

Federal Court



Cour fédérale

Date: 20221027

Docket: IMM-7115-21

Citation: 2022 FC 1472

Ottawa, Ontario, October 27, 2022

PRESENT: Madam Justice Pallotta

BETWEEN:

OSMAN AKAR

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] Osman Akar, a citizen of Turkey, brings this application for judicial review to set aside a decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board of Canada. The RPD found that Mr. Akar's refugee protection ceased, and that his claim for protection was deemed rejected, because he voluntarily reavailed himself of the protection of Turkey within the meaning of paragraph 108(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] Mr. Akar was found to be a Convention refugee in July 2001 and became a permanent resident of Canada in May 2002. Between 2006 and 2012 he returned to Turkey six times using his Turkish passport. While he was in Turkey in 2012, Mr. Akar applied for and obtained a Turkish national identity card and a new Turkish passport. He used the new passport to travel to Turkey three times between 2016 and 2018.

[3] In September 2020, the Minister of Public Safety and Emergency Preparedness (Minister) filed an application for cessation of Mr. Akar's refugee status on the basis that he had voluntarily reavailed himself of Turkey's protection. The RPD's September 9, 2021 decision (Decision) granting the Minister's application is the subject of this application.

[4] Mr. Akar challenges the Decision on the basis that the RPD failed to properly consider his motivation for returning and whether he returned for reasons that were beyond his control. He states he was forced to return to Turkey to attend funerals, care for ill relatives and receive urgent dental care, and that travelling to Turkey to visit his ailing family did not amount to voluntary reavilment of Turkey's protection as the visits were temporary, and fell within an exception under paragraph 125 of the United Nations High Commissioner for Refugees *Handbook on Procedures and Criteria for Determining Refugee Status* [UNHCR Handbook]. Also, Mr. Akar submits the RPD failed to consider his medical condition and a psychiatrist's report. He asserts that he was suffering from serious psychological issues that affected his actions. Based on these alleged errors, Mr. Akar submits the Decision is unreasonable.

[5] The respondent submits that Mr. Akar disagrees with the Decision but he has not established a reviewable error. The RPD assessed each of the three requirements for reavailment, namely: (i) the refugee acted voluntarily, (ii) the refugee intended to reavail themselves of the protection of their country of nationality, and (iii) the refugee actually obtained such protection: *Cerna v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1074 at para 12 [*Cerna*]. The respondent submits the RPD made reasonable findings to conclude that all three requirements were met. The respondent notes, for example, that Mr. Akar presented his passport to Turkish officials upon entering and exiting the country, he had personal dealings with Turkish government officials when he renewed his passport, and he travelled to Turkey twice to obtain dental care and remained there for long periods of time.

[6] Whether the Decision is unreasonable is determined according to the guidance set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paragraphs 10, 16, 17 [*Vavilov*]. The reasonableness standard of review is a deferential but robust form of review: *Vavilov* at paras 12-13, 75 and 85. The reviewing court must focus on the decision actually made, including the reasoning process and the outcome, and consider whether the decision as a whole is transparent, intelligible, and justified in relation to the relevant factual and legal constraints that bear on the decision: *Vavilov* at paras 15, 83, 99. The party challenging the decision bears the burden of establishing sufficiently central or significant flaws to render the decision unreasonable: *Vavilov* at para 100.

[7] Mr. Akar challenges the RPD's findings with respect to each of the three requirements for reavailment: he states his trips to Turkey were not voluntary, he had no intention of returning

to Turkey permanently or reavailing himself of Turkey's protection, and there was no actual reavailment.

[8] I am not persuaded by Mr. Akar's arguments that the RPD erred.

[9] When a refugee applies for and obtains a national passport from the country of nationality, there is a rebuttable presumption that the refugee intended to avail themselves of the protection of that country: *Galinda Camayo v Canada (Minister of Citizenship and Immigration)*, 2022 FCA 50 at para 63 [*Galinda Camayo*]; *Cerna* at para 13. The presumption is stronger when a refugee uses a national passport to travel to the country of nationality, as they are not only under diplomatic protection while travelling, but also entrusting their safety to government authorities upon arrival: *Galinda Camayo* at para 63.

[10] This Court has recognized that a person who is compelled to return to their country of nationality for reasons beyond their control may not have acted voluntarily: *El Kaissi v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1234 at para 29.

[11] Contrary to Mr. Akar's submissions, the RPD did consider his motivations for returning to Turkey. The RPD noted that Mr. Akar believed he was justified in obtaining a passport and travelling to Turkey in order to visit ill relatives, attend funerals and obtain dental care. The RPD found, however, that Mr. Akar acted voluntarily to obtain a new Turkish identity card and new Turkish passport to replace his expired one while he was in Turkey in 2012. The RPD did not accept Mr. Akar's position that he was compelled for purposes of family reunification or

family care to make nine return trips to Turkey and found, based on the number of trips and the duration of these trips since he was granted refugee protection in Canada, that he acted voluntarily for most of his return travels. In particular, the RPD gave “considerable weight” to the fact that two of the trips, for two months in 2010 and for 35 days in 2016, were made for the sole reason of obtaining dental care and dental implants. The RPD did not accept Mr. Akar’s contention that these trips were necessary due to the high cost of having the same treatments performed in Canada. Mr. Akar has not established a reviewable error with these findings.

