Federal Court  Cour fédérale

Date: 20240828

Docket: IMM-6117-22

Citation: 2024 FC 1337

Ottawa, Ontario, August 28, 2024

PRESENT: Mr. Justice Norris

BETWEEN:

XINWU ZOU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant is a 56-year-old citizen of China. In 2006, he was found to be a Convention refugee on the basis of his well-founded fear of persecution as a Falun Gong practitioner. He became a permanent resident of Canada in 2008. Subsequently, the applicant returned to China four times: in 2009 to care for his ailing mother; in 2010 for his mother's funeral; in 2015 for his son's wedding; and in 2018 because he was feeling despondent and suicidal.

[2] Relying on these trips together with the fact that the applicant had obtained a new Chinese passport in 2008 and used it to travel, the Minister of Citizenship and Immigration applied 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 has ceased due to reavailment. In a decision dated June 3, 2022, the Refugee Protection Division (RPD) of the Immigration and Refugee Board of Canada allowed the application. By the operation of subsection 108(3) of the *IRPA*, the applicant's claim for refugee protection was deemed to be rejected.

[3] The applicant now applies for judicial review of this decision under subsection 72(1) of the *IRPA*.

[4] For the reasons that follow, I am satisfied that the RPD's decision should be set aside because it is unreasonable.

[5] The RPD's understanding of the legal test for cessation on the basis of reavailment is central to this application for judicial review. The applicant submits that the decision should therefore be assessed on a correctness standard of review. According to the applicant, the RPD applied the incorrect test and this alone warrants the Court's intervention.

[6] While I agree that the RPD's decision is flawed in the key ways the applicant has identified, I do not agree that the correctness standard of review applies. Reasonableness is the default standard of review of administrative decisions and none of the recognized exceptions apply here: see *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16-17;

and *Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association*, 2022 SCC 30 at paras 26-28.

[7] That being said, established legal tests are among the constraints with respect to which an administrative decision must be justified. Both statutory and common law impose constraints on how and what an administrative decision maker can lawfully decide (*Vavilov*, at para 111). A decision maker's errors in stating or applying an established legal test can call into question the overall reasonableness of the decision, especially if the decision maker does not explain or justify a departure from settled interpretations, long-standing case law, or binding precedent (*Vavilov*, at paras 111-12). Whether or not the RPD applied the "correct" legal test, the determinative question on review is whether the decision exhibits the requisite degree of justification, intelligibility, and transparency in relation to the legal constraints within which the decision was made (*Vavilov*, at para 100).

[8] The Minister alleged that the applicant's refugee protection has ceased under paragraph 108(1)(a) of the *IRPA* because he had voluntarily re-availed himself of the protection of his country of nationality. The test for cessation on the basis of reavailment is well established. Before allowing the Minister's application, 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 China, 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 of intent to re-avail 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 reavailment 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] 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] In my view, when considered in light of these legal constraints established in statutory and common law, the RPD's decision fails the test of reasonableness in two key respects.

[13] First, the RPD did not carry out reasonably the individualized assessment required by *Galindo Camayo*. There was evidence before the RPD that the applicant has cognitive impairments and mental health issues that prevented him from understanding the legal consequences of returning to China after having been granted refugee protection. Prior to the cessation hearing, a coordinating member of the RPD judged the evidence of the applicant's cognitive impairments to be sufficiently compelling to warrant the appointment of a designated representative because the applicant might be unable to appreciate the nature of the cessation proceeding. However, on the critical issue of the applicant's understanding of the implications of his actions, the RPD said only this in its decision allowing the Minister's application:

> The panel has given serious consideration to the Respondent's [now, the applicant's] mental health and cognitive impairments, as explained by his medical doctor and his sister during their testimony. While the Respondent may not have [been] aware of the consequences that could result from returning to China, as a protected person, the panel finds that during his testimony he was able to provide dates, events and detailed explanations relating to his four trips to China and the reasons why he acted as he did.

[14] This assessment is simply a *non sequitur* that leaves the central question – Was the applicant aware of the consequences that could result from returning to China? – unanswered. As a result, the RPD's conclusion that the test for reavailment was met lacks justification, transparency, and intelligibility.

[15] Second, as set out above, returning to one's country of nationality using a passport issued by that country gives rise to a strong presumption that the individual in question intended to avail him or herself of the protection of their country of nationality. This presumption assists the Minister in establishing an intent to re-avail, the second element of the test. As just explained, the RPD's conclusion that the applicant failed to rebut this presumption is unreasonable. However, there is no question that this presumption is part of the test, that it was triggered in the present case, or that the burden therefore fell on the applicant to rebut it.

[16] On the other hand, in its decision, the RPD introduced another presumption that the applicant was also required to rebut: a presumption of voluntariness. The RPD stated: "The Panel finds on a balance of probabilities that the Respondent has not rebutted the presumption that he acted voluntarily in travelling to China on three of the four occasions that he undertook between 2009 and 2018." (The RPD was satisfied that the applicant had rebutted this presumption of voluntariness in connection with the trip to China for his mother's funeral.) The legal basis for this additional presumption, which appears to be entirely new and which the respondent does not seek to defend, is left unexplained. On an application under subsection 108(2) of the *IRPA*, the Minister must establish that the applicant acted voluntarily. There is no presumption of voluntariness that the applicant must rebut if the first element of the

test is to be decided in his favour. In this respect as well, the RPD's decision lacks justification, transparency, and intelligibility. In the particular circumstances of this case, where there are unresolved issues as to the applicant's cognitive capacities, I am unable to agree with the respondent that the RPD's erroneous reliance on a presumption of voluntariness was a harmless error.

[17] For these reasons, the application for judicial review must be allowed. The decision of the RPD will be set aside and the matter will be remitted for redetermination by a different decision maker.

[18] 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.

[19] Finally, the original style of cause names the respondent as the Minister of Immigration, Refugees and Citizenship. Although that is how the respondent is now commonly known, its name under statute remains the Minister of Citizenship and Immigration: *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, s 5(2) and *IRPA*, s 4(1). Accordingly, as part of this judgment, the style of cause is amended to name the respondent as the Minister of Citizenship and Immigration.

JUDGMENT IN IMM-6117-22

THIS COURT'S JUDGMENT is that

1. The style of cause is amended to reflect the Minister of Citizenship and Immigration as the correct respondent.
2. The application for judicial review is allowed.
3. The decision of the Refugee Protection Division dated June 3, 2022, is set aside and the matter is remitted for redetermination by a different decision maker.
4. No question of general importance is stated.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6117-22
STYLE OF CAUSE:	XINWU ZOU v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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APPEARANCES:

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