

Federal Court



Cour fédérale

Date: 20190408

Docket: IMM-3118-18

Citation: 2019 FC 425

Ottawa, Ontario, April 8, 2019

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

EZAZ UD DIN

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act] for judicial review of a decision made by the Refugee Protection Division of the Immigration and Refugee Board of Canada [RPD] dated May 22, 2018 [Decision] wherein the RPD granted the application of the Minister of Citizenship and Immigration [Minister] to terminate the Applicant's refugee status under s 108(2) of the Act because the Applicant had

voluntarily re-availed himself of the protection of his country of nationality as described in s 108(1)(a) of the Act.

II. BACKGROUND

[2] The Applicant, Ezaz Ud Din, is a citizen of Pakistan. He arrived in Canada with his wife in 2005 and made a claim for refugee protection. His claim was based on his Ahmadi Muslim faith. The Applicant's claim for refugee protection was accepted on May 11, 2006. In February 2007, he became a permanent resident of Canada.

[3] Shortly after obtaining his permanent residence, the Applicant obtained a Pakistani passport which he used to travel to Pakistan on numerous occasions. Specifically, the Applicant travelled to Pakistan and stayed for one month beginning in March 2007, two months beginning in October 2007, one and a half months beginning in March 2008, and four months beginning in November 2009. The Applicant renewed his Pakistani passport in December 2011 and travelled to Pakistan for three weeks beginning in December 2013 and three weeks beginning in December 2014.

[4] On July 31, 2015, the Minister made an application to terminate the Applicant's refugee protection pursuant to s 108(1)(a) of the Act on the basis that the Applicant had voluntarily re-availed himself of the protection of Pakistan.

III. DECISION UNDER REVIEW

[5] The RPD began by setting out three conditions listed in the United Nations High Commissioner for Refugees Handbook [UNHCR Handbook] which are to be considered when assessing voluntary re-availment. First, the refugee must act voluntarily. Second, the refugee must intend to re-avail himself of the protection of his home country. Finally, the refugee must obtain such protection. The RPD noted that it was not bound to follow the guidelines from the UNHCR Handbook, but acknowledged their usefulness and applied the three conditions to the Applicant's case.

[6] The RPD concluded that the Applicant acted voluntarily by applying for a Pakistani passport from the Pakistani Consulate in Toronto. There was no evidence demonstrating that the Applicant was compelled to obtain a new passport.

[7] The RPD then considered whether the Applicant intended to re-avail himself. While noting that the Applicant used his Pakistani passport to travel to the United States on two occasions, the RPD held that the passport was obtained specifically to travel to Pakistan. Furthermore, the RPD reasoned that travelling under a Pakistani passport demonstrates re-availment.

[8] The RPD assessed the Applicant's explanation that he travelled to Pakistan to sort out a retirement issue with his former employer, and that he needed to return to Pakistan to settle a property dispute. The RPD held that there is no provision that allows refugees to return to their country of origin for financial or property reasons.

[9] The RPD also impugned the Applicant's credibility in relation to his travel to Pakistan. The RPD found that the Applicant was unable to recall the dates of his trips. Additionally, the RPD stated that the Applicant "was selective in what he could recall." The RPD disagreed with the Applicant's explanation that he was able to hide from his agents of persecution when he returned to Pakistan.

[10] The RPD concluded that the Applicant had voluntarily and intentionally re-availed himself of Pakistan's protection. The RPD also held that there was no requirement to assess any future risk facing the Applicant upon return to Pakistan.

[11] The RPD granted the Minister's application to cease the Applicant's refugee protection pursuant to s 108(2).

IV. ISSUES

[12] The issues to be determined in the present matter are the following:

1. What is the standard of review?
2. Was the Decision reasonable?
3. Was there a breach of procedural fairness?
4. Did the RPD err in failing to assess the risk to the Applicant upon return to Pakistan?

V. STANDARD OF REVIEW

[13] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*], held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[14] A standard of reasonableness applies to the RPD's decision to grant the Minister's application for cessation of refugee protection (*Siddiqui v Canada (Citizenship and Immigration)*, 2016 FCA 134 at para 11).

[15] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at para 47, and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59 [*Khosa*]. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[16] Courts have recently held that the standard of review for an allegation of procedural unfairness is ‘correctness’ (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Khosa*, above, at paras 59 and 61).

