

Federal Court



Cour fédérale

Date: 20230125

Docket: IMM-4285-20

Citation: 2023 FC 123

Ottawa, Ontario, January 25, 2023

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

ISMAIL KAYA

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] Ismail Kaya [Applicant] seeks judicial review of the Refugee Protection Division's [RPD] August 21, 2020 decision [Decision] ceasing his refugee protection pursuant to subsection 108(3) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The RPD found that the Applicant voluntarily re-availed himself of the protection of Turkey, his country of nationality, pursuant to paragraph 108(1)(a) of IRPA.

[2] The application for judicial review is dismissed.

II. Background

[3] The Applicant is of Kurdish ethnicity and a citizen of Turkey. In April 2011, the Applicant claimed refugee status in Canada on the basis of a fear of persecution due to his ethnicity and support of the Barış ve Demokrasi Partisi [BDP], as well as a fear of compulsory military service. On December 23, 2014, the Applicant's refugee claim was accepted and in May 2017, he became a permanent resident of Canada.

[4] In March 2016, the Applicant obtained a new Turkish passport from the Turkish Consulate in Toronto. On October 27, 2017, the Applicant, with the assistance of his father, obtained an exemption from military service through a recently enacted Turkish law. From December 2017 until March 2018 [First Trip], the Applicant travelled to Turkey, where he got married and obtained a Turkish National Identity Card [NIC]. The Applicant testified that he went on the First Trip because his father was ill and facing imprisonment pending appeal. During the First Trip, the Applicant's father's appeal was dismissed, resulting in his imprisonment following the Applicant's return to Canada. On March 1, 2018, the Applicant's brother was arrested at the Applicant's father's home. The brother was released after four days.

[5] In July 2018, as a result of the First Trip, the Minister of Immigration, Refugees and Citizenship [Minister] brought an application to cease the Applicant's refugee protection. The Minister submitted that the Applicant had voluntarily re-availed himself of Turkey's protection.

The Applicant's cessation hearing occurred on August 15, 2019, but was subsequently adjourned until November 28, 2019.

[6] In January 2019, the Applicant obtained another passport from the Turkish Consulate in Toronto. In November 2019, amidst the first and second RPD sittings, the Applicant travelled to Turkey [Second Trip]. When the Applicant returned from the Second Trip, he told a Canada Border Service Agency officer that he traveled to Ukraine to visit his sick mother. The Applicant then testified at the second sitting of the RPD hearing that his primary reason for returning to Turkey was to pay respects to his recently deceased uncle, with whom he was very close. The Minister submitted additional disclosure of the Second Trip before the second RPD sitting.

III. The Decision

[7] The RPD allowed the Minister's application for cessation, finding that the Applicant re-availed himself of Turkey's protection pursuant to paragraph 108(1)(a) of *IRPA*. The RPD considered the *United Nations' High Commission on Refugees Handbook on Procedures and Criteria for Determining Refugee Status* [UNHCR Handbook], which sets out the three requirements for re-availment: voluntariness, intention, and actual re-availment.

[8] In considering the voluntariness of the First Trip, the RPD found that the Applicant's testimony regarding his father's health was vague and inconsistent with a medical report. Although the medical report referenced his father's kidney and cardiovascular issues, it did not reference any liver cancer, nor did it conclude that his father was seriously disabled. The RPD also noted that the Applicant's father assisted the Applicant in obtaining his military service

exemption, further casting doubt on his incapacity. As a result, the RPD drew a negative credibility inference regarding the Applicant's assertion that the primary reason for the First Trip was due to his father's health condition. The RPD found that the Applicant obtained his Turkish passport in 2016 with the intent of visiting his family, and that his presence in Turkey was not required to facilitate care for his father. Overall, the RPD found the First Trip voluntary.

[9] In considering the voluntariness of the Second Trip, the RPD noted that the Applicant, knowing the Minister had commenced cessation proceedings, used his second Turkish passport to travel to Ukraine on October 30, 2019, and then to Turkey the following day using his NIC. The Applicant testified that he used his NIC instead of his passport because he knew that having a Turkish stamp in his passport would not be viewed favourably in the cessation proceedings. The RPD drew a negative inference from the Applicant's credibility regarding his reasons for taking this trip, as described at paragraph 6 of this judgment, and found the Second Trip voluntary.

