Federal Court  Cour fédérale

Date: 20210409

Docket: IMM-6247-19

Citation: 2021 FC 312

Ottawa, Ontario, April 9, 2021

PRESENT: The Honourable Madam Justice Fuhrer

BETWEEN:

BABU CHOWDHURY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Babu Chowdhury, is a Convention refugee and a permanent resident of Canada. He fled his country of nationality, Bangladesh, because he feared persecution by Islamic extremists and religious fundamentalists with the Jamaat-e-Islami. A Bangladesh passport was issued to Mr. Chowdhury after he was granted permanent resident status, but was lost in the mail. Using the replacement passport that was issued to him, Mr. Chowdhury returned to

Bangladesh twice, allegedly to tend ailing family members – his young daughter and spouse respectively. His trips to Bangladesh on such passport also involved transiting through the United Arab Emirates [UAE].

[2] Based on Mr. Chowdhury's travel to Bangladesh, the Minister of Immigration, Refugees and Citizenship applied for cessation of his refugee status, pursuant to subsection 108(2) of the *Immigration and Refugee Protection Act*, SC 2001 c 27 [*IRPA*]. The Refugee Protection Division [RPD] granted the Minister's application, having regard to the *IRPA* s 108(1)(a), and deemed Mr. Chowdhury's refugee claim rejected, further to the *IRPA* s 108(3).

[3] Mr. Chowdhury now seeks judicial review of the cessation decision. He raises the following issues for this Court's determination, namely, that the RPD erred by failing to assess or consider properly whether Mr. Chowdhury (i) intended to reavail himself of Bangladesh protection, (ii) actually obtained protection from Bangladesh, and (iii) could have reavailed himself of protection that never existed from the State against his (non-state) agents of persecution. Mr. Chowdhury also alleges (iv) breach of procedural fairness in connection with the RPD's handling of the issue of forward looking risk.

[4] Based on my review of the record and consideration of the parties' submissions, I am not persuaded that the RPD erred in any of the alleged manners. For the detailed reasons below, I thus dismiss Mr. Chowdhury's judicial review application.

II. Standard of Review

[5] The parties agree, as do I, that the presumptive standard of review, reasonableness, applies to the first three issues above: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 10. A reasonable decision must be "based on an internally coherent and rational chain of analysis" and it must be justified in relation to the factual and legal constraints applicable in the circumstances: *Vavilov*, at para 85. Courts should intervene only where necessary. To avoid judicial intervention, the decision must bear the hallmarks of reasonableness – justification, transparency and intelligibility: *Vavilov*, at para 99. The Court must avoid reassessing and reweighing the evidence before the decision maker; a decision may be unreasonable, however, if the decision maker "fundamentally misapprehended or failed to account for the evidence before it": *Vavilov*, at paras 125-126. The party challenging the decision has the onus of demonstrating that the decision is unreasonable: *Vavilov*, at para 100.

[6] Breaches of procedural fairness in administrative contexts, however, have been considered reviewable on a correctness standard or subject to a "reviewing exercise … 'best reflected in the correctness standard' even though, strictly speaking, no standard of review is being applied": *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54. The duty of procedural fairness "is 'eminently variable', inherently flexible and context-specific"; it must be determined with reference to all the circumstances, including the *Baker* factors: *Vavilov*, above at para 77. In sum, the focus of the reviewing court is whether the process was fair.

III. Legislative Framework and Interpretative Guidance

[7] See Annex “A” below for relevant *IRPA* provisions. See also Annex “B” for relevant paragraphs of the United Nations High Commissioner for Refugees *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* [UNHCR Handbook] that, although not binding on this Court, provide useful interpretative guidance regarding cessation.

IV. Analysis

[8] The Federal Courts have recognized the three-part test for reavailment under the *United Nations Convention relating to the Status of Refugees*, as reflected in the *IRPA* s 108(1)(a). The elements of the test are: 1) voluntariness, in that the refugee must not be coerced; 2) intention, meaning the refugee must intend by their actions to reavail themselves of the protection of the country of their nationality; and 3) reavailment, in the sense that the refugee must actually obtain such protection: *Nsende v Canada (Minister of Citizenship and Immigration) (FC)*, 2008 FC 531 [*Nsende*] at para 13, [2009] 1 FCR 49; *Siddiqui v Canada (Citizenship and Immigration)*, 2016 FCA 134 [*Siddiqui*] at para 6, citing *Nsende*; *Jing v Canada (Citizenship and Immigration)*, 2019 FC 104 [*Jing*] at para 16, citing *Siddiqui*. Voluntariness is not a live issue in the circumstances of the matter before me.