[17] While an assessment of procedural fairness on a standard of correctness accords with recent jurisprudence, it is not a doctrinally sound approach. A better conclusion is that no standard of review at all is applicable to the question of procedural fairness. The Supreme Court of Canada in *Moreau-Bérubé v New Brunswick (Judicial Council)*, 2002 SCC 11 stated (at para 74) that the issue of procedural fairness,

requires no assessment of the appropriate standard of judicial review. Evaluating whether procedural fairness, or the duty of fairness, has been adhered to by a tribunal requires an assessment of the procedures and safeguards required in a particular situation.

[18] Failure to assess future risk is reviewable on a standard of correctness (*Nyoka v Canada (Citizenship and Immigration)*, 2008 FC 568 at para 13; *Mahmutyazicioglu v Canada (Citizenship and Immigration)*, 2008 FC 668 at para 11; *Quintero Guzman v Canada (Citizenship and Immigration)*, 2008 FC 1329 at para 25).

V. STATUTORY PROVISIONS

[19] The following provisions of the Act are relevant to this application for judicial review:

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

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 :

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).

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 protection
des réfugiés, de tels des
faits mentionnés au
paragraphe (1).

VI. ARGUMENT

A. *Applicant*

[20] The Applicant initially submitted that the RPD breached procedural fairness by failing to advise the Applicant of his right to counsel but this ground of review was withdrawn at the hearing of this application.

[21] The Applicant says that the RPD failed to address the third prong of the test for re-avilment. Specifically, the RPD did not consider whether the Applicant actually received protection from Pakistan. If the RPD had considered this element of the test, it would have determined that the Applicant, due to his status as an Ahmadi Muslim, could never obtain protection from Pakistan.

[22] The Applicant acknowledges that obtaining a passport creates a presumption that an individual intends to re-avail themselves of that country's protection, but argues that this presumption is rebutted in the circumstances of this case. The Applicant's status as an Ahmadi Muslim and the documentary evidence showing persecution of Ahmadi Muslims is sufficient to rebut the presumption.

[23] The Applicant also challenges the RPD's finding that it is unlikely that the Applicant was able to enter and exit Pakistan while remaining in hiding from agents of persecution. This finding is neither transparent nor intelligible. Either the RPD is acknowledging that the Applicant cannot receive protection from Pakistan or the RPD is making credibility findings which must be explained.

[24] According to the Applicant, documentary evidence confirms that Ahmadi Muslims face widespread persecution in Pakistan. The evidence demonstrates that there is no state protection available and no possibility of internal flight. The persecution of Ahmadi Muslims is sanctioned by the Pakistani government through legislation and is increasingly violent in nature. Based on this evidentiary foundation, it is clear that the third element of the test for re-availment was not met in this case. The Applicant did not actually re-avail himself of Pakistani protection.

[25] The Applicant submits that the RPD erred further by failing to conduct a prospective risk analysis. Although the jurisprudence remains unclear, a proper interpretation of s 108(1) reveals that a forward-looking risk analysis is necessary in a cessation application. This line of reasoning

is bolstered by the Applicant's belonging to a heavily persecuted religious minority. The RPD's failure to conduct an analysis of future risk is a reviewable error.

B. *Respondent*

[26] The Respondent says it was reasonable for the RPD to grant the application for cessation because the Minister succeeded in establishing that the Applicant voluntarily and intentionally re-availed himself to Pakistan.

[27] The Respondent submits that the Applicant voluntarily re-availed himself by obtaining a passport for the purpose of travelling to Pakistan. Additionally, the Applicant demonstrated his reliance on Pakistan's protection by travelling to the United States with his Pakistani passport. Only in exceptional circumstances will an individual be able to rebut the presumption of re-avilment in such circumstances. The explanations offered by the Applicant were insufficient to rebut the presumption of re-avilment.

[28] The Respondent says that there is no jurisprudence to support the Applicant's contention that the RPD was required to conduct a forward-looking risk assessment. The RPD was correct to find that prospective risk, if any, was nullified by the Applicant's voluntary re-avilment. The notion that the RPD was required to conduct a forward-looking risk assessment is illogical because it would essentially create a second refugee hearing. Moreover, the Applicant has other options such as a pre-removal risk assessment.

[29] The Respondent submits that the third prong of the test for cessation of refugee protection was satisfied in this case because the Applicant obtained a Pakistani passport and actually used it to travel to Pakistan.

