protection, it is critical that the real reason it is being sought form part of the determination authority's considerations. Unless the refugee's motive is genuinely the entrusting of her interests to the protection of the state of her nationality, the requisite intent is absent.

[37] In *Chandrakumar*, the Court went on to note:

[5] In the case at bar, the [Convention Refugee Determination Division] did not engage in an analysis of the *intention* of the principal applicant in renewing his passport. Rather, the CRDD seems to have assumed that the simple action of renewing the passport, without more, was sufficient to establish re-availment of the protection of Sri Lanka. Such an inference, in my view, is unreasonable.

[Emphasis in original.]

[38] In my view, the present case is analogous to *Chandrakumar*. The RPD made no reference to the Applicant's testimony regarding his intention in obtaining a passport. The RPD needed to at least consider whether this evidence was capable of rebutting the presumption that the Applicant intended to avail himself of China's protection. The Decision lacks the transparency, intelligibility, and justification required of reasonable decision (*Vavilov* at para 86).

VII. Conclusion

[39] The application for judicial review is allowed. The RPD conflated the analyses required at the three stages of the test by relying on the same facts at each stage, without ever considering whether the Applicant intended to avail himself of China's protection.

[40] The parties did not propose a question for certification and I agree that none arises.

JUDGMENT in IMM-8481-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.
2. The matter is remitted for re-determination by a different member of the RPD.
3. There is no certified question.
4. There is no order as to costs.

"Paul Favel"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-8481-21

STYLE OF CAUSE: XING LI YAO v THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: HELD BY VIDEOCONFERENCE

DATE OF HEARING: NOVEMBER 3, 2022

JUDGMENT AND REASONS: FAVEL J.

DATED: JULY 4, 2023

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