[10] Regarding intent, the RPD noted that the presumption of re-availment is particularly strong where a refugee uses their national passport to travel to their country of nationality and that it is only in "exceptional circumstances" that their travel will not result in the termination of refugee status (*Abadi v Canada (Citizenship and Immigration)*, 2016 FC 29 at paras 16, 18 [*Abadi*]). The RPD found that: (1) the Applicant engaged with the Turkish government in obtaining his passports, military service deferral, marriage certificate, and NIC; (2) the Applicant's testimony that he maintained a low profile was not credible when, for example, the Applicant was confronted with evidence that more people attended the various ceremonies

surrounding his wedding than he stated; and (3) the Applicant was inconsistent as to where he stayed while in Turkey and whether he went out in public. Accordingly, the RPD found that the Applicant intentionally re-availed himself of Turkey's protection.

[11] Lastly, turning to third requirement, the RPD found that the Applicant actually re-availed himself of the diplomatic protection of Turkey by obtaining two passports from the Turkish Consulate and engaging with Turkish government authorities while in Turkey. The RPD also found that the Applicant's NIC application, use of his passports and NIC, and registration of his marriage meant he alerted officials of his presence in Turkey. In doing so, the RPD concluded that the Applicant acknowledged his confidence in the Turkish government to protect him despite being granted refugee protection.

IV. Issues and Standard of Review

[12] The only issue is whether the Decision is reasonable. The relevant sub-issues for consideration are:

1. Did the RPD err by failing to explain why the Applicant did not rebut the presumption of re-availment?
2. Did the RPD err by failing to explain the decision to cease the Applicant's refugee protection under paragraph 108(1)(a) rather than paragraph 108(1)(e) of *IRPA*?
3. Did the RPD make credibility determinations that were unsupported by the evidence?

[13] I agree with the parties that the appropriate standard of review is reasonableness. This matter does not engage the exceptions set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. Therefore, the presumption of reasonableness is not rebutted (*Vavilov* at paras 16-17).

[14] A reasonableness review requires the Court to examine outcome of the Decision and its underlying rationale to assess “whether the decision, as a whole, bears the hallmarks of reasonableness—intelligibility, transparency, and justification—and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision” (*Vavilov* at paras 87, 99). However, a reviewing court must refrain from reweighing and reassessing the evidence considered by the decision-maker (*Vavilov* at para 125). If the reasons of the decision maker allow a reviewing Court to understand why the decision was made and determine whether the decision falls within the range of acceptable outcomes, the decision will be reasonable (*Vavilov* at paras 85-86).

V. Legislation

[15] The relevant excerpts of *IRPA* are as follows:

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

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 of their country of nationality;

...

(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.

protection du pays dont il a la nationalité;

...

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.

[16] The consequences of the cessation of refugee protection include:

Inadmissibility Cessation of refugee protection — foreign national

40.1 (1) A foreign national is inadmissible on a final determination under subsection 108(2) that their refugee protection has ceased.

Cessation of refugee protection — permanent resident

(2) A permanent resident is inadmissible on a final determination that their refugee protection has ceased

Interdictions de territoire
Perte de l'asile — étranger

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.

Perte de l'asile — résident permanent

(2) La décision prise, en dernier ressort, au titre du paragraphe 108(2) entraînant, sur constat des faits

for any of the reasons described in paragraphs 108(1)(a) to (d).

Loss of status

Permanent Residence

46 (1) A person loses permanent resident status

...

(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);

mentionnés à l'un des alinéas 108(1)a) à d), la perte de l'asile d'un résident permanent emporte son interdiction de territoire.

Perte du statut

Résident permanent

46 (1) Emportent perte du statut de résident permanent les faits suivants :

...

(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;

VI. Analysis

A. *Did the RPD err by failing to explain why the Applicant did not rebut the presumption of re-availment?*

(1) Applicant's Position

[17] The Applicant acknowledges that when a refugee obtains a passport issued by their country of nationality and uses that passport to travel to this country, it creates a presumption that the refugee intended to and obtained actual protection of that state. However, this presumption is rebuttable if the refugee can demonstrate that exceptional circumstances exist (*Chokheli v Canada (Citizenship and Immigration)*, 2020 FC 800 at para 72 [*Chokheli*]). In *Din v Canada (Minister of Citizenship and Immigration)*, 2019 FC 425 [*Din*], the Court found that although Mr. Din obtained several passports and returned to Pakistan on multiple occasions, the

RPD failed to consider evidence that may have rebutted the presumption (at paras 41, 46). Notwithstanding the RPD's view that *Din* was an "outlier" case, the circumstances in *Din* required an individualized assessment of the evidence (*Camayo v Canada (Citizenship and Immigration)*, 2022 FCA 50 at para 66 [*Camayo*]). Applied to the present matter, the RPD failed to consider country condition evidence surrounding the persecution of Kurds and those belonging to an opposition party, as well as the arrests of the Applicant's father and brother.

