

Federal Court



Cour fédérale

Date: 20231123

Docket: IMM-485-23

Citation: 2023 FC 1553

Toronto, Ontario, November 23, 2023

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

ADITI SAHA

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision of the Refugee Protection Division [RPD] dated December 19, 2022 [the Decision]. In the Decision, the RPD allowed the application of the Minister of Public Safety and Emergency Preparedness [Minister] to cease the Applicant's refugee protection, pursuant to section 108 of the *Immigration and Refugee*

Protection Act, SC 2001, c 27 [IRPA], based on her re-availment of the protection of her country of nationality.

[2] As explained in greater detail below, this application is allowed, because the RPD failed to analyse reasonably the Applicant's subjective knowledge of the consequences of re-availment.

II. Background

[3] The Applicant is a citizen of Bangladesh. Her claim for refugee protection, based on persecution by Islamic extremists, was accepted in April 2011, and in June 2013 she obtained permanent resident status in Canada.

[4] Shortly after obtaining her permanent resident status, the Applicant used her original Bangladeshi passport to return to Bangladesh, arriving in September 2013. She re-entered Canada in March 2014. On this trip, she used a new Bangladeshi passport issued in Dhaka in January 2014.

[5] In December 2014, the Applicant used the new passport to travel to Bangladesh again, returning to Canada in January 2015. She used this passport again in 2016, traveling to Bangladesh for five months and returning to Canada in May 2016.

[6] Based on the Applicant's travel history back to Bangladesh employing a passport issued by the Bangladeshi government, the Minister applied to the RPD pursuant to section 108 of the IRPA for the cessation of the Applicant's refugee protection.

III. Decision under Review

[7] In its Decision, the RPD explained by way of introduction that the Minister argued that the Applicant voluntarily re-availed herself of the protection of her country of nationality within the meaning of paragraph 108(1)(a) of the IRPA. Paragraph 108(1)(a) mandates that a claim for refugee protection be rejected and prescribes that a person is not a Convention refugee or a person in need of protection, if that person has voluntarily re-availed themselves of the protection of their country of nationality. The Minister also alleged that the Applicant became a citizen of India sometime after 2013, but the RPD chose to limit its analysis to the finding under 108(1)(a) and did not assess the Minister's application pursuant to 108(1)(c) of the IRPA related to her acquisition of Indian citizenship.

[8] In considering whether the Applicant had voluntarily re-availed herself of Bangladesh's protection, the RPD was guided by the United Nations High Commission on Refugees Handbook on Procedures and Criteria for Determining Refugee Status [Handbook]. Paragraph 119 of the Handbook outlines the following cumulative three-part analytical framework for cessation:

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

[9] The RPD also referenced *Canada (Citizenship and Immigration) v Galindo Camayo*, 2022 FCA 50 [*Camayo*], in which the Federal Court of Appeal identified a number of

factors (at para 84) that the RPD found it may weigh and consider in determining an application for cessation. The RPD commented that those remarks in *Camayo* were made in *obiter* and are not binding, although the RPD stated that it was nonetheless guided by them in making its determination. The RPD proceeded then to examine the three parts of the analytical framework identified in the Handbook.

A. *Voluntariness*

[10] The RPD concluded that the Applicant had acted voluntarily in traveling to Bangladesh on her original Bangladeshi passport, in applying for and obtaining a new passport from Bangladesh, and in traveling to Bangladesh using that passport, all after she obtained refugee protection in Canada. The RPD considered the Applicant's submission that she was compelled to return to Bangladesh to be with her ailing father and that she was compelled to renew her passport in Bangladesh because the original passport expired while she was there. However, the RPD found the Applicant's justification did not alter the voluntariness of the act.

B. *Intention*

[11] In relation to intention, the RPD considered the statement in the Handbook that, if a refugee applies for and obtains a national passport or its renewal, it will, in the absence of proof to the contrary, be presumed that the refugee intends to avail themselves of the protection of the refugee's country of nationality, which principle has been endorsed by the Federal Court of Appeal in *Camayo*. Noting that this presumption is rebuttable, the RPD considered Federal Court jurisprudence stating that it is only in exceptional circumstances that a refugee's travel to their country of nationality on a passport issued by that country will not terminate the refugee's status

(*Abadi v Canada (Citizenship and Immigration)*, 2016 FC 29). The RPD found the Applicant had not provided credible or persuasive evidence or testimony to warrant the need for her to return to Bangladesh that amounted to an exceptional circumstance. The RPD then provided its reasoning in support of that finding.

[12] The Applicant testified that she returned to Bangladesh the first two times out of concern for her father's health. The RPD was not convinced by this explanation, as the evidence indicated that her father became ill in June 2013 and the Applicant did not return to Bangladesh until September 2013. The RPD found the evidence did not show that her father's condition was so compelling that it necessitated her return at that time. The RPD also considered the fact that, during her first trip, the Applicant also got married, went on a honeymoon, and attended her brother's wedding. The RPD concluded the first trip was mostly related to wedding events and, as these were not exceptional circumstances, the Applicant did not rebut the presumption of re-availment.

