Federal Court Cour fédérale

Date: 20231005

Docket: IMM-2574-22

Citation: 2023 FC 1332

Ottawa, Ontario, October 5, 2023

PRESENT: Mr. Justice Norris

BETWEEN:

MUNEEB ULLAH SHAH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant is a 36-year-old citizen of Pakistan. In September 2017, he was found to be a Convention refugee on the basis of his well-founded fear of persecution due to his sexual orientation. The applicant became a permanent resident of Canada on April 1, 2019.

[2] On August 23, 2019, the applicant returned to Pakistan using his Pakistani passport, which had been issued in 2015. He stayed there until October 5, 2019. Still using his Pakistani passport, the applicant then travelled to Dubai before returning to Canada on October 31, 2019.

[3] On September 24, 2020, the Minister of Public Safety and Emergency Preparedness applied to the Refugee Protection Division (RPD) of the Immigration and Refugee Board of Canada under subsection 108(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*) for a determination that the applicant's refugee protection had ceased because he had voluntarily re-availed himself of the protection of his country of nationality.

[4] In a decision dated March 1, 2022, the RPD allowed the Minister's application. Pursuant to subsection 108(3) of the *IRPA*, the applicant's claim for refugee protection was deemed to be rejected.

[5] The applicant now applies for judicial review of this decision under subsection 72(1) of the *IRPA*. He submits that the decision must be set aside because it is unreasonable.

[6] For the reasons that follow, I agree with the applicant.

[7] The parties agree, as do I, that the RPD's decision should be reviewed on a reasonableness standard. 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" (*Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 85).

A reviewing court "must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic, and it must be satisfied that there is a line of analysis within the reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived" (*Vavilov* at para 102, internal quotation marks and citation omitted). On the other hand, "where reasons are provided but they fail to provide a transparent and intelligible justification [. . .], the decision will be unreasonable" (*Vavilov* at para 136). To set aside a decision on the basis that it is unreasonable, the reviewing court must be satisfied that "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100).

[8] The test for whether the applicant's refugee protection has ceased due to re-availment is well-established. Paragraph 108(1)(a) of the *IRPA* states that a person is not a Convention refugee where "the person has voluntarily reavailed themself of the protection of their country of nationality." To find that the applicant's refugee protection has ceased due to re-availment, the RPD had to be satisfied that the applicant acted voluntarily, that he intended by his action to re-avail himself of the protection of Pakistan, and that he actually obtained such protection (*Siddiqui v Canada (Citizenship and Immigration*), 2016 FCA 134 at para 6).

[9] Furthermore, "there is a presumption that refugees who acquire and travel on passports issued by their country of nationality to travel to that country or to a third country have intended to avail themselves of the protection of their country of nationality" (*Canada (Citizenship and Immigration) v Galindo Camayo*, 2022 FCA 50 at para 63). When the refugee returns to their country of nationality, this presumption is even stronger, "as they are not only placing

themselves under diplomatic protection while traveling, they are also entrusting their safety to governmental authorities upon their arrival" (*ibid.*).

[10] As the Court of Appeal also states in *Galindo Camayo*, this presumption is rebuttable (at para 65). The onus is on the refugee to adduce sufficient evidence to rebut the presumption when it arises (*ibid.*). For its part, the RPD must carry out an individualized assessment of all the evidence before it, including the evidence adduced by the refugee as to his or her actual knowledge and intent, in determining whether the presumption of re-availment has been rebutted (*Galindo Camayo* at paras 66 and 71). Among the factors the RPD should consider are whether the individual returned to their country of nationality knowing that this could put their refugee status in jeopardy; the personal attributes of the individual such as their age, education, and level of sophistication; whether the agent of persecution is the government of the country of nationality or a non-state actor; the purpose of the travel (travel to the country of nationality for a compelling reason such as the serious illness of a family member may have different significance than travel to that country for a more frivolous reason such as vacation or a visit with friends); and whether the individual took precautionary measures while they were in their country of nationality (*Galindo Camayo* at para 84).

[11] On a more general level, the Court of Appeal underscores that the test for cessation "should not be applied in a mechanistic or rote manner" (*Galindo Camayo* at para 83). Rather, "The focus throughout the analysis should be on whether the refugee's conduct – and the inferences that can be drawn from it – can reliably indicate that the refugee intended to waive the protection of the country of asylum" (*ibid.*).

