

Federal Court



Cour fédérale

Date: 20240611

Docket: IMM-6698-23

Citation: 2024 FC 890

Ottawa, Ontario, June 11, 2024

PRESENT: Madam Justice Azmudeh

BETWEEN:

AHMED ABD ELKAD KANDIL

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of a decision of the Refugee Protection Division [RPD] dated May 12, 2023 [the “Decision”], granting the Minister of Public Safety and Emergency Preparedness’s application to cease Ahmed Abd Elkad Kandil’s [the “Applicant”] refugee

protection pursuant to paragraph 108(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] because the Applicant had reavailed himself of Egypt's protection.

[2] For the reasons that follow, I find that the Applicant has discharged his burden to demonstrate that the RPD's decision is unreasonable. Therefore, this application for judicial review is granted.

II. Facts

[3] The Applicant is a citizen of Egypt. The Applicant was granted refugee status on August 26, 2011 and permanent residency on June 25, 2014. The first Egyptian passport the Applicant obtained after he became a permanent resident was on October 19, 2014. This was primarily to travel to Egypt, as he could not use his Canadian travel document for this purpose. He subsequently obtained another Egyptian passport in 2021.

[4] The Applicant alleges to be a member of the Muslim Brotherhood, and as such, continues to fear the Egyptian authorities. Despite this, on his Egyptian passport, the Applicant travelled approximately ten times to Egypt in 2014, 2015, 2017, 2018, 2019, 2020 and 2021. He alleges that he obtained an Egyptian passport when he needed to care for his ill sister and that he could not use his Canadian Travel Document. He also alleges that caring for his sister was the only purpose of each trip as there was no other family member available to care for her. Each time, he entered and exited the country by paying bribes to the officials he knew through family members, and that even though he needed to care for his sister, he did not spend the night at her house and that he changed his residence every three to five days.

[5] Despite these precautions, the Applicant alleges that because of his association with the Muslim Brotherhood, which is considered a terrorist organization in Egypt, on October 22, 2022, the Egyptian authorities have sentenced him to “life sentence of 20 years”. This document was before the RPD.

III. Decision under review

[6] On April 13, 2022, the Minister of Immigration, Refugees and Citizenship Canada (the “Minister”) made an application (the “Cessation Application”), to the RPD pursuant to subsection 108(2) of the IRPA and in accordance with Rule 64 of the *Refugee Protection Division Rules* [RPD Rules] for the cessation of the refugee protection granted to the Applicant on August 26, 2011.

[7] The RPD relied on s. 108 of IRPA, Rule 64 of RPD Rules, relevant sections of the *United Nations High Commissioner for Refugees Handbook on Procedures and Criteria for Determining Refugee Status* [UNHCR Handbook] and the Federal Court of Appeal authority in *Canada (M.C.I.) v Galindo Camayo*, 2022 FCA 50 [*Camayo FCA*] to assess whether the Applicant had met the three prongs of the conjunctive test:

- (a) Voluntariness: the refugee must act voluntarily;
- (b) Intention: the refugee must intend by his [their] action to reavail himself [themselves] of the protection of the country of his [their] nationality; and
- (c) Reavailment: the refugee must actually obtain such protection.

[8] On voluntariness, the RPD found that the Applicant voluntarily chose to obtain and renew his Egyptian passport, and voluntarily chose to travel on numerous occasions to Egypt in order to take care of his ill sister. Despite never making a clear credibility finding to the purpose of the Applicant's trip, the RPD found it unreasonable that the sister could not rely on other family members for her care, or that the Applicant could not more heavily rely on hired help. The RPD therefore found that the Applicant's presence did not constitute an exceptional circumstance to rebut the presumption of reavailment.

[9] On the question of intention to travel to Egypt, the RPD never made a clear credibility finding on the Applicant's allegation to enter and exit Egypt through payment of bribes or the precautions he allegedly took. The RPD also noted that the Applicant had used his Egyptian passport on other international travel to other Arab or Middle Eastern countries.