[13] With respect to the second and third trips, the RPD similarly found the Applicant did not rebut the presumption. The Applicant stated the second trip was to assist her father in obtaining specialized medical treatment in India, although explaining that ultimately they were unable to travel to India because her father did not obtain a visa. The RPD found the medical evidence did not support the fact that the father needed specialized treatment in India. Moreover, the RPD considered the fact that the Applicant travelled to India for ten days on this trip with her husband and found the purpose of this trip was mostly to reunite with her husband, which was not an exceptional circumstance.

[14] The Applicant testified that she made the third trip after learning of some reproductive health issues threatening her fertility, the only solution for which was to travel to Bangladesh to try to conceive a child with her husband. The RPD did not find these reasons to amount to exceptional circumstances sufficient to rebut the presumption.

[15] The RPD then considered the duration and length of the Applicant's travel, the precautionary measures she took against her agents of persecution, and her subjective knowledge regarding the consequences of returning to Bangladesh. In considering the duration of the Applicant's travel, which amounted to just over 12 months in total, the RPD found the Applicant demonstrated a lack of subjective fear and an intention to re-avail herself of the protection of Bangladesh, given her participation in activities such as getting married, going on a honeymoon, and visiting with friends and family.

[16] In considering the precautionary measures the Applicant took, the RPD dismissed the Applicant's submission that her case must be assessed differently than one in which a person has made a refugee claim based on a fear of the state or its agents. Here, the Applicant's refugee status was based on a fear of Islamic extremists who targeted her in 2009. The Applicant testified that she took precautions to avoid her persecutors and did not return to the village where the persecution took place. However, the RPD found that, because all her family resides in Dhaka, there was no reason for her to return to her native village. Moreover, the RPD found based on her numerous public activities that the Applicant was not a person in hiding and therefore was demonstrating a lack of subjective fear. The RPD also observed that the refugee protection regime does not distinguish between state and non-state actors (citing *Chowdhury v Canada (Citizenship and Immigration)*, 2021 FC 312 at para 23).

[17] Finally, the RPD considered the Applicant's knowledge of the legal consequences of returning to Bangladesh and using and renewing her passport. She testified that she was unaware of those consequences and that she travelled with her permanent resident card, believing it offered her protection, and was not aware she could obtain a refugee travel document. The RPD was not persuaded by the Applicant's reasoning. It noted that she had indicated at her refugee hearing that she could never return to Bangladesh as her life would be in danger. The RPD noted that the Applicant is an educated woman, with a level of sophistication, and that she had access to "persons in Canada, namely her former counsel at her RPD hearing, all of whom were able to provide her with information regarding her rights and responsibilities to travel as a recognized Convention refugee". The RPD found the fact she did not engage in such conversations demonstrated that she intended to return to Bangladesh, knowing that there were possible risks in doing so.

[18] Ultimately, the RPD found that the Applicant had not rebutted the presumption of intention to re-avail.

C. *Re-availment*

[19] Turning to the third part of the analytical framework for cessation, actual re-availment, the RPD considered the Handbook's statement that obtaining an entry permit or a national passport for the purposes of returning will, in the absence of proof to the contrary, be considered as terminating refugee status. The RPD referenced the Applicant's efforts to hide from the agents of persecution but, relying on *Lu v Canada (Citizenship and Immigration)*, 2019 FC 1060, at

para 60, the RPD observed that the type of protection relevant to a cessation proceeding is diplomatic protection, not state protection.

[20] The RPD noted that it was unpersuaded by the Applicant's testimony that she did not appreciate the consequences of her actions. The RPD concluded that the Applicant's actions demonstrated that her travels were planned, that they were voluntary and not necessary, and that her actions indicated a lack of subjective fear in returning to her country of persecution. The RPD found the Applicant consciously and intentionally subjected herself to the protection of that state, therefore reinstating the relationship between her and Bangladesh and actually obtaining the protection of Bangladesh.

D. *No future risk analysis*

[21] The RPD briefly considered what it understood to be the Applicant's submission that the RPD has jurisdiction to consider the Applicant's future risk in Bangladesh and that it should conduct such an inquiry. However, relying on jurisprudence from the Federal Court, the RPD found that an assessment of future risk is not a relevant consideration in the analysis of a cessation application.

IV. Issue and Standard of Review

[22] The sole issue articulated by the Applicant is whether the RPD erred by failing to conduct the mandatory assessment required by *Camayo* and by disregarding key evidence.

[23] The parties agree (and I concur) that the standard of review is reasonableness (see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65).