(2) Respondent's Position

[18] A *prima facie* case had been made for re-availment. The Applicant applied for, and obtained, two Turkish passports and made two trips back to Turkey. Therefore, the onus was on the Applicant to rebut the presumption, which he failed to do (*Chokheli* at para 56; *Camayo* at para 65).

[19] The facts in *Din* and *Camayo* are distinguishable from this matter. In *Din*, the RPD failed to consider the applicant's efforts to hide from authorities, avoid his family members, and conceal his Ahmadi faith (at para 36). In *Camayo*, it was the applicant's mother who applied for a passport while the applicant was a minor, and the mother took measures to protect herself (such as hiring security guards) upon her return to Colombia (at paras 14-15). However, in this case, the RPD noted the country condition evidence regarding Kurds and those who support Kurdish political parties, as well as the Applicant's evidence surrounding his family members' issues with authorities, but properly determined that cessation proceedings require consideration of diplomatic, and not state, protection (*Chokheli* at paras 34, 44-45). The RPD also assessed the

Applicant's individual circumstances and reasonably concluded that the Applicant was not compelled by exceptional circumstances to return to Turkey.

(3) Conclusion

[20] This Court has confirmed that the three-part test for assessing re-availment considers: “(1) voluntariness, in that the refugee must not be coerced; (2) intention, meaning the refugee must intend by their actions to re-avail themselves of the protection of the country of their nationality; and (3) re-availment, in the sense that the refugee must actually obtain such protection” (*Chowdhury v Canada (Citizenship and Immigration)*, 2021 FC 312 at para 8; *Nsende v Canada (Minister of Citizenship and Immigration)*, 2008 FC 531 at para 13; *Siddiqui v Canada (Citizenship and Immigration)*, 2016 FCA 134 at para 6; *Jing v Canada (Citizenship and Immigration)*, 2019 FC 104 at para 16 [*Jing*]).

[21] In my view, the RPD did not err in concluding that the Applicant's two trips to Turkey were voluntary. The record does not support the assertion that either trip involved circumstances that the Applicant was instructed or otherwise compelled to perform an act against his will. The record also does not support the assertion that the Applicant's parent's health issues or his uncle's passing were the sole, or even primary reasons, for either the First or Second Trip.

[22] I further find that the RPD did not err in arriving at its conclusion that the Applicant intentionally re-availed himself of Turkey's protection. As held by Justice Fothergill in *Abadi*, similarly cited by the RPD in its reasons:

[18] It is only in “exceptional circumstances” that a refugee’s travel to his country of nationality on a passport issued by that country will not result in the termination of refugee status (Refugee Handbook at para 124). Mr. Shamsi relies on paragraph 125 of the Refugee Handbook to argue that visiting an old or sick parent qualifies as an “exceptional circumstance” sufficient to rebut the presumption of re-availment. However, paragraph 125 of the Refugee Handbook concerns an individual who travels to his country of nationality on a travel document issued by his country of refuge, and not on a passport issued by his country of nationality (*Nilam* at para 28).

[Emphasis added.]

[23] Here, the RPD reasonably found that the Applicant’s testimony surrounding his First Trip contained inconsistencies, and that the evidence demonstrated the Applicant did not keep a low profile during his First Trip when he proposed to his wife, held numerous ceremonies, and went on outings with his wife. Respectfully, I disagree with the Applicant as to how these facts constitute “exceptional circumstances” for finding that his engagement with Turkish officials and his travels on multiple Turkish passports he had applied for, as opposed to travel documents issued by his country of refuge, would not result in the termination of his refugee status. The UNHCR Handbook provides:

124. Obtaining a national passport or an extension of its validity, may, under certain exceptional circumstances, not involve termination of refugee status...

[24] In my view, the RPD assessed all of the evidence before it in finding that the Applicant intentionally re-availed himself of Turkey’s protection. The RPD reasonably found that there were no exceptional circumstances present to justify the continuation of his refugee protection.