(i) *Intention to Reavail?*

[9] Contrary to Mr. Chowdhury's submission, I am not persuaded that the RPD incorrectly determined that he intended to reavail himself of state protection by obtaining a Bangladesh passport and travelling to Bangladesh. The Minister has the onus of establishing reavailment on a balance of probabilities: *Li v Canada (Citizenship and Immigration)*, 2015 FC 459 at para 42. A presumption of intention to reavail arises, however, upon a refugee's application for (or renewal of) and receipt of a passport from the refugee's country of nationality; the presumption is considered strong if the refugee uses the passport to travel to the refugee's country of nationality: *Canada (Citizenship and Immigration) v Nilam*, 2015 FC 1154 [*Nilam*] at para 25; *Abadi v Canada (Citizenship and Immigration)*, 2016 FC 29 [*Abadi*] at para 16; *Abechkhrishvili v Canada (Citizenship and Immigration)*, 2019 FC 313 [*Abechkhrishvili*] at para 23.

[10] Further, each situation is dependent on its own circumstances: *Canada (Public Safety and Emergency Preparedness) v Bashir*, 2015 FC 51 [*Bashir*] at para 70, [2015] 4 FCR 336. I agree with the parties in the case before me that, depending on the facts, the act of applying for a passport in itself may not constitute reavailment. I note, for example, that when the Minister's counsel asked Mr. Chowdhury at the RPD hearing whether he had plans to travel when he applied for the passport, Mr. Chowdhury answered "No." As stated by the Court in *Bashir*, "there is no logical reason to **irrefutably** presume that as soon as a refugee states that he intends to travel abroad with a national passport, he is deemed to have had the intention of reavailing himself of the protection of his country of nationality" [emphasis added]: *Bashir*, above at para 70. As Professor James C. Hathaway notes in *The Law of Refugee Status* (Toronto: Butterworths,

1991) at 193-195 [cited in *Bashir*, above at para 70]: "… Since there is no automatic linkage between the issuance or renewal of a passport and the granting of protection, it is critical that the real reason it is being sought form part of the determination authority's considerations. Unless the refugee's motive is genuinely the entrusting of her interests to the protection of the state of her nationality, the requisite intent is absent."

[11] The RPD's discretion, however, is not limited to any specific point or points in time that the relevant events occurred resulting in a reavailment determination: *Lu v Canada (Citizenship and Immigration)*, 2019 FC 1060 [*Lu*] at para 42. As noted above, the presumption of intention to reavail is considered strong if the refugee uses the national passport to travel to the former home country. Such travel may not be contemporaneous with, or even intended at the time of, the acquisition of the passport but rather, may be undertaken later, as occurred in the matter before me.

[12] The prevailing view is that the presumption of intention to reavail is rebuttable in exceptional circumstances with evidence to the contrary; the refugee has the onus of presenting sufficient evidence to rebut the presumption: *Nilam*, above at para 26; *Abadi*, above at paras 17-18. According to guidance in para 125 of the UNHCR Handbook, visiting a sick or old parent may be an exceptional circumstance to a presumption of intention to reavail, depending on the individual merits of the case. This is so because visiting a sick or old parent in one's former home country involves different considerations, regarding relations with the former home country, than regular visits for vacation or business purposes. Several cases, however, have interpreted this "exceptional circumstance" as being limited to refugees who travel to their

former home country using a travel document issued by their country of residence, as opposed to a national passport: *Abadi*, above at para 18, citing *Nilam*, above at para 28.

[13] Mr. Chowdhury contends his intention for obtaining a Bangladesh passport was twofold, namely, for identification purposes and for execution of a power of attorney to be able to sell property in Bangladesh from Canada. I disagree with his argument, however, that the RPD misconstrued his testimony in answer to the Minister's questions regarding use of the passport in a Canadian context, such as to transact Canadian business. In reviewing the hearing transcript, I find that the Minister's questions concerning this issue were clear and that Mr. Chowdhury's answers do not demonstrate confusion, contrary to his assertions.

[14] I agree with Mr. Chowdhury that the RPD made an improper implausibility finding regarding his explanation that he needed a Bangladesh passport for a power of attorney to be able to sell property in Bangladesh. The RPD held it was not credible that he would apply for the passport before having found someone to act as his power of attorney, and thus engaged in unacceptable speculation regarding what Mr. Chowdhury should or should not have done in less than the clearest of cases, where the circumstances "cannot be characterized as outside the realm of reasonableness": *Selvarasu v Canada (Citizenship and Immigration)*, 2015 FC 849 at para 32; *Ilyas v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1270 at para 59.