[10] The RPD concluded that his alleged need to be close to his sister placed him in Cairo meant that he was closest to the seat of the Government who are his persecutors. The RPD also noted that the Applicant accompanied his sister to medical appointments by taking public taxis and concluded that he did not experience any issues. The RPD also referred to the Applicant's answers to a questionnaire to conclude that he knew of serious consequence of cessation, which could lead to the loss of his permanent residence. The RPD was therefore satisfied that the Applicant had the intent to reavail himself of Egyptian protection. In other words, on a balance of probabilities, the RPD was satisfied that the Applicant's intent was established, and the Applicant had not rebutted it.

[11] On actual reavilment, the RPD relies on *Camayo FCA* to note that the burden rests on the refugee claimant to demonstrate that they did not actually seek reavilment of the protection of the country from which they sought refuge. To discharge this burden, the refugee claimant must demonstrate that they were obligated to travel due to exceptional circumstances. In this case, the RPD found that by returning to Egypt on ten different occasions, and while using an Egyptian passport that was acquired voluntarily, the Applicant had effectively reavailed himself of Egyptian protection.

IV. Issues and standard of review

[12] The only issue before me is whether the RPD reasonably concluded that the Applicant's refugee status was ceased due to reavilment.

[13] The standard of review in this case is that of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 10, 25 [*Vavilov*]; *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at paras 7, 39–44 [*Mason*]). 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” (*Vavilov* at para 85). The reviewing court must ensure that the decision is justifiable, intelligible, and transparent (*Vavilov* at para 95). Justifiable and transparent decisions account for central issues and concerns raised in the parties' submissions to the decision maker (*Vavilov* at para 127). The party challenging the decision bears the onus of demonstrating that the decision is unreasonable (*Vavilov* at para 100).

V. Legal Framework

[14] The relevant legislative provisions are found at subsection 108(1) and 108(2) of the IRPA, which states the following:

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 protection of their country of nationality;

[...]

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).

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 du pays dont il a la nationalité;

[...]

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 la protection des réfugiés, de tels des faits mentionnés au paragraphe (1).

[15] The test for cessation pursuant to section 108(1)(a)-reavailment of the IRPA is well established and not disputed in this matter. It is based on para 119 of the UNHCR Handbook and endorsed by the jurisprudence of this Court (See *Dari v Canada (Citizenship and Immigration)*, 2023 FC 887 at para 14; *Cerna v Canada (Citizenship and Immigration)*, 2015 FC 1074 at para 12; *Nsende v Canada (Minister of Citizenship and Immigration)*, 2008 FC 531 at paras 12–15; *Kuoch v Canada (Citizenship and Immigration)*, 2015 FC 979 at para 26), as well as by *Camayo FCA* and stated at paragraph 7 of these reasons.

[16] The Minister bears the onus of proving reavilment, on a balance of probabilities (*Canada (Citizenship and Immigration) v Safi*, 2022 FC 1125 at para 33 [*Safi*]). When a refugee claimant has obtained or renewed a passport from their country of nationality, this triggers a presumption that they have reavailed themselves of their country's protection (*Safi* at para 33; *Abadi v Canada (Citizenship and Immigration)*, 2016 FC 29 at para 17 [*Abadi*]). This presumption is "particularly strong" when the refugee claimant uses that passport to travel to their country of nationality (*Camayo FCA* at para 63; *Abadi* at para 16). 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, and *Abadi* at paras 16 and 18). *Camayo FCA* made a similar point when it stated that "this presumption is even stronger where refugees return to their country of nationality, as they are not only placing themselves under diplomatic protection while travelling, they are also entrusting their safety to government authorities upon their arrival" (*Camayo FCA* at para 63).

