

Federal Court



Cour fédérale

Date: 20240610

Docket: IMM-1310-23

Citation: 2024 FC 866

Ottawa, Ontario, June 10, 2024

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

ZIEDO ZIARDO CAINE

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] Mr. Caine asks the Court to set aside a decision of the Refugee Protection Division [RPD] allowing an application by the Minister of Public Safety and Emergency Preparedness [the Minister] pursuant to section 108 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] for the cessation of the refugee protection granted to him on June 8, 2012. For the reasons that follow, this application will be dismissed.

I. Background

[2] Mr. Caine is a citizen of Saint Vincent and the Grenadines [SVG]. In his successful claim for refugee protection, he claimed to have a well-founded fear of persecution and risk of life due to his sexual orientation. He became a permanent resident of Canada on November 16, 2016.

[3] Mr. Caine obtained a newly issued passport from SVG authorities in Toronto in October 2020. He went in person to the SVG consulate in Toronto, completed a passport application form, and returned his expired passport in order to receive the new one.

[4] Using the newly obtained passport, Mr. Caine traveled to SVG, where he remained from December 16, 2020, to January 7, 2021. Upon his return to Canada on January 7, 2021, he was questioned by a Canada Border Services Agency [CBSA] officer. He attempted to mislead the CBSA officer, initially stating that he had travelled only to Barbados. When shown a SVG stamp in his passport, he admitted to also visiting SVG, and stated that the purpose of his trip was for a vacation. He further told the CBSA officer that he stayed at his mother's home in SVG, who was suffering from a non-serious illness and receiving care from other family members. Mr. Caine stated that he did not experience any problems during his trip.

[5] On February 5, 2021, the Minister applied to the RPD, pursuant to paragraph 108(1)(a) of the Act, for cessation of his status as a Convention refugee.

II. The RPD Decision

[6] The RPD allowed the Minister's application and rejected Mr. Caine's claim for refugee protection. It found that he had voluntarily, intentionally, and actually reaviled himself to the diplomatic protection of SVG pursuant to paragraph 108(1)(a) of the Act.

[7] On voluntariness, the RPD found that Mr. Caine voluntarily applied for and received a new SVG passport from the country's diplomatic representatives in Toronto. It found that he was not coerced or forced by any person or government entity to return to SVG and that the purpose of his trip was for a vacation, as he stated to the CBSA officer.

[8] On intention, the RPD found that Mr. Caine failed to rebut the presumption that he intended to reavail. It rejected his testimony that the purpose of his trip was to care for his mother, as this contradicts the CBSA officer's note of what he said. It also found that he had some degree of awareness of the immigration consequences of his trip. This is contrary to the Applicant's testimony that he thought he could return to SVG as he was a permanent resident for over three years. The RPD noted that the evidence before it also established that Mr. Caine presented himself in public and in an institutional setting, which it found is not consistent with the actions of a person who has a subjective fear.

[9] On actual reavailment, the RPD found that Mr. Caine entered SVG through the normal airport entry process and did not experience any difficulties with authorities or any state or non-state actors during his visit. It noted that he had several encounters with officials from SVG and

that he did not always take precautions during his visit. As such, the RPD found that the Applicant “conducted himself as a person without a subjective fear.”

III. Issue and Standard of Review

[10] The sole issue for determination is whether the RPD’s decision is reasonable.

[11] The parties agree, and I concur, that the standard of review is reasonableness, as articulated by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[12] Reasonableness is a deferential, but robust, standard of review: *Vavilov* at paras 12-13. Absent exceptional circumstances, reviewing courts must not interfere with the decision-maker’s factual findings and cannot reweigh and reassess evidence considered by the decision-maker: *Vavilov* at para 125. Reasons must “not be assessed against a standard of perfection;” reviewing courts cannot expect administrative decision makers to “respond to every argument or line of possible analysis:” *Vavilov* at paras 91, 128.