[15] The RPD made this implausibility finding in respect of the voluntariness element of the reavailment test, along with a number of negative credibility determinations relating to Mr. Chowdhury's explanations for needing the passport in a Canadian context. While the RPD's

reasons are not perfect, I find overall they permit me to understand why the RPD made such determinations and I am not persuaded that on the whole they are unreasonable notwithstanding the improper implausibility finding.

[16] Further, although Mr. Chowdhury's motivations for applying for and obtaining a Bangladesh passport initially may not have involved travel, he later did travel on the passport on two occasions giving rise to a strong presumption of an intention to reavail: *Abechkhrishvili*, above at para 23; *Chokheli v Canada (Citizenship and Immigration)*, 2020 FC 800 [*Chokheli*] at para 55.

[17] This leaves for consideration on this element of the test whether Mr. Chowdhury has demonstrated exceptional circumstances rebutting the strong presumption of an intention to reavail. The RPD relied on *Abadi* to find that Mr. Chowdhury in turn cannot rely on para 125 of the UNHCR Handbook to demonstrate exceptional circumstances. Nonetheless, the RPD considered in some detail Mr. Chowdhury's account regarding the purpose for his trips, to tend to his ailing daughter and wife, and his location during those trips, but found his credibility lacking.

[18] It was open to the RPD to consider Mr. Chowdhury's credibility based on inconsistencies in his testamentary and documentary evidence. Although the RPD's analysis of Mr. Chowdhury's evidence about his trips to Bangladesh and his family's ailments, including relevant information on his citizenship and permanent resident card applications, was somewhat microscopic, I find that it was not unreasonably so. In my view, this matter is distinguishable

from *Peiqrishvili v Canada (Immigration, Refugees and Citizenship)*, 2019 FC 1205 where there was a failure to analyze the refugee's efforts to hide from their particular agent of persecution. On the contrary, the RPD's analysis of this issue was quite detailed in the matter before me.

[19] In my view, this matter also is distinguishable from *Totaram v Canada (Citizenship and Immigration)*, 2009 FC 853 where the Court found it not impossible, improbable nor implausible that an applicant who has given a successful form-preparer what they believe to be all relevant information would sign the form without reading it, especially when the applicant otherwise is found to be an honest and credible witness. Rather, in respect of the matter before me, the RPD was of the view that Mr. Chowdhury was not credible in many respects and that his evidence regarding the preparation of the forms was evolving. Further, there is no evidence about the success rate of the alleged form-preparer who assisted him with the preparation of his citizenship and permanent resident card applications. That there even was a form-preparer who assisted Mr. Chowdhury, as alleged, was in doubt because of credibility concerns.

[20] I further find this case is distinguishable from *Li v Canada (Citizenship and Immigration)*, 2014 FC 545 where the Court held that the Immigration Officer made an unreasonable conclusion regarding the applicant's psychiatric condition unsupported by evidence. Rather, in the case before me, the RPD found, not unreasonably, that the several medical reports in evidence regarding Mr. Chowdhury's wife's illness were inconsistent and hence, unreliable.

[21] While I might have arrived at a different conclusion than the RPD regarding Mr. Chowdhury's intention to reavail, it is not the role of the Court to reassess or reweigh the evidence. Further, a conclusion is not unreasonable merely because inferences that differ from those of the decision maker reasonably could be drawn from the evidence; when considered cumulatively, I am satisfied the evidence was sufficient on the whole to ensure that the RPD's decision could not be characterized as unreasonable: *Canada (Minister of Citizenship and Immigration) v Thanaratnam*, 2005 FCA 122 at para 34.

(ii) *Actually Obtained Protection From Bangladesh?*

[22] I agree with Mr. Chowdhury that travel on a national passport via a third country (in his case, the UAE) to a refugee's home country is not determinative of actually obtaining the home country's protection: *Bashir*, above at para 68. That said, I am not persuaded that the RPD's determination regarding this issue overall was unreasonable. The RPD held, not unreasonably, that the number of his trips (2) and their duration (more than 2 months for the first trip and more than 4 months for the second trip), both involving travel on the Bangladesh passport, showed diplomatic protection was accorded to Mr. Chowdhury.

[23] I disagree that it makes a difference to the reavailment analysis whether the refugee's fear relates to state or non-state actors. The focus of the three-part reavailment test is the refugee's actions; the test itself does not distinguish between state and non-state agents of persecution: *Okojie v Canada (Citizenship and Immigration)*, 2019 FC 1287 at para 32 [*Okojie*]. Further, as noted by the RPD, Mr. Chowdhury appears to be conflating state protection relevant to his

refugee claim with diplomatic protection relevant to cessation proceedings: *Lu*, above at para 60; *Okojie*, above at para 30; *Chokheli*, above at para 65.

