

Federal Court



Cour fédérale

Date: 20220914

Docket: IMM-6815-21

Citation: 2022 FC 1295

Toronto, Ontario, September 14, 2022

PRESENT: Madam Justice Go

BETWEEN:

ABDEL GADIR OMER

Applicant

and

**THE MINISTER OF IMMIGRATION,
REFUGEES AND CITIZENSHIP**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mr. Abdel Gadir Omer [Applicant], a citizen of Sudan, brings an application for judicial review of a decision rendered on September 20, 2021 [Decision] by the Refugee Protection Division [RPD]. The RPD allowed the application by the Minister of Public Safety and Emergency Preparedness [the Minister] for the cessation of refugee protection to the Applicant, pursuant to s. 108(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] The Applicant was found to be a Convention Refugee by an overseas officer on October 14, 2002. On October 28, 2004, the Applicant travelled to Canada and became a Permanent Resident [PR].

[3] Between January 2007 and February 2019, the Applicant returned to Sudan on seven occasions. The shortest of these trips lasted for 9 days and the longest 16 months. On his first trip to Sudan, the Applicant used an emergency travel document issued by the Sudanese embassy in Ottawa. The Applicant later obtained a Sudanese passport and used this passport to enter Sudan. In 2017, the Sudanese embassy issued the Applicant another emergency travel document. According to the Applicant, he made his two initial trips, in 2007 and 2007-2009, respectively to visit his ailing mother.

[4] In 2010, the Applicant married his wife, who resided in Sudan, by proxy. The couple has three children. After the marriage, the Applicant returned to Sudan three times to visit his family. In 2017, the Applicant applied for Canadian citizenship. The Applicant later made two more trips to Sudan to obtain documentation requested by the citizenship officer.

[5] The Applicant stated that his wife and children left for the United Arab Emirates in June 2019, due to the deteriorating security situation in Sudan.

[6] On June 12, 2019, the Minister applied to cessate the Applicant's refugee protection.

[7] The RPD found that the Applicant voluntarily re-availed himself of the protection of Sudan pursuant to s. 108(1)(a) of the *IRPA*. In making this determination, the RPD applied the *United Nations' High Commission on Refugees Handbook on Procedures and Criteria for Determining Refugee Status* [UNHCR Handbook], which sets out, at paragraph 119, the conditions for re-availment:

- (a) voluntariness: the refugee must act voluntarily;
- (b) intention: the refugee must intend by his action to re-avail himself of the protection of the country of his nationality;
- (c) re-availment: the refugee must actually obtain such protection.

[8] The RPD found all three conditions were met in the Applicant's case.

[9] The Applicant submits that the RPD rendered an unreasonable Decision and breached the procedural fairness owed to the Applicant. I find the Decision unreasonable and I grant the application for judicial review.

II. Issues and Standard of Review

[10] The Applicant raises the following issues before the Court

- a) Did the RPD breach its duty of procedural fairness to the Applicant?
- b) Was the RPD's decision reasonable?
 - i. Did the RPD err in finding that the Applicant intended to reavail himself of Sudanese protection?
 - ii. Was the RPD's finding that the Applicant obtained the protection of Sudan reasonable, given that the RPD found that 108(1)(e) of the *Act* did not apply?

[11] The parties agree that the standard of review for the merits of the RPD decision is reasonableness.

[12] Reasonableness is a deferential, but robust, standard of review (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], at paras 12-13). The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified: *Vavilov*, at para 15. 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. Whether a decision is reasonable depends on the relevant administrative setting, the record before the decision-maker, and the impact of the decision on those affected by its consequences: *Vavilov*, at paras 88-90, 94, 133-135.

[13] For a decision to be unreasonable, the Applicant must establish the decision contains flaws that are sufficiently central or significant: *Vavilov*, at para 100. Not all errors or concerns about a decision will warrant intervention. A reviewing court must refrain from reweighing evidence before the decision-maker, and it should not interfere with factual findings absent exceptional circumstances: *Vavilov*, at para 125. Flaws or shortcomings must be more than superficial or peripheral to the merits of the decision, or a “minor misstep”: *Vavilov*, at para 100.

III. Analysis

[14] The relevant provisions are ss. 108, 46(1)(c.1) and 40.1(1) of the *IRPA*, which are set out in Appendix A.

[15] The determinative issue, in my view, is the RPD's unreasonable findings with regard to the Applicant's intent to reavail himself of the protection of the Government of Sudan.

[16] The RPD rejected the Applicant's evidence that he was hiding in Sudan and found instead that he was "travelling to stay with friends." The RPD also found not credible the Applicant's claim that his family paid bribes to facilitate his entry and exit from Sudan due to inconsistencies between the Applicant's narrative and testimony in this respect.