[25] Regarding actual re-availment, in my view, the RPD reasonably found that the Applicant had not satisfied his onus. As noted above, the record illustrates that the Applicant travelled to Turkey twice using two Turkish passports he had applied for, and that he alerted Turkish government officials of his whereabouts by getting married and obtaining his NIC. Accordingly, the RPD reasonably found that the Applicant actually re-availed himself of Turkey's protection.

[26] I agree with the Respondent that the facts in *Din* and *Camayo* are distinguishable as outlined above, and that the Applicant is essentially asking the Court to reweigh evidence. I further agree with the Respondent that in the present matter, the RPD considered the country condition evidence regarding Kurds and those who support Kurdish political parties, as well as the Applicant's evidence surrounding his family members' issues with authorities, but determined that cessation proceedings require consideration of diplomatic protection (*Chokheli* at paras 34, 44-45). This Court has held that the RPD is not required to undertake a forward-looking risk analysis in cessation proceedings (*Jing* at para 34; *Abadi* at para 20; *Balouch v Canada (Minister of Public Safety and Emergency Preparedness)*, 2015 FC 765 at para 19).

[27] Therefore, I find that the RPD considered the entirety of the Applicant's circumstances and reasonably found that the presumption that the Applicant actually re-availed himself of Turkey's protection was not rebutted. There is no reviewable error.

B. *Did the RPD err by failing to explain the decision to cease the Applicant's refugee protection under paragraph 108(1)(a) rather than paragraph 108(1)(e) of IRPA?*

(1) Applicant's Position

[28] The Applicant was originally granted refugee protection because one of his claims concerned his fear of compulsory military service. However, due to changes in the country conditions, namely the new Turkish law that allowed the Applicant to obtain a military service exemption, paragraph 108(1)(e) of *IRPA* applies. This new law was passed in December 2014 and became fully implemented by 2016. The Applicant's father secured the Applicant's exemption from military service in October 2017 and the Applicant returned to Turkey in December 2017, only after benefiting from the new law.

[29] Where the RPD is required to choose between assessing cessation under paragraphs 108(1)(a)-(d) or paragraph 108(1)(e) of *IRPA* and it chooses the former, the RPD must explain such choice (*Ravandi v Canada (Citizenship and Immigration)*, 2020 FC 761 at para 33 [*Ravandi*]). The RPD failed to grapple with the collateral consequences of ceasing the Applicant's refugee protection under paragraph 108(1)(a), and not paragraph 108(1)(e), of *IRPA* (*Ravandi* at para 36; *Camayo* at para 84; *Thapachetri v Canada (Citizenship and Immigration)*, 2020 FC 600 at paras 22-23).

(2) Respondent's Position

[30] While the Applicant obtained a military service exemption, the other two grounds of persecution—his Kurdish ethnicity and support of the BDP—remained unaffected. Therefore, the RPD was required to assess cessation under paragraph 108(1)(a) of *IRPA*, and was not required to explain its choice to not cease refugee protection under paragraph 108(1)(e) of *IRPA* (*Ravandi* at paras 40-46).

(3) Conclusion

[31] The RPD did not err in ceasing the Applicant's refugee protection pursuant to paragraph 108(1)(a) as opposed to paragraph 108(1)(e) of *IRPA*.

[32] Paragraph 108(1)(e) of *IRPA* stipulates that "a claim for refugee protection shall be rejected, and a person is not a Convention refugee or a person in need of protection" when "the reasons for which the person sought refugee protection have ceased to exist." In the case at bar, the Applicant was originally granted refugee protection because one of his claims concerned his fear of compulsory military service. However, as explained by the Applicant, the country conditions changed and a new Turkish law was passed that allowed him to obtain a military service exemption.

[33] Although the Applicant obtained a military service exemption for one of the claimed grounds of persecution, the two other grounds of persecution—his Kurdish ethnicity and support of the BDP—remain unaffected, as demonstrated by the country condition evidence. Therefore, I agree with the Respondent that it was unnecessary for the RPD to explain why it did not choose to cease the Applicant's refugee protection pursuant to paragraph 108(1)(e) of *IRPA* (*Ravandi* at para 46).

[34] Further, in considering whether the presumption of re-availment is rebutted, the RPD must consider "[t]he severity of the consequences that a decision to cease refugee protection will have for the affected individual", and "the administrative decision maker's reasons must

meaningfully engage with the central issues and the concerns raised by the parties” (*Camayo* at para 84). The Applicant submits that the RPD failed to grapple with the consequences of this issue.