(iii) *State Protection Never Existed Regarding Non-state Actors?*

[24] In connection with its consideration of the issue of actually obtaining state protection, I find the RPD addressed this related issue that state protection never existed and thus, there could be no reavailment. The RPD held that the proposition there was no reavailment because, as reflected by the RPD's decision granting Mr. Chowdhury Convention refugee status, he was not accorded adequate state protection at the operational level, was not sustainable. Further, once Mr. Chowdhury made the first trip on the Bangladesh passport, the second trip on the passport would show reavailment of diplomatic state protection. Unlike the situation in *Thapachetri v Canada (Minister of Citizenship and Immigration)*, 2020 FC 600, the matter before me is not one where the RPD failed to consider Mr. Chowdhury's argument that the agent of his persecution was a non-state actor and thus, the concept of reavailment did not apply. Rather, I find the RPD, not unreasonably, simply disagreed, having regard in particular to the second trip. Further, I note that the Court previously has rejected such argument: *Chokheli*, above at paras 67-71.

(iv) *Breach of Procedural Fairness Regarding Forward Looking Risk?*

[25] I am not convinced that the RPD breached procedural fairness regarding forward looking risk. It is true in this case that the *Protecting Canada's Immigration System Act*, SC 2012, c 17 [*PCISA*], which made permanent residents subject to cessation proceedings, came into force after Mr. Chowdhury became a permanent resident. His travel to Bangladesh, however, occurred after

the *PCISA* came into force. He made his first trip about one year after being granted refugee protection. The RPD found, not unreasonably in my view, it was not credible that Mr. Chowdhury did not make any enquiries about the potential consequences of his actions, particularly in light of his acknowledgement that it did come to mind how it might look to Canadian authorities that he was travelling to Bangladesh after the RPD found he had a valid reason for not returning because he could be killed there. In other words, he had some appreciation that his travel to Bangladesh could be an issue for Canadian authorities but chose not to investigate. I find this circumstance, along with the general lack of credibility, and the fact that Mr. Chowdhury was an adult - as opposed to a minor - on his first and subsequent trips, serve to distinguish the matter presently before me from the one I considered in *Camayo v Canada (Citizenship and Immigration)*, 2020 FC 213, on which there is an outstanding appeal.

[26] Contrary to Mr. Chowdhury's submissions, I disagree that the RPD made a determination regarding forward looking risk. The RPD acknowledged that under the *IRPA* s 108(1)(a), it is not tasked with assessing whether there is any residual profile of credible evidence or a forward looking risk that could displace a reavailment finding. Further, while the RPD could have been clearer, I understand the RPD as indicating that Mr. Chowdhury's lack of credibility and his past actions were not consistent with forward looking risk. The RPD prefaced these comments with the caveat that the matter was before the Federal Court of Appeal for consideration.

[27] In my view, Mr. Chowdhury conflates the RPD's past risk assessment with an assessment of forward looking risk, in a manner not warranted by the RPD's decision: *Jing*, above at para 32. I find that in the case before me, the RPD approached this issue in substantially the same

manner as described in *Jing*, above at paras 29-34 and, thus, in my view, the RPD committed no reviewable error in its handling of this issue.

V. Conclusion

[28] For the above reasons, I find that on the whole the RPD's decision, while not perfect, was not unreasonable and thus, I dismiss this judicial review application.

[29] Neither party proposed a serious issue of general importance for certification and I find that none arises in the circumstances of this case.

JUDGMENT in IMM-6247-19

THIS COURT'S JUDGMENT is that: this judicial review application is dismissed; and there is no serious question of general importance for certification in this matter.

"Janet M. Fuhrer"
Judge

Annex "A": Relevant Provisions

***Immigration Refugee Protection Act,* SC 2001, c 27**

Cessation of refugee protection — foreign national **40.1 (1)** A foreign national is inadmissible on a final determination under subsection 108(2) that their refugee protection has ceased. **Cessation of refugee protection — permanent resident** **(2)** A permanent resident is inadmissible on a final determination that their refugee protection has ceased for any of the reasons described in paragraphs 108(1)(a) to (d).	**Perte de l'asile — étranger** **40.1 (1)** La décision prise, en dernier ressort, au titre du paragraphe 108(2) entraînant la perte de l'asile d'un étranger emporte son interdiction de territoire. **Perte de l'asile — résident permanent** **(2)** La décision prise, en dernier ressort, au titre du paragraphe 108(2) entraînant, sur constat des faits mentionnés à l'un des alinéas 108(1)a) à d), la perte de l'asile d'un résident permanent emporte son interdiction de territoire.
Cessation of Refugee Protection **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 themself 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). **Effect of decision** **(3)** If the application is allowed, the claim of the person is deemed to be rejected. **Exception**	**Perte de l'asile** **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 protection des réfugiés, de tels des faits mentionnés au paragraphe (1). **Effet de la décision** **(3)** Le constat est assimilé au rejet de la demande d'asile. **Exception**