[17] Once the presumption of reavilment is established, the burden shifts to the refugee claimant, who must adduce sufficient credible evidence to rebut the presumption (*Camayo FCA* at para 65; *Abadi* at para 17; *Canada (Minister of Citizenship and Immigration) v Nilam*, 2015 FC 1154 at para 26 [*Nilam*]; *Li v Canada (Minister of Citizenship and Immigration)*, 2015 FC 459 at para 42 [*Li*]).

[18] In *Camayo FCA* at paragraph 66, the Federal Court of Appeal held that the RPD should conduct an individualized assessment in light of all of the evidence before it, to assess if the refugee claimant has successfully rebutted the presumption of reavilment. In conducting that assessment,

the RPD should pay particular attention to the list of factors enumerated in *Camayo FCA* at paragraph 84.

[19] Some of the important principles set out by *Camayo FCA* are as follows:

- Determining the outcome of each cessation application is largely fact dependent. The test should not be applied in a mechanistic or rote manner (paragraph 83).
- When assessing if the protected person rebutted the presumption that arises from the acquisition and use of a passport, the RPD must consider evidence regarding the protected person's lack of knowledge that the use of a passport confers diplomatic protection. This factor may not be determinative, but it is a key factual consideration (paragraphs 70-71).
- When determining if the presumption is rebutted, the protected person's subjective intent is relevant. The RPD should not base itself on what the protected person should have known, but whether they subjectively intended by their actions to depend on the protection of their country of nationality (paragraph 68).
- The Court cautioned against using the same factors, such as the use of a passport, to satisfy all three elements of the test. This leaves little room for the protected person to demonstrate that they did not intend to reavail (paragraph 79).
- The RPD should have regard to the following factors, at a minimum, when examining if the presumption of reavilment has been rebutted. No individual factor is necessarily dispositive; all the factors should be considered and balanced to determine whether the

actions of the protected person are such that they have rebutted the presumption of reavailment (paragraph 84):

1. the provisions of subsection 108(1);
2. international Conventions and guidelines, such as the UNHCR Handbook;
3. the severity of the consequences;
4. the submissions of the parties;
5. the state of the protected person's knowledge with respect to the cessation provisions and their consequences;
6. the personal attributes of the protected person;
7. the identity of the agent of persecution;
8. whether the passport was obtained voluntarily;
9. whether the protected person used the passport to travel;
10. the purpose of the travel;
11. the frequency and duration of the travel;
12. what the protected person did while in the country in question;
13. whether the protected person took precautionary measures while in their country of nationality;
14. whether the actions of the protected person demonstrate that they no longer have a subjective fear; and
15. any other relevant factors.

VI. Analysis

Was the RPD decision reasonable?

[20] In its decision, the RPD demonstrates a thorough analysis of the cessation law. There is no question that the Applicant's obtaining and using of the Egyptian passport on the multiple occasions creates a presumption of reavailment. However, the Applicant had provided evidence to rebut that presumption. The RPD does not make clear findings of facts through a reasonable credibility assessment, and as a result, it produces reasons that lack intelligibility.

Voluntariness

[21] The RPD relied on *Abadi, Tung v Canada (Citizenship and Immigration)*, 2018 FC 1224 and *Jing v Canada (Citizenship and Immigration)*, 2019 FC 104 to conclude that visiting a sick relative is not an exceptional circumstance when there are other family members to take care and support the ailing person. The RPD concluded that there were other family members, even though the un rebutted evidence was to the contrary.

[22] The Applicant had alleged that he had no choice to travel to Egypt once he learnt of his sister's health, and that he could not have travelled there but with an Egyptian passport. In addition to his testimony at the hearing, the sister had provided written evidence on her dependence on her brother in her circumstances and on the unavailability of anyone else. There was evidence that one of her children lived in Saudi Arabia and the other was unavailable, and that her husband was disabled. The RPD never made a credibility finding on any of these, which leaves the Court to believe that it had accepted them. Yet, at paragraph 18 of its reasons, it suggested that the daughter living in Egypt could have provided more help with the mother

(despite evidence to the contrary that she could not). It is unclear as to why the RPD makes this assumption.