[17] The Applicant argues that even if the Court accepts as reasonable the RPD's rejection of his evidence regarding his hiding and paying of bribes, the RPD still erred by failing to consider the significance of the Applicant's belief that he enjoyed the security of his Canadian PR status. The Applicant submits that the RPD should have either accepted the Applicant's testimony about his belief and rejected the cessation application on that basis, or rejected the Applicant's testimony about his belief altogether: *Aydemir v Canada (Minister of Citizenship and Immigration)*, 2022 FC 987 at para 71 [*Aydemir*].

[18] In essence, the Applicant argues that having accepted his evidence that he did not know about the risk of losing his Canadian PR status until he received the Minister's application in 2019, the RPD failed to provide a sufficient link between that evidence to its finding that the Applicant knew he risked losing his Canadian status by virtue of his multiple trips to Sudan. This was particularly unreasonable, the Applicant argues, given the RPD's findings that the conditions in Sudan have remained the same. Based on that finding, the Applicant ought to have been afraid of his risks of return to Sudan.

[19] Further, the Applicant submits that he went back to Sudan not because he was not afraid, but because of the situation with his mother. The Applicant argues the RPD erred by not considering the Applicant's actual purpose for returning to Sudan.

[20] The Applicant further submits that the RPD erred by relying on *Al-Habib v Canada (Minister of Citizenship and Immigration)*, 2020 FC 545 [*Al-Habib*]. The Applicant claims that *Al-Habib* failed to address the significance of a person's subjective knowledge of immigration consequences, contrary to *Canada (Minister of Citizenship and Immigration) v Galindo Camayo*, 2022 FCA 50 [*Camayo FCA*].

[21] I begin my analysis with *Camayo FCA* which establishes the factors that the RPD must weigh in cessation cases. At para 84, the FCA laid down a list of non-exhaustive factors for the RPD to consider and I have included those most relevant to this case:

- 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;
- 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;
- The frequency and duration of the travel;
- 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;
- 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.

[22] The FCA made clear 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 reavailment”: (*Camayo FCA*, at para 84)

[23] I do not agree with the Applicant that the RPD erred by relying on *Al-Habib* or that *Al-Habib* failed to address the significance of a person’s subjective knowledge of immigration consequences, contrary to *Camayo FCA*. However, I find that the RPD erred by imputing intent to the Applicant to reavail himself of Sudanese Government’s protection without regard to the evidence.

[24] In finding that the Applicant has not rebutted the presumption of reavailing himself of Sudanese protection, the RPD noted:

I accept that the [Applicant] was not aware of the consequences of his returns to Sudan until he received the Minister’s cessation application. However, counsel asked the [Applicant] whether now he would consider returning to Sudan. The [Applicant] replied that he does not think of going back to Sudan at all now for security reasons. Everyone in Sudan wishes that they could leave the country. His parents and siblings are trying to leave because there is no security or safety. The situation in Sudan is worse than before. Not once did the [Applicant] mention the possible consequences on his permanent residence in Canada as one of the considerations for not travelling to Sudan. Even now, knowing the full consequences that returning to Sudan would have on him, the [Applicant] has not travelled because, as he testified, the general situation has deteriorated in Sudan. I find this is evidence that the [Applicant] did not travel to Sudan only on the strength of his belief that he enjoyed the security of having permanent residence in Canada but rather due

to other reasons, including the general situation in Sudan at the time of his travels.

[Emphasis added]

[25] There are several errors arising from this analysis.

[26] First, as the Applicant points out, the RPD did not explain how it jumped from accepting the Applicant “was not aware of the consequences of his returns to Sudan” to finding that the Applicant travelled to Sudan due to “other reasons, including the general situation in Sudan at the time of his travels.” In effect, the RPD took from the Applicant’s testimony about the worsening general conditions currently in Sudan to reach its conclusion that the Applicant returned to Sudan previously because the situations were less dire. This conclusion, in my view, was not supported by evidence. More to the point, just because the Applicant stated the situation in Sudan has worsened does not mean he travelled to Sudan previously because he believed it was safe to do so.

[27] Second, I agree with the Applicant that he has given his “other reason” for travelling to Sudan, namely to visit his family. The Decision does not explain why this “other reason”, coupled with the Applicant’s belief that he was protected by his Canadian PR status, would make it less likely for the Applicant to rebut the presumption of reavailment. While it was up to the RPD to find that visiting family in this case did not qualify as one of the “exceptional circumstances” under paragraph 124 of the UNHCR Handbook, this still counts as a “compelling reason” that weighs in favour of the Applicant: *Camayo FCA*, at para 84. The Decision did not

analyze this aspect of the Applicant's evidence when considering the Applicant's intent to reavail.

