

Federal Court



Cour fédérale

Date: 20240522

Docket: IMM-1511-23

Citation: 2024 FC 770

Ottawa, Ontario, May 22, 2024

PRESENT: The Honourable Mr. Justice Régimbald

BETWEEN:

ANDRES ESTEBAN BAQUERO ALVAREZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision of the Refugee Protection Division [RPD] dated January 4, 2023 [Decision], granting the Minister of Public Safety and Emergency Preparedness's [Minister] application to cease the Applicant's refugee protection pursuant to paragraph 108(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] because the Applicant had reavailed himself of Colombia's protection.

[2] Having considered the record before the Court, including the parties' written and oral submissions, as well as the applicable law, I find that the Applicant has failed to discharge his burden to demonstrate that the RPD's decision is unreasonable. For the reasons that follow, this application for judicial review is dismissed.

II. Facts

[3] The Applicant, Andres Esteban Baquero Alvarez [Applicant], is a citizen of Colombia. His claim for refugee protection in Canada was accepted on April 7, 2008, and he became a permanent resident on September 1, 2010.

[4] Shortly thereafter, on May 24, 2011, the Applicant obtained a new Colombian passport from the Consulate General of Colombia in Toronto. He used this passport to travel to Colombia for a period of approximately four years, from September 29, 2011 until July 28, 2015.

[5] The Applicant concedes that he travelled to Colombia for this extended period, and states that he did so due to marital problems, and to take care of his aging parents.

[6] While in Colombia, the Applicant stayed at his family home in Bogota and assisted his parents by running errands and attending to their medical needs. Throughout his stay, the Applicant attests that he took precautionary measures such as changing his phone number, changing his daily routine, avoiding his family's farm, and avoiding travel to the north of Colombia, where his problems originated.

[7] The Applicant entered Canada again in 2015, and applied for Canadian citizenship in 2018. In his application, he indicated that he returned to Colombia because of marital problems and to look after his aging parents.

III. Decision under review

[8] On September 29, 2020, the Minister made an application to the RPD, pursuant to subsection 108(2) of the IRPA, for the cessation of the Applicant's refugee protection. In their Decision dated January 4, 2023, the RPD granted the Minister's application. In doing so, the RPD assessed the voluntary nature of the Applicant's actions, his intention, and whether he actually reavailed himself of Colombia's protection.

[9] On voluntariness, the RPD found that the Applicant voluntarily chose to renew his Colombian passport while in Canada, and voluntarily chose to travel back to and live in Colombia in order to take care of his aging parents and due to his marriage breakdown. The RPD heard and assessed the oral testimony from the Applicant's sister, who revealed that the Applicant's presence in Colombia was not necessary because, while difficult, the family members could take care for their parents and share responsibilities. The Applicant's presence therefore did not constitute an "exceptional circumstance," to rebut the presumption of reavailment.

[10] On the intent, the RPD assessed the Applicant's subjective intent and noted that he did not experience any issues using his Colombian passport to enter and exit the country, and he lived there for an extended period leading essentially a normal life, without encountering any difficulties. Most notably, he used his Colombian passport to travel to and from Colombia,

demonstrating his intent to reavail himself of Colombia's protection. On a balance of probabilities, the RPD was satisfied that the Applicant's intent was established, and the Applicant had not rebutted it.

[11] On actual reavilment, the RPD notes that the burden rests on the refugee claimant to demonstrate that they did not actually seek reavilment of the protection of the country from which they sought refuge. To discharge this burden, the refugee claimant must demonstrate that they were obligated to travel due to exceptional circumstances. In this case, the RPD found that by returning to Colombia for an extended period of time and using a Colombian passport that was acquired voluntarily, the Applicant had effectively reavailed himself of Colombia's protection.

IV. Issues and standard of review

[12] The sole question before this Court is whether the RPD reasonably concluded that the Applicant's refugee status was ceased due to reavilment.

[13] The standard of review in this case is that of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 10, 25 [*Vavilov*]; *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at paras 7, 39–44 [*Mason*]). To avoid judicial intervention, the decision must bear the hallmarks of reasonableness – justification, transparency and intelligibility (*Vavilov* at para 99; *Mason* at para 59). A decision may be unreasonable if the decision maker misapprehended the evidence before it (*Vavilov* at paras 125–126; *Mason* at para 73). Reasonableness review is not a “rubber-stamping” exercise, it is a robust form of review

(*Vavilov* at para 13; *Mason* at para 63). The party challenging the decision bears the onus of demonstrating that the decision is unreasonable (*Vavilov* at para 100).