[12] Mr. Akar asserts that the RPD failed to consider his medical condition, but he does not explain how the medical evidence that he put forward should have altered the RPD’s analysis of whether he acted voluntarily and intentionally reavailed himself of Turkey’s protection in view of his repeated trips to Turkey since being granted refugee protection in Canada. The RPD stated that it considered the totality of the evidence before it, and gave significant weight to the number of return trips, the total time spent in Turkey (about 300 days), and the lack of justification for the trips where Mr. Akar underwent dental procedures. A refugee bears the onus of adducing sufficient evidence to rebut the presumption of reavilment: *Galinda Camayo* at para 65, citing *Canada (Minister of Citizenship and Immigration) v Nilam*, 2015 FC 1154 at para 26 and *Li v Canada (Minister of Citizenship and Immigration)*, 2015 FC 459 at para 42. Based on the totality of the evidence, the RPD found, reasonably in my view, that Mr. Akar had not rebutted the presumption of reavilment.

[13] Mr. Akar argues the RPD erred by failing to recognize that his travels to Turkey fell under the “Paragraph 125 exception” of the UNHCR Handbook, which states that “visiting an

old or sick parent will have a different bearing on the refugee's relation to his former home country than regular visits to that country spent on holidays or for the purpose of establishing business relations". Also, he states that his visits were temporary, and he had no intention to reside in Turkey permanently. In this regard he relies on a statement in *Abawaji v Canada (Minister of Citizenship and Immigration)* 2006 FC 1065 [*Abawaji*] that "[a] temporary visit by a refugee to the country where persecution was feared without an intention to permanently reside there should not result in the loss of refugee status": *Abawaji* at para 15, citing *Camargo v Minister of Citizenship and Immigration*, 2003 FC 1434 at para 35 [*Camargo*]. In essence, Mr. Akar's position is that it was not open to the RPD to find he had voluntarily and intentionally reavailed himself of Turkey's protection in view of the language of paragraph 125 of UNHCR Handbook and the temporary nature of the trips. I disagree.

[14] I agree with the respondent that paragraph 125 of the UNHCR Handbook provides instructive guidance. It is not domestic law. In this case, the RPD's findings were guided by the UNHCR Handbook, including paragraph 125, and Mr. Akar has not demonstrated a reviewable error in this regard. In fact, the language of paragraph 125 is not directly applicable to Mr. Akar's case because it addresses the situation where a refugee travels on a travel document issued by their country of residence:

125. Where a refugee visits his former home country not with a national passport but, for example, with a travel document issued by his country of residence, he has been considered by certain States to have re-availed himself of the protection of his former home country and to have lost his refugee status under the present cessation clause. Cases of this kind should, however, be judged on their individual merits. Visiting an old or sick parent will have a different bearing on the refugee's relation to his former home country than regular visits to that country spent on holidays or for the purpose of establishing business relations.

[15] Furthermore, Mr. Akar has not provided persuasive submissions on how the two lengthy trips for dental procedures in 2010 and 2016 would be analogous to the kind of visit that should have a different bearing on a refugee's relation to their former home country, according to UNHCR Handbook paragraph 125.

[16] With respect to the temporary nature of the trips, in my view the Court's decision in *Abawaji* does not stand for the principle that nothing short of an intention to permanently reside in a refugee's home country will result in a loss of refugee status. I agree with the respondent that the Court in *Abawaji* was referring to two concepts, reestablishment and reavailing, and the reference to an intention to permanently reside in the country of feared persecution related to the test for voluntary reestablishment. The Court was relying on *Camargo* at paragraph 35, which referred to the guiding principles for reestablishment under paragraph 134 of the UNHCR Handbook. Under the *IRPA*, cessation of refugee protection in circumstances of reestablishment is the subject of a different provision, namely paragraph 108(1)(d). The RPD found that Mr. Akar's protection had ceased under *IRPA* paragraph 108(1)(a).

[17] In conclusion, I find the RPD reasonably determined that Mr. Akar voluntarily reavailed himself of Turkey's protection.

[18] The parties did not propose a question for certification, and in my view there is no question for certification.

JUDGMENT in IMM-7115-21

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.
2. There is no question to certify.

"Christine M. Pallotta"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-7115-21

STYLE OF CAUSE: OSMAN AKAR v THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

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APPEARANCES:

Aparna Das FOR THE APPLICANT

Nadine Silverman FOR THE RESPONDENT

SOLICITORS OF RECORD:

Brian I. Cintosun FOR THE APPLICANT
Barrister and Solicitor
Toronto, Ontario

Attorney General of Canada FOR THE RESPONDENT
Toronto, Ontario