VII. ANALYSIS

[30] The parties agree that the three requirements that must be shown in order to terminate refugee protection are that:

- (a) The refugee acted voluntarily;
- (b) The refugee intended to re-avail himself of his country of nationality; and
- (c) The refugee actually obtained such protection.

[31] The RPD correctly cites the test in the Decision and attributes it to the grounds of cessation referred to in s 108(1) of the Act. As the RPD also points out, the test comes from the UNHCR Handbook at Article 1(c)(1). The guidelines from the Handbook were not binding upon the RPD, but they have been endorsed by this Court as the appropriate approach to determine cessation of protection by re-availment. See, for example, the case of *Canada (Public Safety and Emergency Preparedness) v Bashir*, 2015 FC 51 where Justice Bédard (at para 43) had the following to say on this point:

The UNHCR Handbook provides guidance in the interpretation of the Convention cessation clauses, including cessation of refugee protection due to the refugee's reavailment of the protection of his country of nationality. Paragraph 108(1)(a) of the IRPA essentially reproduces Article 1C(1) of the Convention, and this Court has recognized the relevance of relying on the UNHCR Handbook as an interpretative guide to assess the meaning of reavailment.

[32] In the present case, the RPD identified and applied the correct test but it did so in a way that gives rise to two important reviewable errors.

[33] First of all, the RPD says that the Applicant acted voluntarily in obtaining the several Pakistani passports and in repeatedly returning to Pakistan for visits. The parties agree that, in the various acts cited by the RPD, the Applicant acted voluntarily. However, the Applicant says that he did not intend to re-avail himself of the protection of Pakistan and did not actually obtain such protection.

[34] In deciding that the Applicant had the necessary intention to re-avail, the RPD relies upon the acquisition of passports, the Applicant's travel to the United States using a Pakistani passport and repeated trips to Pakistan. The Applicant, however, provided a great deal of additional evidence to demonstrate that, notwithstanding the foregoing, he had no intention of re-availing himself and, in fact, could not have done so even if he had had such an intention.

[35] The RPD's only mention of this additional evidence in the Decision is as follows:

I note that the Respondent [Applicant] testified he traveled to Pakistan as it was related to his employment at the Pakistani International Airline and as it related to his retirement. He further returned due to a property dispute with tenants, but refugee protection does not have a provision that allows one to return to a country from one ... from where one seeks protection simply for financial reasons, property disputes or other reasons.

I find I do not agree with the Respondent [Applicant] that he had the ability to hide from the agents of persecution in this case, as he alleged in his refugee claim that he feared death due to his religious identity. If the agents of persecution include the State then it's highly unlikely that he'd be able to hide and re-enter and exist as easily as he did.

I find the Respondent [Applicant] not credible as it relates to his various returns. He could not recollect when he returned.

[36] This is not a satisfactory review of the Applicant's evidence of his lack of intention. The Applicant testified at the cessation hearing to the following:

- (a) When he visited Pakistan he was always in hiding, staying at a friend's house or in hotels (Certified Tribunal Record at page 104);
- (b) He did not openly practice his Ahmadi faith (Certified Tribunal Record at page 104);
- (c) He could not stay with his brothers because they were Muslims and opposed his Ahmadi faith (Certified Tribunal Record at page 105);
- (d) He could not ask his brothers to help him with the family real estate issue for the same reason and this is why he had to go to Pakistan himself (Certified Tribunal Record at page 105);
- (e) When in Pakistan, he did not attend the mosque or the graveyard and lived in constant fear (Certified Tribunal Record at page 104);
- (f) He never told anyone that he was coming to Pakistan, and if people came to know that he was there, he would leave his luggage and all his things and return to Canada (Certified Tribunal Record at page 104);
- (g) He was only able to travel to Pakistan because he could fly free via Pakistani Airlines, which is his former employer (Certified Tribunal Record at page 106).

[37] The issue was not whether refugee protection allows someone to return for "financial reasons, property disputes or other reasons." It clearly does not, but this does not mean that the Applicant, by returning to Pakistan, necessarily intended to re-avail himself of Pakistan's protection. That issue requires a consideration and analysis of all the evidence and the bald

assertion about the Applicant's "ability to hide" fails to explain, for instance, how the state would know he is a refugee or an Ahmadi Muslim, given that he has a passport that only identifies him as Muslim.