[23] The Applicant had also provided evidence that his entrances and exits to Egypt were due to payment of bribes through their connections. The member did not make a credibility assessment to reject this evidence, but found that the Applicant should have asked the husband of the niece who provided the connection and his wife (the sister's daughter/his niece) for more assistance with his sister's health. It is hard to know on what basis the RPD member makes this demand or how she links the husband's ability to assist with his connection to pay the bribe at the border to physical and emotional help with illness. The demand does not amount to a finding to rebut the Applicant's evidence that there was no one else to take care of her.

[24] The Applicant had alleged that fearing the authorities, he never spent a night at his sister's and would only go to her house to take her to the hospital. The sister's evidence also stated that he could not stay at a hotel to not bring himself to anybody's attention. The RPD does not reject this and did not engage with it in the context of either voluntariness or actual reavailment. Rather, it suggested that the hired help engaged during the Applicant's absences should have taken the sister to the hospital instead of him. It is hard to follow a chain of reasoning when it is only based on the member's subjective expectations of the Applicant's behaviour with no credibility finding.

[25] Ultimately, on plain reading of the RPD reasons, it appears that the member's interpretation of case law was that visiting sick relatives would amount to exceptional circumstances when there are no other family members. However, because of the member's

arbitrary fact-finding on the availability of other family members, the Court cannot see a rational connection with its conclusion.

Intention

[26] The RPD found that the Applicant used his Egyptian passport on multiple occasions to visit Egypt and a number of other Arab or Middle Eastern countries. It was the Applicant's uncontradicted evidence that through bribes and connection, he evaded being examined by the state authorities. He and his sister also provided evidence to the precautions he took while in Egypt, including his sister's statement on not staying at her place or a hotel to not bring himself to the attention of the authority. The member did not reject this but found it implausible that he would still go to Cairo where it is the seat of the government who are his persecutors.

[27] First, this is a plausibility finding when it is not very clear where the member expected him to be when it was his evidence that he was only there to care for his sister who lived in Cairo. Also, without rejecting (or accepting) any of the Applicant's evidence, the member made this plausibility finding by stating that "[e]ven if the panel were to believe him, ..." (at para 26). Later in para 27, the member stated that "[i]n the present case, there is no evidence that the Respondent concealed his presence in Egypt from his persecutors". There was clearly evidence to the contrary, but without any credibility findings, it is difficult to understand how the member concludes this.

[28] Ultimately, the member concludes that "[b]ribing a few officers does not mean that the rest of his persecutors abandoned their desire to persecute him, considering his alleged association with the Muslim Brotherhood and the government's crackdown on the member of

this organization” (at para 27). In short, the member implied that he possessed the requisite intention because he lacked a subjective fear of the authorities.

[29] First, the member’s statement on bribing the officers at the port of entry implies that she accepted that the Applicant had tried to conceal his entries and exits through bribes, even though she had earlier stated that there is “no evidence” that he had concealed his presence. Second, other than through a problematic plausibility finding, the member appears to have accepted the evidence on the Applicant’s subsequent sentencing of 20 years because of his allegations, but did not see it necessary to address it as corroboration (or evidence of lack of credibility) for his alleged fear, which required a credibility assessment.

[30] The RPD also relied on the questionnaire the CBSA had asked the Applicant to complete where they had clearly stated that “please note that cessation of refugee status pronounced by the Refugee Protection Division may lead to the loss of permanent residence status in Canada” (at para 31).

