Federal Court  Cour fédérale

Date: 20240103

Docket: IMM-6206-21

Citation: 2024 FC 9

Ottawa, Ontario, January 3, 2024

PRESENT: Madam Justice McDonald

BETWEEN:

FAIZAN ALI MEER
A.K.A. FAIZAN ALI RASHID ALI MEER

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant seeks judicial review of the cessation decision [Decision] of the Refugee Protection Division [RPD] pursuant to paragraph 108(1)(a) of the *Immigration and Refugee Protection* Act, SC 2001, c 27 [IRPA] finding that he reavailed to India.

[2] This judicial review is granted as I have concluded that in the context of considering cessation, the RPD erred by not addressing paragraph 108(1)(e) of IRPA.

[3] I decline to certify the question posed by the Applicant.

I. Background

[4] In 2004, Mr. Meer, a citizen of India, obtained refugee status in Canada on the grounds of persecution because of his sexual orientation. In 2006, he became a permanent resident [PR] of Canada.

[5] In 2013, the Immigration Appeal Division [IAD] determined that Mr. Meer did not meet the residency requirements of IRPA as he had resided in Canada for less than 200 days. The IAD did not accept that it was necessary for Mr. Meer to be in India to care for his parents and issued a departure order.

[6] In October 2019, the Minister of Citizenship and Immigration [Minister] applied to the RPD pursuant to subsection 108(2) of IRPA and Rule 64 of the *Refugee Protection Division Rules*, SOR/2012-256 [RPDR] to cease the refugee protection granted to Mr. Meer in 2004.

[7] In the meantime in 2020, Mr. Meer returned to Canada and obtained a new PR card.

II. RPD Decision under review

[8] The RPD held a hearing at which Mr. Meer represented himself and gave evidence. The RPD also considered the information provided by Mr. Meer to recover his PR status and the International Credential Evaluation Service travel information disclosed by the Minister.

[9] The main issue considered by the RPD was whether Mr. Meer reavailed himself of India's protection pursuant to paragraph 108(1)(a) of IRPA. The RPD considered the principles of voluntariness, intention, and reavailment in the context of cessation of Convention refugee status.

A. *Voluntariness*

[10] The RPD found that Mr. Meer's return to India indicated voluntariness and the RPD was not convinced by Mr. Meer's explanations for why he travelled to India. When Mr. Meer testified that he went back to India to take his parents to medical appointments, the RPD drew a negative credibility inference due to the lack of corroborating documents and contradictions with Mr. Meer's documentary evidence. The RPD also drew a negative inference from Mr. Meer's testimony that he never worked with Jet Airways in Mumbai when it also contradicted his previous documentary evidence.

[11] The RPD concluded that even if they believed Mr. Meer's evidence, they did not consider his presence in India was compulsory or absolutely necessary, as he had other family members present in India to attend to his parents' needs.

[12] The RPD determined that his actions indicated voluntariness, noting that he obtained a new passport in 2009 to travel back and forth to India and to travel to Qatar and reside there for an extended period of time as an Indian national. The RPD found that Mr. Meer acted voluntarily when he returned to India for numerous and lengthy trips.

B. *Intention*

[13] The RPD found that Mr. Meer presented no evidence of exceptional circumstances exempting him from the termination of his refugee status. The RPD found that Mr. Meer being in India with unwell family members did not constitute exceptional circumstances.

[14] The RPD found no evidence that Mr. Meer was coerced into obtaining a new Indian passport in 2009. The RPD further found that by obtaining a new Indian passport, he demonstrated that he was voluntarily representing himself to Indian border officials as a citizen of India. The RPD found Mr. Meer intended to reavail himself of the protection of India.

C. *Actual reavailment*

[15] The RPD found that Mr. Meer failed to rebut the presumption of actual reavailment. The RPD concluded, based upon paragraph 108(1)(a) of IRPA, that Mr. Meer acted voluntarily, had requisite intention to reavail, and actually reavailed himself.

[16] The RPD granted the Minister's application to cease Mr. Meer's refugee status pursuant to subsection 108(2) of IRPA and thus Mr. Meer's claim for refugee protection was deemed rejected pursuant to subsection 108(3) of IRPA.

