Federal Court  Cour fédérale

Date: 20240122

Docket: IMM-372-22

Citation: 2024 FC 94

Toronto, Ontario, January 22, 2024

PRESENT: The Honourable Madam Justice Ngo

BETWEEN:

YETONG LU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant seeks judicial review of the decision of the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada [IRB] rendered on January 5, 2022 allowing the Minister's application pursuant to section 108(2) of the *Immigration and Refugee Protection Act*, SC 2001, c-27 [*IRPA*] to cease the Applicant's refugee protection [Decision]. This application is brought under subsection 72(1) of the *IRPA*.

[2] The Applicant seeks to quash or set aside the Decision and to send the matter back to the RPD for reconsideration on the grounds that the Decision was unreasonable.

[3] For the following reasons, the application for judicial review is dismissed. Having considered the Decision, the evidentiary record and the applicable law, I find that the Decision is not unreasonable.

II. Background

[4] The Applicant is a Chinese citizen who was recognized by the RPD as a Convention refugee on January 20, 2015.

[5] The facts leading to the Respondent's application for cessation of the Applicant's refugee status are not contested. Of relevance to the application before this Court is that in granting refugee status, the RPD found that the Applicant engaged in Falun Gong practice with his grandmother, a practice banned in China. The RPD found that the Applicant had a well-founded fear of persecution and that the state was the agent of persecution. The RPD also found that the Applicant's grandmother was arrested and was serving a sentence of three and a half years' imprisonment following a raid by the Public Security Bureau [PSB].

[6] On January 28, 2017, the Applicant obtained Permanent Resident status in Canada. Shortly thereafter, on April 27, 2017, the Applicant renewed his Chinese passport (his country of nationality). In the summer of 2019, he returned to China using this passport for a six-week period from July 23, 2019, to September 5, 2019, accompanied by his wife.

[7] On September 5, 2019, the Applicant returned from China and arrived at Pearson International Airport. Upon entry to Canada, a Canada Border Services Agency [CBSA] officer questioned the Applicant on the reasons for his trip to China. During the course of this exchange, the Applicant answered that he did not have any fear going back to his country. The Applicant does not contest the nature of the exchange or the answers he provided to the CBSA officer as noted by the officer.

[8] On January 5, 2021, the Respondent brought an application for cessation of refugee protection to the RPD pursuant of subsection 108(2) of the *IRPA*. The application dealt with whether the Applicant voluntarily reavailed himself of the protection of his country of nationality, as described in paragraph 108(1)(a) of the *IRPA.*

[9] On December 22, 2021, the RPD heard the Respondent's application, and the Applicant testified in those proceedings. On January 5, 2022, the RPD allowed the Respondent's application and rejected the Applicant's claim for refugee protection.

III. Standard of review

[10] The parties both submit that the issue before the Court is whether the Decision was reasonable. I agree that the applicable standard of review is reasonableness.

[11] Decisions by the RPD with respect to cessation of refugee status is reasonableness (*Abas v Canada (Citizenship and Immigration)*, 2023 FC 871 [*Abas*] at para 20, citing *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 10, 23, and *Camayo v*

Canada (Citizenship and Immigration), 2020 FC 213 at paras 17-18; aff'd 2022 FCA 50 at paras 39-43).

[12] A court applying the reasonableness standard does not ask what decision it would have made in place of the administrative decision maker. It is "an approach meant to ensure that courts intervene in administrative matters only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process. It finds its starting point in the principle of judicial restraint and demonstrates a respect for the distinct role of administrative decision makers" (*Vavilov* at para 13).

[13] The reviewing court does not attempt to ascertain the "range" of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the "correct" solution to the problem (*Vavilov* at para 83).

[14] The decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker" (*Vavilov* at para 125).

[15] The court has to examine two things when accessing the reasonableness of the Officer's reasoning process leading to the outcome and the outcome itself (*Vavilov* para 83). A reasonable decision is one 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. The reasonableness standard

requires that a reviewing court defer to such a decision (*Vavilov* at para 85). Reasonableness review is not a "line-by-line treasure hunt for error" (*Vavilov* at para 102).