[28] Having listened to the audio recording of the hearing, I find several other errors with respect to the RPD reasons, in addition to the ones cited by the Applicant.

[29] The Applicant was represented by a different counsel at the RPD hearing. While the RPD faulted the Applicant for "not once" mentioning the possible consequences on his Canadian PR status as the reason for not travelling to Sudan now when questioned by his counsel, this finding mischaracterized the exchange between the Applicant and his then counsel. The actual question put forward by counsel was as follows:

When you knew you would lose your PR status if you return to Sudan, you said when you received the notice of this hearing. Would you consider travelling to Sudan now that you know this?

[30] In short, the fact that the Applicant knew about the consequences for his PR status when he received the notice of his cessation hearing was imbedded in the question asked by counsel. In light of the actual question asked by counsel, it was unreasonable for the RPD to expect the Applicant to restate his understanding of the risk of losing his PR status should he return to Sudan now, as part of response to his counsel's question.

[31] The audio recording further confirms that counsel for the Applicant asked the Applicant whether he has ever thought that he was receiving protection from the Sudanese government on his return trips, to which the Applicant replied "never." In addition, the Applicant testified that he never thought of receiving any protection from the Sudanese government because he was

against the head of the regime, Omar Hassan Ahmad al-Bashir, who came into power in 1989 and took over the control of security and economy in Sudan. The Applicant was further questioned by the Minister's Counsel about when did he decide not to go back to Sudan again. The Applicant responded that he never wanted to go back in all of his trips to Sudan; and that in all the trips to Sudan, he was obliged to return to Sudan.

[32] None of the above testimony was mentioned, let alone analyzed, in the Decision.

[33] I acknowledge the Respondent's submission that the Applicant's subjective belief was not determinative, and that it must be weighed against all the other factors as outlined in *Camayo FCA*. However, the RPD in this case did not attempt to analyze the Applicant's evidence regarding his subjective belief; nor did it make a clear finding on the Applicant's subjective belief, as the Applicant argues. Instead the RPD focused solely on the Applicant's multiple trips to Sudan to find there was intent on the part of the Applicant to reavail himself of Sudanese protection, and ignored other evidence that contradicted its finding.

[34] The Applicant compares his case to *Aydemir* in which the Court found the RPD unreasonably held both that Mr. Aydemir's actions demonstrated a lack of subjective fear and that he continued to fear persecution: *Aydemir*, para 69.

[35] In finding that the RPD erred in *Aydemir*, Justice Kane noted at para 65 Mr. Aydemir's testimony stating "it was not his intention to reavail himself of Turkey's protection; he continued to fear the Turkish police and nationalists and never believed they would afford him protection,

and he always travelled with his Canadian permanent resident card knowing he had the right to return to Canada at any time.” Justice Kane continued:

[70] The RPD’s findings based on the same testimony--in the absence of any credibility finding--are inconsistent. The RPD accepted Mr. Aydemir’s testimony that he feared persecution as a Kurd and due to his involvement in political activities in support of Kurdish people, and that he feared the police and nationalist Turkish people during his return trips. The RPD found, based on the country condition evidence and Mr. Aydemir’s testimony, that his protection had not ceased under 108(1)(e) because the “alleged change in country conditions ... was not operationally effective and durable enough to ground a permanent cessation of [his] claim.”

[71] While different considerations are at play in the context of reavailment pursuant to paragraphs 108(1)(a) and (e), the two findings based on the same testimony cannot be reconciled--on one hand, that Mr. Aydemir’s actions demonstrated a lack of subjective fear and that he had not rebutted the presumption of an intent to reavail; and, on the other hand, that he remained in fear of persecution as a Kurd in Turkey and would not be protected by the authorities

[36] While the facts are different in this case, and as the Respondent noted, there were adverse credibility findings made by the RPD, but as I have concluded above, the RPD never addressed the evidence given by the Applicant with regard to his fear towards the Sudanese government. It was that element of subjective fear that Justice Kane had found in *Aydemir* to be incongruous with the RPD’s finding that Mr. Aydemir had reavailed himself of protection by the Turkish government. Here, the RPD did not even acknowledge the Applicant’s stated subjective fear before finding that he has not rebutted the presumption of reavailment. As such, the Decision lacks 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*, para 85.