[35] While it is true that the collateral consequences are more severe in a cessation proceeding involving paragraph 108(1)(a) as opposed to paragraph 108(1)(e) of *IRPA*, based on the record and the unaffected grounds of persecution, the RPD was not presented with a choice to make.

[36] In summary, the RPD did not err in failing to explain the decision to cease the Applicant’s refugee protection under paragraph 108(1)(a) rather than paragraph 108(1)(e) of *IRPA* because there was no choice to make. Two of the Applicant’s initial grounds of persecution remained unchanged, as evidenced by the country conditions.

C. *Did the RPD make credibility determinations that were unsupported by the evidence?*

(1) Applicant’s Position

[37] The RPD’s credibility determinations were unreasonable for three reasons. First, the RPD mischaracterized, misunderstood, and ignored the Applicant’s evidence. Briefly, the Applicant takes issue with three findings: (1) the Applicant did not testify that he was compelled to return to physically care for his father, but that his presence was necessary because his father was sick and facing imprisonment; (2) the Applicant testified that his father’s liver cancer arose after his imprisonment; and (3) the Applicant did not testify that he was staying at his father’s home, but that he stayed at his sister’s home, as corroborated by his wife.

[38] Second, the RPD failed to consider corroborating documentary and witness evidence before impugning the Applicant's evidence. This documentary evidence included the criminal proceedings against the Applicant's brother and father, his father's health documents, his uncle's death certificate, and his military exemption. The RPD also failed to assess the credibility of the Applicant's wife and how her testimony substantiated that of the Applicant. The RPD has a duty to consider evidence as a whole before making an adverse credibility finding (*Chen v Canada (Citizenship and Immigration)*, 2013 FC 311 at paras 20-21).

[39] Third, the RPD breached procedural fairness by failing to put inconsistencies to the Applicant for an opportunity to explain before impugning his credibility. Namely, the RPD impugned the Applicant's credibility because it found a discrepancy with whether their marriage ceremony involved an extra attendee or the officiant.

(2) Respondent's Position

[40] In response to the Applicant's first argument that the RPD mischaracterized, misunderstood, and ignored the Applicant's evidence: (1) the Applicant is relying on selective parts of the evidence; (2) the transcript illustrates that the Applicant visited his father because his father had liver cancer; and (3) the transcript illustrates the inconsistency as to where the Applicant stayed during his visit.

[41] Second, the Applicant's father's criminal proceedings, his uncle's death certificate, and his military exemption are all clearly discussed at paragraphs 43, 46, and 59 of the Decision.

[42] Lastly, the example presented by the Applicant has no bearing on the Decision. The Applicant engaged with several other government officials without issue, and one more person would not make a difference.

(3) Conclusion

[43] It is trite law that findings of fact and determinations of credibility fall within the heartland of the RPD's expertise (*Liu v Canada (Citizenship and Immigration)*, 2017 FC 736 at para 18; *Giron v Canada (Minister of Employment and Immigration)*, [1992] FCJ No 481, 143 NR 238 (FCA)). After reviewing the totality of the record, I find that the Applicant disagrees with the RPD's assessment of the evidence that impugned his credibility. In other words, the Applicant is asking the Court to reweigh the evidence, which is not the function of judicial review (*Vavilov* at para 125).

[44] Turning to the Applicant's second argument, I agree with the Respondent that the corroborating evidence of his father's criminal proceedings, his uncle's death certificate, and his military exemption are all clearly discussed in the Decision. Moreover, administrative decision-makers are presumed to have considered the entirety of the evidence before them, and need not refer to every piece of evidence in their written reasons (*Tovar v Canada (Citizenship and Immigration)*, 2016 FC 598 at para 26; *Florea v Canada (Employment and Immigration)*, [1993] FCJ No 598 at para 1 (FCA)).

[45] Lastly, I agree with the Respondent that the example presented by the Applicant—who or how many people attended the wedding ceremony—has no bearing on the Decision. The evidence on this point was inconsistent. The RPD committed no reviewable error.

VII. Conclusion

[46] For the above reasons, the application for judicial review is dismissed.

[47] The parties have not proposed a question for certification and I agree that none arises.

JUDGMENT in IMM-4285-20

THIS COURT'S JUDGMENT is that:

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

"Paul Favel"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4285-20

STYLE OF CAUSE: ISMAIL KAYA v THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: HELD BY VIDEOCONFERENCE

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