V. Analysis

A. *The Law*

[14] The relevant legislative provisions are found at subsection 108(1) and 108(2) of the IRPA, which state the following:

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 themselves of the protection of their country of nationality;

[...]

Cessation of refugee protection

(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).

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;

[...]

Perte de l'asile

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

[15] The test for cessation pursuant to section 108 of the IRPA is well established and not disputed in this matter. The test was borrowed from the United Nations High Commissioner for Refugees Handbook on Procedures and Criteria for Determining Refugee Status [UNHCR Handbook] and cited in *Canada (Citizenship and Immigration) v Galindo Camayo*, 2022 FCA 50

at paragraphs 18, 79 [*Camayo FCA*] (see also *Dari v Canada (Citizenship and Immigration)*, 2023 FC 887 at para 14; *Cerna v Canada (Citizenship and Immigration)*, 2015 FC 1074 at para 12; *Nsende v Canada (Minister of Citizenship and Immigration)*, 2008 FC 531 at paras 12–15; *Kuoch v Canada (Citizenship and Immigration)*, 2015 FC 979 at para 26). They include:

- A. Voluntariness: The refugee must have acted voluntarily;
- B. Intention: The refugee must have intended to reavail themselves of the protection of their country of nationality; and
- C. Reavailment: The refugee must have actually obtained that protection.

[16] The Minister bears the onus of proving reavailment, on a balance of probabilities (*Canada (Citizenship and Immigration) v Safi*, 2022 FC 1125 at para 33 [*Safi*]). The Minister can satisfy this burden if they demonstrate that a refugee claimant has obtained or renewed a passport from their country of nationality, in which case, the refugee claimant is presumed to have reavailed themselves of their country's protection (*Safi* at para 33; *Abadi v Canada (Citizenship and Immigration)*, 2016 FC 29 at para 17 [*Abadi*]). This presumption is “particularly strong” when the refugee claimant uses that passport to travel to their country of nationality (*Camayo FCA* at para 63; *Abadi* at para 16).

[17] Once the presumption of reavailment is established, the burden shifts to the refugee claimant, who then bears the onus to adduce sufficient evidence to rebut the presumption (*Camayo FCA* at para 65; *Abadi* at para 17; *Canada (Minister of Citizenship and Immigration) v Nilam*, 2015 FC 1154 at para 26 [*Nilam*]; *Li v Canada (Minister of Citizenship and Immigration)*, 2015 FC 459 at para 42 [*Li*]).

[18] In *Camayo FCA* at paragraph 66, the Federal Court of Appeal held that the RPD should conduct an individualized assessment in light of all of the evidence before it, to assess if the refugee claimant has successfully rebutted the presumption of reavilment. In conducting that assessment, the RPD should pay particular attention to the list of factors enumerated in *Camayo FCA* at paragraph 84, and balance those factors with the evidence before it, noting that no individual factor is determinative. Such exercise is highly fact-dependent (*Camayo FCA* at para 83).

B. *The RPD's decision is reasonable*

[19] The crux of this matter rests on the second part of the cessation test, being the Applicant's intention. The Applicant's main argument is that the RPD did not carry out an individualized assessment of the evidence. Particularly, the RPD erred by omitting to assess an important factor, being the Applicant's subjective knowledge that his return to Colombia would put his refugee status in jeopardy in Canada. In other words, the Applicant claims that he did not know at the time that he was reavailing himself through his actions and that he could lose his status in Canada, and the RPD ought to have weighed this fact.

[20] The Applicant also argues that the RPD erred by failing to adequately assess his particular profile, specifically the evidence he provided on his mental health at the time of his RPD hearing. In his post-hearing submissions, the Applicant submitted a psychological assessment dated December 9, 2020, attesting to his depression and related symptoms, and stated that his mental state affected his ability to provide clear testimony before the RPD and to make rational decisions.

[21] The refugee claimant's subjective knowledge with respect to cessation and reavilment is one of the many factors that the RPD should consider, but is not determinative of its own (*Camayo FCA* at paras 70, 84).

[22] The RPD has an obligation to assess the key evidence and arguments that are presented by the parties (*Camayo FCA* at para 82; *Ahmad v Canada (Citizenship and Immigration)*, 2023 FC 8 at para 35 [*Ahmad*]). The assessment of the Applicant's subjective knowledge becomes relevant to the RPD once it has been meaningfully raised by the parties and the parties adduced relevant evidence on this factor (*Veerasingam v Canada (Citizenship and Immigration)*, 2024 FC 639 at paras 35, 37 [*Veerasingam*]; *Begum v Canada (Citizenship and Immigration)*, 2023 FC 1317 at paras 21–22; *Safi* at paras 43, 55; *Ahmad* at paras 34–35). In other words, the RPD is not expected to go through the *Camayo FCA* factors like a checklist, even if they were not raised, but is rather expected to assess the relevant *Camayo FCA* factors in light of the parties' submissions and the evidentiary record.