[38] There can be no doubt as to the Applicant's religious beliefs and practices because the RPD clearly stated that his refugee claim "was based on his religious beliefs, namely that he is a Ahmadi" and there was no evidence before the RPD to suggest that the Applicant had changed his religious affiliations and practices.

[39] The RPD's comment that "refugee protection does not have a provision that allows one to return to a country from one... from where one seeks protection simply for financial reasons, property disputes or other reasons" misses the point of the Applicant's evidence which was to show that, when taken as a whole, he did not intend to re-avail.

[40] However, most problematic in this case is that the RPD never considers whether the Applicant actually obtained Pakistan's protection, even though it cites this as a necessary consideration. The Decision suggests that the RPD conflates "intention" with "actual protection."

[41] The country condition evidence that was before the RPD confirms that there is no state protection available to Ahmadi Muslims anywhere in Pakistan and that, in fact, the state is an active persecutor of Ahmadi Muslims.

[42] The Immigration and Refugee Board of Canada has issued a Jurisdictional Guide based upon RAD-Decision-TB7-01837 – May 8, 2017, which obliges the RPD to apply the same reasoning set out in that decision or to explain why it has not done so. The Immigration and Refugee Board of Canada has selected this guide because it provides a reasoned explanation as to why there is an absence of state protection and a viable internal flight alternative for Ahmadi claimants from Pakistan. The decision itself states:

[39] Having considered the evidence, the RAD finds that the Appellant faces a serious possibility of persecution on account of her Ahmadi faith. As the state is one of the leading agents of persecution, the Appellant cannot expect adequate state protection. As the persecutory laws, measures, and practices exist in all areas of Pakistan, the Appellant cannot avail herself of a viable internal flight alternative.

[43] There is no indication in the Decision that the RPD even considered the third element of the test (“must actually obtain protection”), let alone the evidence that there is no protection for Ahmadi Muslims in Pakistan and the state is an active persecutor.

[44] As I understand the Respondent’s arguments before me, the consideration of “actual protection” was not required in this case because cessation under s 108(1)(a) does not require an assessment of forward-looking risk. This accords with the RPD’s conclusion that “there’s no requirement to assess his risk upon return, and that he nullified his risk by returning on multiple occasions.”

[45] This does not, however, answer the issue raised in this case that re-availment required the RPD to consider whether the Applicant had actually obtained state protection in Pakistan when he allegedly re-availed himself. Cessation and voluntary re-availment under s 108(1)(a) do not

occur unless the Applicant has actually obtained state protection in Pakistan. So this case is not about whether, given cessation under s 108(1)(a), was the RPD obliged to consider the Applicant's profile and future risk. The RPD did not consider whether, by giving the Applicant a Pakistani passport, the state was also granting him actual protection. There was significant evidence in this case to suggest that it was not, and that the Applicant did not acquire actual protection. Even if this Applicant intended to re-avail and so had no subjective fear (s 96), there was still the possibility that, when he returned to Pakistan, he was at risk under s 97 of the Act which does not require subjective fear. See *Rajadurai v Canada (Citizenship and Immigration)*, 2013 FC 532 at para 38. The RPD simply did not address these issues.

[46] It is well-recognized in the case law that it is only in "exceptional circumstances" that a refugee who travels to his/her country of nationality on a passport issued by that country will not result in the termination of refugee protection. See, for example, *Abadi v Canada (Citizenship and Immigration)*, 2016 FC 29 at para 18. But exceptional circumstances do arise from time to time. In the Applicant's case, we don't yet know if this is an exceptional case because the RPD failed to address the applicable criteria in a reasonable way. This means that the Decision must be struck and returned for reconsideration.

[47] The parties have made submissions on the issue of whether, upon cessation of refugee status pursuant to s 108(1)(a) of the Act, the RPD is required to consider whether the person is at risk of persecution or in need of protection pursuant to ss 96 and 97 of the Act. This issue is not germane to my decision.

JUDGMENT IN IMM-3118-18

THIS COURT'S JUDGMENT is that

1. The application is allowed. The Decision is quashed and the matter is returned for reconsideration by a different member.
2. There is no question for certification.

“James Russell”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3118-18

STYLE OF CAUSE: EZAZ UD DIN v THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: MARCH 7, 2019

**REASONS FOR JUDGMENT
AND JUDGMENT:** RUSSELL J.

DATED: APRIL 8, 2019

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