[31] As found by this court at *Baquero Alvarez v Canada (MCI)*, 2024 FC 770 at para 21 [*Baquero Alvarez*], the refugee claimant’s subjective knowledge is one of the many factors that the RPD should consider, but is not determinative of its own (*Camayo FCA* at paras 70, 84). My colleague Mr. Justice Régimbald states the following in *Baquero Alvarez* at para 22:

[22] The RPD has an obligation to assess the key evidence and arguments that are presented by the parties (*Camayo FCA* at para 82; *Ahmad v Canada (Citizenship and Immigration)*, 2023 FC 8 at para 35 [*Ahmad*]). The assessment of the Applicant’s subjective knowledge becomes relevant to the RPD once it has been meaningfully raised by the parties and the parties adduced relevant

evidence on this factor (*Veerasingam v Canada (Citizenship and Immigration)*, 2024 FC 639 at paras 35, 37 [*Veerasingam*]; *Begum v Canada (Citizenship and Immigration)*, 2023 FC 1317 at paras 21–22; *Safi* at paras 43, 55; *Ahmad* at paras 34–35). In other words, the RPD is not expected to go through the *Camayo FCA* factors like a checklist, even if they were not raised, but is rather expected to assess the relevant *Camayo FCA* factors in light of the parties' submissions and the evidentiary record.

[32] Therefore, at the end of the day, the Court is left with RPD findings of facts with no credibility assessment and where the record contains contradictory evidence on material facts. This prevents the Court to follow a logical chain of reasoning.

Actual Reavailment

[33] There is no question that as the RPD stated, the presumption to have actually reavailed is stronger when the Applicant has visited the country of nationality, and in his case multiple times. The RPD reasoning largely rests on the use of the passport for finding that the Applicant had actually reavailed to the protection of the Egyptian authorities.

[34] As stated, the Applicant had presented evidence to the contrary on coming to the attention of the authorities, with which the RPD did not engage. The Applicant also showed a document that suggested he was sentenced to 20 years. The RPD attempted to engage with the evidence in the context of accepting or rejecting his evidence on his behaviour to bringing himself to the attention of the authorities. Together with this, the Applicant had provided three affidavits from family members on being questioned by the authorities. They allege to have been questioned one day after the issuance of the sentence. It is very unclear whether the RPD accepted or rejected any of this because she stated that “the panel finds it extremely suspect that all the affiants, regardless of their location, were questioned by the police on the same day,

namely on October 23, 2022” (at para 39). As counsel for the Respondent agreed, this is a plausibility finding in case other than the clearest of cases (*Santos v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 937, at para 14). The RPD’s cursory conclusion of implausibility was reached arbitrarily and with no evidence that the Egyptian authorities could not have reasonably questioned multiple people on the same day). The RPD then continues to say that even if it were to believe the document, it predated the issuance of the Applicant’s passport.

[35] First, it is unclear whether the RPD accepts or rejects that the Egyptian authorities became interested in the Applicant, and whether this would undermine or support his allegation that he feared them all along and had tried to evade the authorities by keeping a low profile. This confusion about fact finding on a material evidence further renders the decision unintelligible.

[36] Second, it is unclear to the Court how a subsequent prosecution to when the passport was used would sufficiently negate the Applicant’s reavilment when it was his evidence that he feared this to happen all along, and this is why he kept a low profile, and that the RPD had not made credibility findings to the contrary. The RPD’s credibility finding would have put the evidence in perspective, but this was not done.

[37] As stated, cessation applications are heavily fact-specific. In this case, the RPD failed to make clear findings of facts relevant and material issues on all three prongs of a conjunctive test. This resulted in a decision that provided a good summary of cessation law, but did not apply it to the facts in question because the key facts were left hanging. As a result, the rational chain of reasoning was broken and the reasons were not intelligible.

VII. Conclusion

[38] The RPD's reasons are unreasonable, so this judicial review application is granted.

[39] The parties did not propose and I agree that there are no question to be certified.

JUDGMENT in IMM-6698-23

THIS COURT'S JUDGMENT is that:

1. The judicial review application is granted. This matter is returned to the RPD to be decided by a differently constituted panel.
2. There is not question to be certified.

“Negar Azmudeh”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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MINISTER OF CITIZENSHIP AND IMMIGRATION

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