III. Issues and standard of review

[17] Mr. Meer submits that the RPD Decision was procedurally unfair for failing to consider paragraph 108(1)(e) of IRPA. Although he frames the Decision as procedurally unfair, his

submissions focused on the reasonableness of the RPD decision. Accordingly, I will conduct a reasonableness review.

[18] In conducting a reasonableness review of the RPD cessation Decision, the Court asks "whether the decision bears the hallmarks of reasonableness—justification, transparency and intelligibility—and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov]* at para. 99).

[19] Reasonableness review involves both an assessment of the outcome of the case and of the reasoning process leading to that outcome (*Vavilov* para 83). It is not sufficient for the decision to be *justifiable, but, where* reasons are required, the decision must also be *justified* by the decision maker to those to whom the decision applies (*Vavilov* para 86).

IV. Analysis

[20] Mr. Meer argues that the RPD erred in failing to consider both paragraphs 108(1)(a) and (e) of IRPA with attention to the consequences of the findings under each of those paragraphs . He argues that the RPD had a duty to consider paragraph 108(1)(e) in light of evidence of the change in circumstances in India towards the LGBTQ+ community and his personal circumstances.

[21] In the Decision, at paragraph 21, the RPD outlines only sections 108(1)(a) and (e) of IRPA. Then at paragraph 22, the RPD notes:

> The panel takes notice that the paragraphs of 108(1) is to be read disjunctively. Thus, where a person who was granted protection by Canada, voluntarily reavails themselves of the protection of their country of nationality under paragraph 108(1)(a), they are considered to have ceased to be a Convention refugee and their claim for protection is deemed to have been rejected as of the time it was initially determined.

[22] The RPD concludes its analysis as follows at paragraph 76:

> Based on the foregoing reasons, the panel finds that the Respondent has failed to rebut the presumption of actual reavailment. Based on the totality of evidence before it, the panel finds the Respondent is described at paragraph 108(1)(a) of the IRPA, as alleged by the Minister.

[23] The consequences of the RPD finding cessation under paragraph 108(1)(a) as compared to a finding cessation under paragraph 108(1)(e) of IRPA were addressed in *Abbas v Canada (Citizenship and Immigration)*, 2023 FC 871 [*Abbas*]. At paragraph 25, Justice Walker outlines the consequences as follows:

> The loss of refugee protection under subsection 108(2) of the *IRPA* has serious potential consequences for the person affected. If that person is a permanent resident and the RPD determines that their refugee protection has ceased under any of paragraphs 108(1)(a) through (d), its cessation decision also results in the loss of permanent resident status and inadmissibility (subsection 40.1(2) and paragraph 46(1)(c.1), *IRPA*). The cessation decision cannot be appealed to either the Refugee Appeal Division or the Immigration Appeal Division (paragraph 110(2)(e) and subsection 63(3), *IRPA*). In addition, the person is subject to removal from Canada as soon as possible (subsection 48(2), *IRPA*) and is barred from seeking a Pre-removal Risk Assessment or making an application for permanent residence on humanitarian and compassionate grounds for at least one year (paragraph 112(2)(b.1) and subparagraph 25(1.2)(c)(i), *IRPA*).

[24] In *Abbas*, Justice Walker found the RPD committed a reviewable error when it failed to explain why, considering the serious collateral consequences, it applied paragraph 108(1)(a) (*Abbas* at paras 38 and 52).

[25] Here, the RPD quotes 108(1)(e) at paragraph 21 of the Decision, however the RPD does not otherwise address or discuss 108(1)(e) anywhere in the Decision. Unlike in *Abbas*, Mr. Meer (who was self-represented) did not specifically argue before the RPD that they should consider his circumstances under 108(1)(e). This raises the question as to whether there was any duty on the RPD to consider 108(1)(e) when it was not raised by the Applicant.