[16] A reviewing court "must bear in mind that the written reasons given by an administrative body must not be assessed against a standard of perfection. That the reasons given for a decision do "not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred" is not on its own a basis to set the decision aside" (*Vavilov* at para 91). Moreover, "even where elements of the analysis are left out and, in the whole scheme of the things, the decision is not undermined as a whole and must stand" (*Vavilov* at para 122).

[17] The burden of proof lies with the party claiming that the decision is unreasonable. The party must prove to the reviewing court that the decision is so seriously flawed that it cannot be said to meet the requirements of justification, intelligibility and transparency (*Vavilov* at para 100).

IV. Analysis

[18] I consider next the test for reavailment and its constituent elements.

A. *The Test for Reavailment*

[19] There is no dispute that, as the Respondent submits, refugee protection is intended to be a temporary measure. The intent is to provide surrogate protection for refugees until they can either reclaim the protection of their home state or secure an alternative form of enduring protection. The Respondent also cites Article 1C of the 1951 *Convention Relating to the Status of Refugees*, 28

July 1951, 189 UNTS 137 [Convention] which sets out criteria for determining whether refugee protection is no longer appropriate as a result of a person's own actions and/or changed country conditions. These criteria include, for example, if the person concerned has re-availed himself or herself of the protection of their home state.

[20] The *IRPA* reflects the provisions of the Convention, and paragraph 108(1)(a) of the *IRPA* provides that a claim for refugee protection shall be rejected, and a person is not a Convention refugee or a person in need of protection, where the person has voluntarily reavailed themself of the protection of their country of nationality.

[21] There are three conjunctive elements to test for reavailment that must all be met: (a) the refugee must have acted voluntarily; (b) the refugee must have intended to reavail themselves to the protection of the country of nationality; and (c) the refugee must have actually obtained that protection: (*Wu v Canada (Citizenship and Immigration),* 2023 FC 1071 [*Wu*] at para 21, citing *Canada (Citizenship and Immigration) v Galindo Camayo,* 2022 FCA 50 [*Galindo Camayo*] at para 79.

[22] The Minister has the burden of proving reavailment on the balance of probabilities. In doing so, the Minister is entitled to rely on the presumption of reavailment by proving that the refugee obtained or renewed a passport from his or her country of origin. Once that has been proved, the burden of proof is reversed. The refugee then has the burden of showing that he or she did not actually seek reavailment *(Abadi v Canada (Minister of Citizenship and Immigration),* 2016 FC 29 [*Abadi*] at para 17; *Li v Canada (Citizenship and Immigration),* 2015 FC 459 [*Li*] at

para 42. It is then presumed that the refugee intended to reavail themselves of the protection of the country in question. It is also presumed that the refugee has obtained the actual protection of the country when the Minister establishes that the refugee has used that passport to travel. (*Canada (Citizenship and Immigration) v Safi* 2022 FC 1125 [*Safi*] at para. 33)

[23] As Justice Strickland stated in *Safi*, this Court has characterized the presumption of reavailment as "particularly strong" when the refugee has used his or her passport to travel to the country of nationality. (*Safi* at para 33, citing *Seid v Canada (MCI)*, 2018 FC 1167 [*Seid*] at para 14 and *Mayell v Canada (Citizenship and Immigration)*, 2018 FC 139 [*Mayell*] at para 12).

[24] Reavailment brings into question a refugee's fear of returning to their country of origin. "Reavailment typically suggests an absence of risk or a lack of subjective fear of persecution. Absent compelling reasons, people do not abandon safe havens to return to places where their personal security is in jeopardy." When a refugee applies for and obtains a passport from his country of nationality, it is presumed that he intended to reavail himself of the diplomatic protection of that country. (*Safi* at para 34, citing *Seid* at para 14, *Abadi* at para 16, *Galindo Camayo* at para 63).

[25] The presumption of reavailment may be rebutted and the onus is on the refugee to adduce sufficient evidence to rebut the presumption (*Safi* at para 35, citing *Canada (Citizenship and Immigration) v Nilam*, 2015 FC 1154 at para 26; *Li* at para 42; *Galindo Camayo* at para 65).

[26] In his written submissions and at the hearing, the Applicant did not challenge the RPD's finding of voluntariness or of actual reavailment under the applicable test. The Applicant's arguments at the hearing and his written submissions related primarily to the intention to reavail and paragraph 15 of the Decision.