V. Analysis

[24] My decision to allow this application for judicial review turns on the Applicant's argument that the RPD failed to properly assess her subjective knowledge of the consequences of re-availment, as required by the guidance of the Federal Court of Appeal in *Camayo*. The Applicant relies on paragraph 68 of *Camayo*, which explains as follows how the RPD erred in that case in assessing subjective intent:

68. If it were acting reasonably, at this point in its analysis, the RPD should have considered not what Ms. Galindo Camayo *should have* known, but rather whether she *did* subjectively intend by her actions to depend on the protection of Colombia. Having failed to find that Ms. Galindo Camayo's testimony on this point lacked credibility, the RPD is deemed to have accepted her claim that she did not know that using her Colombian passport to return to Colombia and to travel elsewhere could result in her being deemed to have reavailed herself of Colombia's protection, and that this was not her intent.

[Emphasis in original]

[25] The Applicant submits that the RPD in the case at hand committed the same error as described in *Camayo*, i.e., performing the mandatory analysis of her subjective intent by considering what she should have known as to the consequences of re-availment, rather than by analysing her actual knowledge of those consequences.

[26] Before addressing that argument, I note the Applicant's argument in reply at the hearing of this application that some of the Respondent's submissions at the hearing appeared at times to question the guidance provided in *Camayo*. While some of the Respondent's submissions did create that impression, I asked the Respondent's counsel to clarify his argument. He confirmed that the Respondent's position is not that the RPD was not required to consider the factors set out in paragraph 84 of *Camayo* but rather that the RPD did consider those factors and did so reasonably. Regardless, *Camayo* is binding on this Court.

[27] I agree with the Applicant that the RPD's analysis of her subjective intent demonstrates the same sort of error as was identified in paragraph 68 of *Camayo*. Telegraphing this error, this portion of the RPD's analysis bears the heading, "The Respondent did not lack in subjective knowledge and knew or should have known the consequences of returning to Bangladesh" [my emphasis]. As the Applicant acknowledges, the language of a heading employed in the Decision should not be treated as determinative of the RPD's reasoning. However, the heading's reference to what the Applicant "should have known" is consistent with the analysis the RPD performed under that heading.

[28] The RPD recognized the Applicant's testimony that she was unaware of the legal consequences of returning to Bangladesh and using and renewing her passport. The RPD explained that it was unpersuaded by that testimony. However, that explanation relied on the RPD's characterization of the Applicant as educated, sophisticated, and having access to counsel who was in a position to provide her with information regarding her rights and responsibilities to travel as a recognized Convention refugee. This analysis is consistent with the flawed reasoning

identified by *Camayo*, in which the RPD had observed that Ms. Galinda Camayo was an educated and sophisticated individual who could have sought information as to the requirements that she had to uphold in order to maintain her status in Canada (at para 67).

[29] Importantly, the RPD reasoned that the fact the Applicant elected not to engage in such conversations with her counsel demonstrated that she intended to return to Bangladesh knowing that there were possible risks in doing so. Consistent with the Applicant's submissions (and with the heading employed by the RPD), I read the RPD's analysis as leading to a conclusion not that the Applicant had subjective knowledge of the immigration consequences of re-availment but rather that she failed to take steps that were available to her to obtain such knowledge.

[30] As the Respondent correctly emphasizes, a refugee's lack of actual knowledge of the immigration consequences of their actions may not be determinative of the question of intent to re-avail (see *Camayo* at para 70; *Giasuddin v Canada (Citizenship and Immigration)*, 2023 FC 711 at para 56; *Dari v Canada (Citizenship and Immigration)*, 2023 FC 887 [*Dari*] at para 18). In *Dari*, this Court noted that the RPD had considered the Applicant's lack of knowledge of the consequences of travelling on a Turkish passport and weighed that knowledge against other *Camayo* factors. The Court concluded that the RPD had conducted the multi-factored analysis required by *Camayo* and rendered a reasonable decision (see *Dari* at paras 18, 24 and 25).

[31] As such, the RPD's error in the case at hand is not failure to treat the Applicant's professed lack of subjective knowledge as determinative. Indeed, the RPD was not required to accept her testimony that she was not aware of the consequences of returning to Bangladesh and

using and renewing her Bangladeshi passport. Rather, the RPD erred in failing to reasonably analyse that factor, in that it considered and arrived at conclusions on what the Applicant should have known, instead of what she actually knew.

[32] On the basis of this error, I find that the Decision is unreasonable. As such, this application for judicial review will be allowed, the Decision set aside, and the matter returned to a different member of the RPD for re-determination. Neither party proposed any question for certification for appeal, and none is stated.

JUDGMENT IN IMM-485-23

THIS COURT'S JUDGMENT is that this application for judicial review is allowed, the Decision is set aside, and the matter is returned to a different member of the RPD for re-determination.

"Richard F. Southcott"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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