[13] That being said, reasonableness review is not a mere “rubber-stamping” process: *Vavilov* at para 13. It is the reviewing court’s task to assess whether the decision as a whole is reasonable; that is, it 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

IV. Legal Framework

[14] Paragraph 108(1)(a) of the Act provides that a claim for refugee protection shall be rejected, and a person is not a Convention refugee nor a person in need of protection, where a person has voluntarily reavailed themselves of the protection of their country of nationality.

[15] In assessing cessation, this Court has adopted the test set out in the *United Nations High Commissioner for Refugees Handbook on Procedures and Criteria for Determining Refugee Status* [the UNHCR Handbook]: *Nsende v Canada (Minister of Citizenship and Immigration)*, 2008 FC 531 at paras 12–14. In particular, paragraph 119 of the UNHCR Handbook outlines the three conjunctive elements required to establish that an applicant has reavailed themselves of diplomatic protection under paragraph 108(1)(a) of the Act:

1. Voluntariness: The refugee must have acted voluntarily;
2. Intention: The refugee must have intended to reavail themselves of the protection of their country of nationality; and
3. Reavailment: The refugee must have actually obtained that protection.

[16] Paragraph 120 of the UNHCR Handbook provides that an applicant is deemed to have acted voluntarily where their actions are free from administrative or government compulsion:

If the refugee does not act voluntarily, he will not cease to be a refugee. If he is instructed by an authority, e.g. of his country of residence, to perform against his will an act that could be interpreted as a reavailment of the protection of the country of his nationality, such as applying to his Consulate for a national passport, he will not cease to be a refugee merely because he obeys such an instruction. He may also be constrained, by circumstances beyond his control, to have recourse to a measure of protection from his country of nationality. He may, for instance, need to

apply for a divorce in his home country because no other divorce may have the necessary international recognition. Such an act cannot be considered to be a “voluntary reavilment of protection” and will not deprive a person of refugee status.

[17] In brief, an applicant does not act voluntarily if there is some sort of necessity for the travel that compels them to act. The necessity for travel must be a legal necessity, rather than something the applicant may deem as necessary. The element of coercion is key in assessing voluntariness.

[18] Paragraph 121 of the UNHCR Handbook provides that there is a presumption that an applicant intended to reavail themselves when they apply for and obtain a passport from their country of nationality:

If a refugee applies for and obtains a national passport or its renewal, it will, in the absence of proof to the contrary, be presumed that he intends to avail himself of the protection of the country of his nationality. On the other hand, the acquisition of documents from the national authorities, for which non-nationals would likewise have to apply – such as a birth or marriage certificate – or similar services, cannot be regarded as a reavilment of protection.

[19] This presumption is “particularly strong” where an applicant uses their national passport to travel to their country of nationality: *Canada (Citizenship and Immigration) v Galindo Camayo*, 2022 FCA 50 [*Camayo*] at para 63. It is only in “exceptional circumstances” that an applicant’s travel to their country of nationality on a passport issued by that country will not result in termination of refugee status: *Abadi v Canada (Citizenship and Immigration)*, 2016 FC 29 [*Abadi*] at para 18. Importantly, the question of intention to reavail “has nothing to do with whether the motive for travel was necessary or justified:” *Camayo* at para 72.

[20] The focus on actual reavilment is whether the applicant received the diplomatic protection of their country of nationality, rather than state protection. This Court has held that obtaining and travelling on a passport issued by the applicant's country of nationality is sufficient to constitute actual reavilment: *Lu v Canada (Citizenship and Immigration)*, 2019 FC 1060 at para 60.

[21] The initial burden falls on the Minister to prove reavilment on a balance of probabilities: *Abadi* at para 17. However, once the Minister establishes that a presumption of reavilment exists, the burden of proof reverses and the applicant must then adduce sufficient evidence to rebut the presumption. In considering whether an applicant has rebutted the presumption, the RPD should have regard to the various factors outlined at paragraph 84 of *Camayo*, including the purpose of the travel to the country of nationality and any precautionary measures the applicant took while there. Importantly, the Federal Court of Appeal cautions that “[n]o 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 reavilment:” *Camayo* at para 84.