[23] In this case, before the RPD, the Applicant did not raise an argument on his subjective knowledge, nor provide evidence to the effect that he lacked the subjective knowledge of a potential impact on his status. The Applicant was represented by counsel before the RPD; it was his duty to raise such evidence to rebut the presumption of reavilment (*Veerasingam* at para 37; *Nilam* at para 26, citing *Li* at para 42).

[24] Therefore, in my view, the RPD did not err by not specifically responding to the Applicant's argument on his mental state and his lack of knowledge of the consequences of his use

of a Colombian passport and lengthy stay in Colombia. The psychological assessment and the post-hearing submissions speak to the Applicant's mental state following his return to Canada from Colombia, and not on his decision to go back to Colombia many years before. The Applicant has also failed to draw a link between the relevance of this psychological assessment and the RPD's finding that he has reavailed himself of Colombia's protection, or that the impact of his mental health influenced his knowledge (or lack thereof) of the consequences of the use of his passport and lengthy continued presence in Colombia.

[25] Consequently, the issues of mental health and subjective knowledge were not key issues or central arguments to the Applicant's case, and for that reason, I am satisfied that the RPD did not commit a reviewable error by not including these arguments in their reavailment assessment (*Vavilov* at para 128). Indeed, the RPD is not expected to conduct a "microscopic examination of everything that could possibly be said on the matter," but is rather expected to provide adequate reasons on the key issues and relevant evidence raised by the parties (*Camayo FCA* at para 82). In my view, the RPD sufficiently grappled with the key issues and relevant evidence in their reasons.

[26] Finally, the Applicant maintains that his travel back to Colombia was necessary because he was the primary caregiver to his aging and sick parents, and his siblings could not take care of them for various reasons. The Applicant submits that this constitutes an "exceptional circumstance," and it therefore rebuts the presumption of reavailment (*Abadi* at para 18; *Jing v Canada (Citizenship and Immigration)*, 2019 FC 104 at para 17; *Tung v Canada (Citizenship and Immigration)*, 2018 FC 1224 at paras 41–46; *Hamid v Canada (Citizenship and Immigration)*,

2022 FC 1541 at para 16). The Applicant also maintains that he took precautionary measures to protect himself while in Colombia.

[27] However, the RPD acknowledged these arguments. On the issue of the parents' care, the RPD concluded that in light of the evidence, in particular the Applicant's sister's testimony, the Applicant's presence in Colombia was not necessary (citing *Kovacs v Canada (Citizenship and Immigration)*, 2022 FC 1532 at para 23). In fact, the Applicant's sister testified that the siblings were able to take care of their aging parents in the Applicant's absence, even if it was difficult, prior to his stay in Colombia. On the issue of the use of precautionary measures, the RPD held that the Applicant testified that he was not fearful and did not take important measures to protect himself such as, for example, hiring private security (citing *Camayo FCA* at para 77). The refugee claimant's hiring of private security in *Camayo FCA* demonstrated their ongoing subjective fear and lack of trust that the state could provide effective protection, which the RPD found to be distinguishable from the evidence in this case.

[28] In this case, in reviewing the parties' submissions, the evidentiary record, and the RPD's decision, I am satisfied that the RPD conducted an individualized assessment of the Applicant's circumstances and reasonably concluded that he reavailed himself of Colombia's protection. The Applicant is essentially asking this Court to re-weigh the evidence that was before the RPD, which is not this Court's role in an application for judicial review on the reasonableness standard. The Court is satisfied that the RPD's conclusion falls within a range of possible and acceptable outcomes, and the Applicant has not discharged his burden to demonstrate that there are sufficient shortcomings warranting the Court's intervention (*Vavilov* at paras 86, 100).

VI. Conclusion

[29] The RPD's decision bears the hallmarks of a reasonableness. It is transparent, intelligible and justified in light of the relevant legal and factual constraints (*Vavilov* at para 99; *Mason* at para 59).

[30] The Applicant's application for judicial review is dismissed.

[31] The parties have not proposed any question for certification and I agree that none arise in the circumstances.

JUDGMENT in IMM-1511-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.
2. There is no question for certification.

"Guy Régimbald"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1511-23

STYLE OF CAUSE: ANDRES ESTEBAN BAQUERO ALVAREZ v THE
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