Obiter Comments

[37] There were other aspects of the Decision that I find troubling. For instance, there was evidence before the RPD that the Applicant was struggling in Canada with serious physical disability and emotional stress that left the Applicant feeling isolated and unable to find stability. To what extent did the Applicant's emotional stresses impact on his intent to reavail was left unexamined by the RPD.

[38] I am also not convinced that all of the RPD's credibility findings, particularly those with respect to the issue of whether bribes were paid to facilitate the Applicant's returns to Sudan, were reasonable. As these issues were not pursued by counsel, I will not comment on them further.

[39] The Decision has a serious impact on the Applicant. A finding that the Applicant has voluntarily re-availed himself of the protection of Sudan under s.108(1)(a) of *IPRA* will not only result in the cessation of the Applicant's status as a Convention Refugee, the Applicant will also lose his PR status in Canada. The Applicant could potentially be removed from Canada without any further risk assessment, notwithstanding the deteriorating security conditions in Sudan. In returning this matter to a different member of the RPD for re-determination, the new decision maker should weigh all the evidence before them in accordance with the factors set out in *Camayo FCA*.

IV. Conclusion

[40] The application for judicial review is granted.

[41] There is no question for certification.

JUDGMENT in IMM-6815-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.
2. The matter is returned for redetermination by a differently constituted panel of the RPD.
3. There are no questions to certify.

"Avvy Yao-Yao Go"

Judge

Appendix A – Relevant Provisions

Immigration and Refugee Protection Act, SC 2001, c 27
Loi sur l'immigration et la protection des réfugiés (L.C. 2001, ch. 27)

<p>Inadmissibility Cessation of refugee protection — foreign national</p> <p>40.1 (1) A foreign national is inadmissible on a final determination under subsection 108(2) that their refugee protection has ceased.</p>	<p>Interdictions de territoire Perte de l'asile — étranger</p> <p>40.1 (1) La décision prise, en dernier ressort, au titre du paragraphe 108(2) entraînant la perte de l'asile d'un étranger emporte son interdiction de territoire.</p>
<p>Loss of Status Permanent resident</p> <p>46 (1) A person loses permanent resident status</p> <p>...</p> <p>(c.1) on a final determination under subsection 108(2) that their refugee protection has ceased for any of the reasons described in paragraphs 108(1)(a) to (d);</p> <p>...</p>	<p>Perte du statut Résident permanent</p> <p>46 (1) Emportent perte du statut de résident permanent les faits suivants :</p> <p>...</p> <p>c.1) la décision prise, en dernier ressort, au titre du paragraphe 108(2) entraînant, sur constat des faits mentionnés à l'un des alinéas 108(1)a) à d), la perte de l'asile;</p> <p>...</p>
<p>Cessation of Refugee Protection Rejection</p> <p>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:</p> <p>(a) the person has voluntarily reavailed themselves of the protection of their country of nationality;</p> <p>(b) the person has voluntarily reacquired their nationality;</p> <p>(c) the person has acquired a new nationality and enjoys the protection of the country of that new nationality;</p> <p>(d) the person has voluntarily become re-established in the country that the person left or remained outside of and in respect of which the person claimed refugee protection in Canada; or</p>	<p>Perte de l'asile Rejet</p> <p>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 :</p> <p>a) il se réclame de nouveau et volontairement de la protection du pays dont il a la nationalité;</p> <p>b) il recouvre volontairement sa nationalité;</p> <p>c) il acquiert une nouvelle nationalité et jouit de la protection du pays de sa nouvelle nationalité;</p> <p>d) il retourne volontairement s'établir dans le pays qu'il a quitté ou hors duquel il est demeuré et en raison duquel il a demandé l'asile au Canada;</p>

(e) the reasons for which the person sought refugee protection have ceased to exist.

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).

Effect of decision

(3) If the application is allowed, the claim of the person is deemed to be rejected.

Exception

(4) Paragraph (1)(e) does not apply to a person who establishes that there are compelling reasons arising out of previous persecution, torture, treatment or punishment for refusing to avail themselves of the protection of the country which they left, or outside of which they remained, due to such previous persecution, torture, treatment or punishment.

e) les raisons qui lui ont fait demander l'asile n'existent plus.

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).

Effet de la décision

(3) Le constat est assimilé au rejet de la demande d'asile.

Exception

(4) L'alinéa (1)e) ne s'applique pas si le demandeur prouve qu'il y a des raisons impérieuses, tenant à des persécutions, à la torture ou à des traitements ou peines antérieurs, de refuser de se réclamer de la protection du pays qu'il a quitté ou hors duquel il est demeuré.

FEDERAL COURT
SOLICITORS OF RECORD

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