V. Analysis

[22] It is submitted that the RPD erred in not sufficiently addressing all of the factors enumerated in *Camayo*. Specifically, Mr. Caine submits that the RPD did not consider his personal attributes, namely his mental health at the time he returned to SVG, and the severity of the consequences of losing his refugee protection.

[23] In regard to his mental health, Mr. Caine points to a Psychiatric Assessment Report from the Canadian Centre for Victims of Torture [the Assessment Report] dated October 17, 2022, that was submitted to the RPD upon its request. The report was prepared by a licensed psychiatrist based on two hours of conversation with Mr. Caine.

[24] The Assessment Report confirms his diagnosis of post-traumatic stress disorder [PTSD] and his poor state of mind at the time he returned to SVG, due in part to his father's death and his mother's illness:

Mr. Caine expressed a lot of regrets about not having had a chance to see his father before he died [in 2015], especially in order to make amends. He said, "My dad died and I didn't get to see him... I still think about not having made things right with him." Mr. Caine carried a lot of guilt and became "depressed and suicidal" after his mother also fell sick and was hospitalized for diabetes around the same time. He said, "I didn't want the same to happen to my mom... I was scared of losing her... I was depressed all the time because I have nobody to talk to. I felt alone and didn't care about what would happen to me because I just wanted to see my mom."

Despite knowing the risks, Mr. Caine returned to St Vincent for three weeks on December 16, 2020 to visit his mother. He explained that even though he was scared that something may happen to him and did not go outside the whole time, at the same time he had a lot of suicidal thoughts and "didn't care what happened to [him]." In addition to his father's death and his mother's illness, Mr. Caine's state of mind at that time was exacerbated by an incident that happened to him in 2015, where he was shot. He described that the bullet went through both of his thighs and he was hospitalized for three days. Mr. Caine continues to have pain in that area and limbs when it is cold.

[25] Mr. Caine submits that the RPD failed to assess these attributes and their implications on his intent to reavail, specifically on his ability to appreciate the consequences of returning to

SVG. This, he submits, is a reviewable error: *Hamid v Minister of Citizenship and Immigration*, 2022 FC 1541 [*Hamid*].

[26] In regard to the severity of the decision's consequences, he submits that the RPD failed to meaningfully grapple with the serious consequences that cessation would have on him, which supersede those explained by the Federal Court of Appeal in *Camayo* at paragraph 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).

[27] In addition to these consequences, Mr. Caine submits that cessation would exacerbate his mental health problems and potentially subject him to persecution due to his sexuality. The

Assessment Report explained that he suffers from suicidal thoughts and ongoing trauma, which would be exasperated if his permanent resident status were revoked. He submits that the decision is unreasonable as the RPD was completely silent on these consequences: *Hamid*.

[28] Despite his counsel's attempt to persuade me otherwise, I do not accept these submissions. I find that the RPD considered the factors outlined in *Camayo* in rendering its decision, including those that he submits were overlooked.

[29] The RPD went beyond merely acknowledging Mr. Caine's submissions that he suffers from mental health issues. Upon noticing that he was emotionally upset, the RPD postponed its initial hearing to allow him the opportunity to obtain the Assessment Report. This confirmed for the panel that the Applicant suffers from PTSD, major depressive disorder, and anxiety. The RPD was mindful of the Applicant's diagnosis in its reasons, even stating that it considered that the Applicant "suffers from mental health challenges and became emotionally upset during [the] proceeding." Nonetheless, the RPD found that the Applicant was "articulate and understood what was being asked of him." It further reasonably found that, on a balance of probabilities, and not withstanding the Applicant's mental health issues, he had at least some idea of the immigration consequences of returning to SVG:

The credible evidence before the panel indicates that the Respondent attempted to mislead the officer concerning his travel destination outside Canada in 2020, initially refusing to admit that he had travelled to STG. Based on this evidence, the panel finds that the Respondent had some degree of awareness that by returning to STG in 2020, he could have encountered adverse immigration problem for himself, and that this is [*sic*] real reason why he was not forthright with the officer when he arrived in Canada in January 2021.