[26] The Minister correctly points out that there are no legislative provisions that direct the RPD to consider paragraph 108(1)(e) or provide reasons for why that paragraph is or is not considered. This was addressed by Justice Walker in *Abbas* at paragraph 29:

> The premise that the absence of an express legislative provision requiring reasons exonerates an administrative decision maker from its obligation to explain its analysis and conclusions is without merit. The RPD's statement that it is not required to explain the exercise of its discretion because "the legislative regime governing cessation proceedings does not require the panel to explain its choice" is not consistent with the fundamental administrative law principle that a decision maker must justify its decision. Whether or not Justice Norris's guidance in *Ravandi* is *obiter dicta*, as the Respondent argues, the guidance reflects and distils the jurisprudence of the Supreme Court, the FCA and this Court in the specific context of section 108 of the *IRPA*.

[27] I also note the Federal Court of Appeal in *Canada (Citizenship and Immigration) v Galindo Camayo*, 2022 FCA 50 [*Camayo*] at paragraph 50 states:

> Where the impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must

> reflect the stakes. The principle of responsive justification means that if a decision has particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflects the legislature's intention: *Vavilov* SCC, above at para. 133. The failure to grapple with the consequences of a decision should thus be considered: Vavilov SCC, above at para. 134, citing Chieu v. Canada (Minister of Citizenship and Immigration), 2002 SCC 3. [Emphasis added.]

[28] In my view, responsive justification would require the RPD to address paragraph 108(1)(e) and provide reasons on why that paragraph is or is not considered or applicable. This is consistent with *Vavilov* at paragraph 133:

> … The principle of responsive justification means that if a decision has particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflects the legislature's intention.

[29] Even accepting that subsection 108(2) grants the RPD discretion, discretion is not a blank slate, and considering the harsh consequences as a result of a finding under paragraphs 108(1)(a)-(d), responsive justification required the RPD to, at least, address why it did not consider cessation under paragraph 108(1)(e).

[30] The RPD's substantive analysis was conducted pursuant to paragraph 108(1)(a) and fully considered the concepts of voluntariness, intention, and reavailment. I do not find any reviewable error arises in relation to the RPD's consideration of paragraph 108(1)(a).

[31] However, the RPD did not grapple with or turn its mind to the consequences of the 108(1)(a) finding as against a finding under 108(1)(e). The RPD Decision is silent on any

considerations of the changed circumstances in India towards LGBTQ+ people and Mr. Meer's personal circumstances relative to paragraph 108(1)(e) of IRPA.

[32] This judicial review is, therefore, granted in part as the RPD Decision lacks the necessary justification for failing to address cessation under paragraph 108(1)(e).

V. Does a certified question arise?

[33] The Applicant proposed the following question for certification:

> Where change of circumstances in the country of return is applicable, should the RPD member in a cessation hearing be required to consider the least punitive sanction first (section 108(1)(e))?

[34] To be certified for appeal under paragraph 74(d) of IRPA, a proposed question must be a "serious question" that (i) is dispositive of the appeal (ii) transcends the interests of the parties and (iii) raises an issue of broad significance or general importance (*Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at para 36).

[35] In *Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22 at paragraph 46, Justice Laskin explained the *Lewis* test of being a serious question as follows:

> … the question must have been dealt with by the Federal Court and must arise from the case itself rather than merely from the way in which the Federal Court disposed of the application. An issue that need not be decided cannot ground a properly certified question (*Lai v. Canada (Public Safety and Emergency Preparedness*), 2015 FCA 21, 29 Imm. L.R. (4th) 211, at paragraph 10). Nor will a question that is in the nature of a reference or whose answer turns on the unique facts of the case be properly certified (*Mudrak v.*

> *Canada (Citizenship and Immigration)*, 2016 FCA 178, 485 N.R. 186, at paragraphs 15, 35).

[36] In my view, the question as posed by the Applicant does not arise from the Decision of the RPD itself. The RPD did not make any findings in relation to the change in country conditions in India.

[37] Accordingly, since the question posed does not arise from the RPD Decision, it will not be certified for appeal.

JUDGMENT IN IMM-6206-21

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted in part;
2. The matter is sent back to be redetermined solely on the issue of paragraph 108(1)(e) of IRPA; and
3. No question of general importance is certified.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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