[27] There was no dispute regarding the Applicant's voluntariness, that he was not coerced, under duress or acting for reasons beyond his control when he renewed his Chinese passport, and that there was actual reavailment in light of his return to China on his renewed Chinese passport. I accept that in the circumstances, the first and the third part of the test for reavailment were met and do not need to address these factors further.

(1) Intention

[28] I will consider the second factor, the intention aspect of the reavailment test. This was the primary focus of the Applicant's submissions.

[29] The Applicant argues that the RPD erred in finding that the Applicant intended to reavail himself of China's protection by failing to consider that he believed that he would be protected by his Canadian permanent resident status.

[30] The Applicant asserts that the RPD found his belief that he would be protected by his Canadian permanent resident status to be credible. Despite this, the RPD completely dismissed his belief as irrelevant. Specifically, the Applicant pointed to this portion of the Decision:

> "[15] Where a protected person obtains or renews a passport from his country of origin, and uses it to travel to that country, the presumption of the intention to reavail is particularly strong. The belief that Canadian permanent resident status provides protection does not change the fact that reavailment occurred. (emphasis added)"

[31] The Applicant states that the underlined portion of the Decision is an error so fundamental that it renders the entire Decision unreasonable.

[32] The Respondent contends that the Court must not only look at one sentence in its review and that the rest of the Decision demonstrates that this factor was properly considered.

[33] I agree with the Respondent. With respect to the Applicant, taking such a narrow reading of the Decision is contrary to the guidance in *Vavilov*. Reasons should be read holistically and contextually to understand the basis on which a decision was made (*Vavilov* at para 97). The Court cannot consider the Decision with only one cited passage in isolation from the rest of the Decision.

[34] While the RPD found the Respondent was generally credible, it found one significant area of credibility concern. This related to whether the Applicant still feared returning to his country. After weighing the evidence at the cessation hearing including the Applicant's testimony before the RPD with the previous statements that the Applicant gave to the CBSA officer, the RPD made a finding that the Applicant was not afraid to return and that "his testimony on this matter lacks credibility."

[35] The RPD then set out the test that is required to determine whether the Applicant reavailed himself under paragraph 108(1)(a) of the *IRPA.*

[36] The RPD's analysis of the second prong of the test for reavailment is not limited to paragraph 15 of the Decision. It starts from paragraphs 12 to 17 under the heading *"Did the Respondent intend to reavail of the protection of China?"*

[37] This section of the Decision considered the Applicant's intention in the context of the evidence, which included his testimony to the RPD that he feared arrest and kept a low profile, and that he was afraid to return to China. His testimony was also assessed with other evidence, including his statements to the CBSA officer upon his return to Canada. The Decision also described the Applicant's position that although he was concerned for his safety, he believed his Canadian permanent residence status would protect him and he really wanted to see his grandparents.

[38] In particular, after the impugned paragraph that the Court was directed to, the RPD addressed the Respondent's assertion of his fear of being arrested and that he kept a low profile. The RPD found that the facts did not support this contention. The RPD assessed the Applicant's evidence and credibility when it found that his actions while in China contradicted his position that he did not intend to reavail himself of the protection of China. This included his testimony that the authorities stopped looking for him in 2018 and his statements to the CBSA officer that he no longer has a fear in China.

[39] The Applicant's belief that he would be protected by his Canadian permanent residence status does not mean that the analysis on the intention to reavail ends there. In fact, an individual's actions are relevant in the assessment of intention in reavailment cases.

[40] Justice Brown in *Ali v Canada (Citizenship and Immigration)*, 2023 FC 383 at paragraphs 45 to 50 [*Ali*] addresses the issue of "intention" that an individual's intent may be determined based on the inference that a trier of fact may draw from the evidence that people intend the natural and probable cause of their actions. An individual's intention is a finding of fact:

> "[47] … Intention is primarily a factual determination and lies within the purview of the trier of fact. The triers of fact in this case are the RPD and RAD and in criminal cases, for example it is the jury if there is one, or the trial judge if there is no jury. The rules of evidence in terms of determining intention are generally the same across all fields of law, absent legislative or judicial intervention. In this connection, it is well established that a party's intent may be determined based on the inference a trier of fact may draw from the evidence that people "intend the natural and probable consequences of their actions." This is a rule of evidence and a matter of common sense as stated by Cory J for the Supreme Court of Canada in *R v Seymour*, 1996 CanLII 201 (SCC), [1996] 2 SCR 252 at paragraph 19:
>
> [19] When charging with respect to an offence which requires proof of a specific intent it will always be necessary to explain that, in determining the accused's state of mind at the time the offence was committed, jurors may draw the inference that sane and sober persons intend the natural and probable consequences of their actions. Common sense dictates that people are usually able to foresee the consequences of their actions. Therefore, if a person acts in a manner which is likely to produce a certain result it generally will be reasonable to infer that the person foresaw the probable consequences of the act. In other words, if a person acted so as to produce certain predictable consequences, it may be inferred that the person intended those consequences.

[Emphasis added]”

[41] Furthermore, the Applicant’s belief that he would be protected by his Canadian permanent residence status is one factor but is not necessarily determinative of the intention to reavail (*Ali* at para 49 citing *Cerna v Canada (Citizenship and Immigration)*, 2021 FC 973 at para 25 and 26; *Al-Habib v Canada (Citizenship and Immigration),* 2020 FC 545 [*Al-Habib*]). This belief must be reviewed in light of all the evidence, and it may not be sufficient to rebut the presumption of reavailment (*Al-Habib* at paragraph 19).

[42] Indeed, no individual factor will necessarily be dispositive, and all of the evidence relating to these factors should be considered and balanced in order to determine whether the actions of the individual are such that they have rebutted the presumption of reavailment (*Galindo Camayo* at para 84).

[43] The Decision predated the *Galindo Camayo* decision. However, Justice St-Louis in *Karasu v Canada (Citizenship and Immigration),* 2023 FC 654 at paragraph 46, observed that there is no indication that the Federal Court of Appeal’s decision in *Galindo Camayo,* changed the overarching principles guiding the analysis that must be conducted under paragraph 108(1) of the *IRPA.*

[44] Applying the general framework and factors in *Galindo Camayo* to the Applicant’s case, I agree with the Respondent that the RPD addressed most of the factors in *Galindo Camayo*. The Decision included the analysis and application of factors such as consideration of subsection 108(1) of the *IRPA*, the Convention, the submissions of the parties, the identity of the agent of

persecution, whether the obtaining of a passport from the country of origin was done voluntarily, whether the individual actually used the passport for travel purposes (if so, whether it was to the individual's country of nationality or to third countries), the purpose of the travel, what the individual did while in the country in question, whether the individual took any precautionary measures while in the country of nationality, whether the actions of the individual demonstrate no longer having a subjective fear of persecution, and frequency and duration of travel (*Galindo Camayo* at para 84).

[45] The Decision took into account the Applicant's belief and considered this with the rest of the Applicant's evidence as a whole, and not simply as an isolated factor.

[46] The Applicant did not dispute the RPD's findings of fact or findings on credibility. Rather, his arguments focus on how the Decision ought to have interpreted these findings with each action being justifiable based on the Applicant's belief.

[47] To follow the Applicant's arguments would require the Court to reweigh and reassess the evidence considered by the decision maker, which it cannot do. There are no exceptional circumstances that warrant interfering with the factual findings on the Applicant's intention to reavail (*Vavilov* at para 125).

[48] Given the Decision, the evidentiary record and the applicable law, I cannot find that the Decision was unreasonable. Rather, I find that it is justified in relation to the facts and law that constrain the decision maker (*Vavilov* at para 83).

V. Conclusion

[49] For the reasons stated above, the Applicant has not persuaded me that there has been a reviewable error with the Decision. The application for judicial review is dismissed.

[50] Both parties confirmed that they had no questions for certification. I agree that none arises.

JUDGMENT in IMM-372-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question for certification.

"Phuong T.V. Ngo"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Michael Korman	FOR THE APPLICANT
Giancarlo Volpe	FOR THE RESPONDENT

SOLICITORS OF RECORD:

KORMAN & KORMAN LLP Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
ATTORNEY GENERAL OF CANADA Toronto, Ontario	FOR THE RESPONDENT