[30] Additionally, the Assessment Report confirms that the Applicant was aware of the consequences of returning to SVG: “Despite knowing the risks, Mr. Caine returned to St Vincent for three weeks on December 16, 2020 to visit his mother” [emphasis added].

[31] Under paragraph 70 of *Camayo*, in determining an applicant’s intent to reavail, the RPD must assess “[a]n individual’s lack of actual knowledge of the immigration consequences of their actions,” as a “key factual consideration.” The Federal Court of Appeal was concerned with an applicant’s *knowledge* of the immigration consequences, rather than an appreciation of those consequences, as Mr. Caine submits. The record before me demonstrates that the RPD reasonably considered this factor, along with the factors that were open for it to include in its analysis of his intent.

[32] At the hearing, counsel argued that the RPD ought to have considered Mr. Caine’s mental health in assessing his *voluntariness* to reavail. I note that the issue of an applicant’s mental illness or cognitive ability at the time they decide to return to their country usually goes to their intent; as described above, these attributes could affect an applicant’s ability to understand the consequences of their actions. There is very limited case law to suggest that the RPD must consider an applicant’s mental capacity in the context of voluntariness: *Malik v Canada (Citizenship and Immigration)*, 2023 FC 443 at para 37, citing *Canada (Public Safety and Emergency Preparedness) v Zinali*, 2022 FC 1371 at para 16. Even if I were to accept this proposition, I find that Mr. Caine failed to meet his evidentiary burden in establishing that he was so incapable that his actions of acquiring and travelling on his SVG passport were involuntary. The RPD’s assessment of his voluntariness to reavail is reasonable.

[33] The RPD also considered the consequences of its decision on Mr. Caine. It stated that he claimed to experience social rejection and mistreatment, and was a victim of several violent assaults in SVG as a gay man. It found, however, that Mr. Caine's actions were not consistent with someone who has a subjective fear of persecution. While I agree with him that the consequences of cessation are severe, this is true in any cessation case where individuals risk losing their refugee protection. The mere fact that Mr. Caine will suffer consequences as a result of the decision is not necessarily enough to rebut the presumption of reavailment. As the Federal Court of Appeal wrote in *Camayo* at paragraph 84, no individual factor is necessarily dispositive.

[34] Further, *Camayo* refers to the severity of the consequences of a cessation decision less as a factor that the RPD must consider in determining whether an applicant has rebutted the presumption of reavailment, but more as a requirement that the RPD provides reasons that reflect the stakes: see *Camayo* at paras 50, 84, citing *Vavilov* at paras 133–135. The RPD's decision meets this principle of responsive justification.

VI. Conclusion

[35] For the foregoing reasons, the application for judicial review is dismissed. The parties raised no question for certification and I agree that none arise.

JUDGMENT in IMM-1310-23

THIS COURT'S JUDGMENT is that this application is dismissed and no question is certified.

"Russel W. Zinn"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1310-23

STYLE OF CAUSE: ZIEDO ZIARDO CAINE v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: HELD BY VIDEOCONFERENCE

DATE OF HEARING: JUNE 5, 2024

JUDGMENT AND REASONS: ZINN J.

DATED: JUNE 10, 2024

APPEARANCES:

Mohamed Mahdi FOR THE APPLICANT

Laoura Christodoulides FOR THE RESPONDENT

SOLICITORS OF RECORD:

Mahdi Weinstock LLP FOR THE APPLICANT
Barristers and Solicitors
Toronto, Ontario

Attorney General of Canada FOR THE RESPONDENT
Toronto, Ontario