[12] Before the RPD, the applicant explained that he had returned to Pakistan because his then five-year-old son (who lives in Pakistan with his mother) was seriously ill. He believed that his son might die. The applicant also provided evidence that, while in Pakistan, he took precautions to avoid his agents of persecution. He did not return to his home village, where he was most at risk, and he stayed at the home of a friend in Islamabad. While the RPD found that the evidence did not establish that the applicant's son was as ill as the applicant believed, it does not appear to doubt that the applicant honestly believed his son was gravely ill or that he took precautions while he was in Pakistan.

[13] The RPD finds that the applicant's return to Pakistan was voluntary because the evidence "does not support a conclusion that [his] presence in Pakistan was absolutely necessary to his son's care." This was because there were others in Pakistan who could help care for the applicant's son.

[14] In my view, the RPD adopted an unreasonably narrow view of the circumstances that could support the applicant's argument that his actions were not voluntary. As Justice Pamel held in *Ahmad v Canada (Citizenship and Immigration)*, 2023 FC 8, by focusing on whether a party's presence in their country of nationality was "absolutely necessary," the RPD does "exactly what the Court in Camayo sought to prevent with regard to the assessment of subjective intent – namely, it failed to consider how compelling Mr. Ahmad's reasons were from his own perspective" (at para 44). In my view, this conclusion applies equally here. (As it happens, *Ahmad* concerned a decision by the same RPD member as in the case at bar.)

[15] The RPD's decision is also unreasonable in a second fundamental respect.

[16] Reasoning as follows, the RPD finds that the applicant (the respondent before the RPD) intended to re-avail himself of the protection of Pakistan:

> I consider that the Respondent admits he knew that as a Convention refugee fleeing persecution in Pakistan he was not supposed to be travelling there. Having the knowledge that one is not supposed to do something yet doing it clearly implies that the act was intentional especially in the absences [*sic*] of exceptional circumstances that made the action involuntary. As discussed above in consideration of the objective medical evidence, and available family members to otherwise support his son's care, the Respondent's subjective belief that his son's medical condition compelled him to return is insufficient to rebut the presumption of re-availment.

[17] After noting the applicant's evidence that he took precautions while in Pakistan, the RPD reviews the applicant's account in his original Basis of Claim narrative as to why he was at risk in Pakistan. The RPD then states: "All good reasons to flee Pakistan and for not returning under any circumstance. Thus, his decision to return to Pakistan, his safety concerns notwithstanding, supports a conclusion that he intended to do so."

[18] In my view, this analysis is unreasonable because it never actually addresses the applicant's intention to re-avail himself of Pakistan's protection. Instead, it conflates this issue with whether the applicant knew he should not return to Pakistan because he would be at risk there. The two issues are both logically and factually distinct. It does not follow from the fact that the applicant returned to Pakistan knowing that his personal safety would be at risk that he also knew that doing so may put his refugee status in Canada in jeopardy (because he could be found to have re-availed himself of Pakistan's protection). The RPD's flawed analysis does not

provide a reasonable basis for the finding that the applicant intended to re-avail himself of Pakistan's protection.

[19] In the passage quoted in paragraph 16, above, the RPD also conflates two separate questions relating to the issue of voluntariness. If the applicant's act of returning to Pakistan using his own passport was involuntary, there is no basis to infer that he intended to re-avail himself of the protection of Pakistan. On the other hand, even if the circumstances under which the applicant acted did not render his actions involuntary, they may still be relevant to whether he willingly accepted the protection of Pakistan. As the Court of Appeal noted in *Galindo Camayo*, travel to a country of nationality for a compelling reason such as the serious illness of a family member may have different significance for whether the individual has rebutted the presumption of re-availment than travel to that same country for a more frivolous reason (at para 84). The RPD fails to appreciate this nuance; instead, it simply concludes that, since the applicant had not established that his actions were involuntary, he had not rebutted the presumption of re-availment.

[20] In fairness to the RPD member, he did not have the benefit of the Court of Appeal's decision in *Galindo Camayo*, which was released a month after the decision in the case at bar. Nevertheless, there is no issue that the reasonableness of the RPD's decision must be assessed in light of the principles set out in *Galindo Camayo* (along with *Vavilov*, of course). Having done so, I am persuaded that the RPD's decision cannot withstand review. The matter must be reconsidered.

[21] The parties did not suggest any serious questions of general importance for certification under paragraph 74(d) of the *IRPA.* I agree that no question arises.

JUDGMENT IN IMM-2574-22

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed.
2. The decision of the Refugee Protection Division dated March 1, 2022, is set aside and the matter is remitted for reconsideration by a different decision maker.
3. No question of general importance is stated.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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