(4) Paragraph (1)(e) does not apply to a person who establishes that there are compelling reasons arising out of previous persecution, torture, treatment or punishment for refusing to avail themselves of the protection of the country which they left, or outside of which they remained, due to such previous persecution, torture, treatment or punishment.	**(4)** L'alinéa (1)e) ne s'applique pas si le demandeur prouve qu'il y a des raisons impérieuses, tenant à des persécutions, à la torture ou à des traitements ou peines antérieurs, de refuser de se réclamer de la protection du pays qu'il a quitté ou hors duquel il est demeuré.

Annex "B" – Relevant Paragraphs

Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees **(Reissued - Geneva, February 2019)**

CHAPTER III – CESSATION CLAUSES

B. INTERPRETATION OF TERMS

(1) Voluntary re-availment of national protection

Article 1C(1) of the 1951 Convention

He has voluntarily re-availed himself of the protection of the country of his nationality;

118. This cessation clause refers to a refugee possessing a nationality who remains outside the country of his nationality. (The situation of a refugee who has actually returned to the country of his nationality is governed by the fourth cessation clause, which speaks of a person having "re-established" himself in that country.) A refugee who has voluntarily re-availed himself of national protection is no longer in need of international protection. He has demonstrated that he is no longer "unable or unwilling to avail himself of the protection of the country of his nationality".

119. This cessation clause implies three requirements:

(a) voluntariness: the refugee must act voluntarily;

(b) intention: the refugee must intend by his action to re-avail himself of the protection of the country of his nationality;

(c) re-availment: the refugee must actually obtain such protection.

120. If the refugee does not act voluntarily, he will not cease to be a refugee. If he is instructed by an authority, e.g. of his country of residence, to perform against his will an act that could be interpreted as a re-availment of the protection of the country of his nationality, such as applying to his Consulate for a national passport, he will not cease to be a refugee merely because he obeys such an instruction. He may also be constrained, by circumstances beyond his control, to have recourse to a measure of protection from his country of nationality. He may, for instance, need to apply for a divorce in his home country because no other divorce may have the necessary international recognition. Such an act cannot be considered to be a "voluntary re-availment of protection" and will not deprive a person of refugee status.

121. In determining whether refugee status is lost in these circumstances, a distinction should be drawn between actual re-availment of protection and occasional and incidental contacts with the national authorities. 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 he intends to avail himself of the protection of the country of his nationality. On the other hand, the acquisition of documents from the national authorities, for which non-nationals

would likewise have to apply – such as a birth or marriage certificate – or similar services, cannot be regarded as a re-availment of protection.

122. A refugee requesting protection from the authorities of the country of his nationality has only "re-availed" himself of that protection when his request has actually been granted. The most frequent case of "re-availment of protection" will be where the refugee wishes to return to his country of nationality. He will not cease to be a refugee merely by applying for repatriation. On the other hand, 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.16 This does not, however, preclude assistance being given to the repatriant – also by UNHCR – in order to facilitate his return.

123. A refugee may have voluntarily obtained a national passport, intending either to avail himself of the protection of his country of origin while staying outside that country, or to return to that country. As stated above, with the receipt of such a document he normally ceases to be a refugee. If he subsequently renounces either intention, his refugee status will need to be determined afresh. He will need to explain why he changed his mind, and to show that there has been no basic change in the conditions that originally made him a refugee.

124. Obtaining a national passport or an extension of its validity may, under certain exceptional conditions, not involve termination of refugee status (see paragraph 120 above). This could for example be the case where the holder of a national passport is not permitted to return to the country of his nationality without specific permission.

125. Where a refugee visits his former home country not with a national passport but, for example, with a travel document issued by his country of residence, he has been considered by certain States to have re-availed himself of the protection of his former home country and to have lost his refugee status under the present cessation clause. Cases of this kind should, however, be judged on their individual merits. Visiting an old or sick parent will have a different bearing on the refugee's relation to his former home country than regular visits to that country spent on holidays or for the purpose of establishing business relations.

FEDERAL COURT

SOLICITORS OF RECORD

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