Federal Court Cour fédérale

Date: 20210921

Docket: IMM-1070-20

Citation: 2021 FC 973

Ottawa, Ontario, September 21, 2021

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

DAVIS WILLIAM LEZAMA CERNA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Mr. Davis William Lezama Cerna, seeks judicial review of a decision of the Refugee Protection Division (the "RPD"), granting a cessation application commenced by the Minister of Immigration, Refugees and Citizenship (the "Minister") under subsection 108(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the "*IRPA*").

[2] Before the RPD, the Applicant argued that the cessation application should be stayed because it constitutes an abuse of process. The Applicant asserted that the Minister unlawfully suspended his citizenship application, thus rendering the cessation process oppressive. The RPD dismissed the Applicant's argument, finding it could not consider the delay in question because it was external to the RPD's proceedings.

[3] The Applicant submits the RPD erred by refusing to consider the Minister's suspension of his citizenship application.

[4] For the reasons that follow, I find the RPD's decision is reasonable. The jurisprudence affirms that the RPD cannot consider actions that are external to its proceedings in determining unreasonable delay amounting to an abuse of process. I therefore dismiss this application for judicial review.

II. **Facts**

A. *The Applicant*

[5] The Applicant is a citizen of Peru. On November 12, 2006, he filed a claim for refugee protection in Canada alleging persecution in his home country stemming from his sexual orientation as a gay man. The RPD granted him refugee status on May 28, 2008.

[6] On February 20, 2009, the Applicant became a permanent resident of Canada. He filed a citizenship application in May 2012.

B. *Citizenship application*

[7] On September 19, 2013, an officer of Citizenship and Immigration Canada interviewed the Applicant and the Applicant passed his citizenship test that same day. However, the officer did not refer the application to a citizenship judge for a decision because of concerns about the possible cessation of the Applicant's refugee protection. On October 11, 2013, the Applicant's file was placed "on hold" (*Lezama Cerna v Canada (Citizenship and Immigration)*, 2019 FC 756 ("*Lezama 2019*") at para 5).

[8] On November 18, 2014, the Minister formally suspended the processing of the Applicant's citizenship application pending the RPD's determination.

[9] The Applicant challenged the Minister's suspension of his application, seeking an order of *mandamus* compelling the Minister to process his citizenship application ("*Mandamus* Application"). On May 29, 2019, this Court dismissed that application, finding that the Minister had the authority to suspend the Applicant's citizenship application pursuant to section 13.1 of the *Citizenship Act*, RSC 1985, c C-29 (the "*Citizenship Act*") (*Lezama 2019* at para 19).

C. *Cessation application*

[10] On October 22, 2013, the Minister of Public Safety applied to the RPD for the cessation of the Applicant's refugee protection under subsection 108(2) of the *IRPA*. They alleged that the Applicant had returned to Peru on at least seven occasions between February 2010 and August

2013, and that he had renewed his Peruvian passport at the Peruvian consulate in Vancouver on three occasions between August 2009 and May 2013.

[11] The RPD granted the cessation application on October 2, 2014. The Applicant then challenged that decision on judicial review. On September 15, 2015, this Court allowed the application, quashed the RPD's decision, and ordered its redetermination (*Cerna v Canada (Citizenship and Immigration)*, 2015 FC 1074).

[12] Originally scheduled for February 19, 2018, the redetermination hearing was adjourned pending the determination of the Applicant's *Mandamus* Application. The RPD held the redetermination hearing on September 19, 2019.

III. **Decision Under Review**

[13] In a decision dated January 21, 2020, the RPD granted the Minister's cessation application. That decision is the subject of this application for judicial review.

[14] The RPD received new evidence from the Minister for the redetermination of the cessation application, establishing that the Applicant had returned to Peru an additional six times between July 2015 and June 2019, and that he obtained a new Peruvian passport on August 10, 2017.

[15] In light of that new evidence, the RPD found that the Applicant had voluntarily and intentionally re-availed himself of the protection of Peru, contrary to subsection 108(1)(a) of the

IRPA. The RPD noted that the Applicant had returned to Peru over a dozen times using his Peruvian passport, most visits lasting at least one month, in addition to renewing said passport and obtaining a new one. The RPD drew particular attention to trips inferring the Applicant's desire to resettle in Peru, including two visits for nonessential cosmetic plastic surgery, an eight-month stay beginning in 2015, during which he built a house in Iquitos, and several visits to his ailing parents who were not reliant on his care.

[16] Before the RPD, the Applicant asserted that the Minister had unlawfully suspended his citizenship application. He argued that, at the time of the suspension, the Minister did not have authority under the *Citizenship Act* to suspend his application; rather, that authority, found in section 13.1, only came into force on August 1, 2014. Alleging the suspension was unlawful, the Applicant argued that the Minister had committed an abuse of process in unlawfully delaying the application, and asked the RPD to stay the cessation proceedings.

[17] The RPD rejected the Applicant's abuse of process argument. Citing the Federal Court of Appeal's decision in *GPP v Canada (Citizenship and Immigration)*, 2019 FCA 71 ("*GPP*"), as well as this Court's decision in *Lezama 2019*, the RPD noted that section 13.1 of the *Citizenship Act* authorized the Minister to suspend citizenship applications made before that provision came into force and not finally disposed of before that date.

[18] The RPD held that it could only assess abuse of process arguments related to delay where such delay arose from administrative procedures before the RPD, citing *Seid v Canada (Citizenship and Immigration)*, 2018 FC 1167 ("*Seid*"). As the delay in question arose from the

citizenship application, which was not before the RPD, the RPD declined to assess the Applicant's abuse of process argument. The RPD further found that the Minister had not committed an abuse of process with respect to the cessation proceedings.

IV. Statutory Framework

A. *Cessation*

[19] Subsection 108(2) of the *IRPA* provides that the Minister may apply to the RPD for a determination as to whether a person's refugee protection has ceased. Subsection 108(1) of the *IRPA* enumerates five grounds for cessation:

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:	**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) the person has voluntarily reavailed themself of the protection of their country of nationality;	**a)** il se réclame de nouveau et volontairement de la protection du pays dont il a la nationalité;
(b) the person has voluntarily reacquired their nationality;	**b)** il recouvre volontairement sa nationalité;
(c) the person has acquired a new nationality and enjoys the protection of the country of that new nationality;	**c)** il acquiert une nouvelle nationalité et jouit de la protection du pays de sa nouvelle nationalité;
(d) the person has voluntarily become re-established in the country that the person left or remained outside of and in respect	**d)** il retourne volontairement s'établir dans le pays qu'il a quitté ou hors duquel il est demeuré et en raison duquel

of which the person claimed refugee protection in Canada; or	il a demandé l'asile au Canada;
(e) the reasons for which the person sought refugee protection have ceased to exist.	**e)** les raisons qui lui ont fait demander l'asile n'existent plus.

[20] If the RPD allows a cessation application, the individual's claim is deemed rejected under subsection 108(3) of the *IRPA*.

[21] The loss of refugee status under section 108 of the *IRPA* has significant consequences for the person affected. Those consequences are especially impactful for a permanent resident, such as the Applicant, whose refugee status is deemed to have ceased under subsections 108(1)(a) through (d) of the *IRPA*. Under subsections 40.1(2) and 46(1)(c.1) of the *IRPA*, such a determination results in the loss of both refugee protection and permanent resident status, as well as rendering that person inadmissible to Canada (*Canada (Citizenship and Immigration) v Nilam*, 2017 FCA 44 ("*Nilam*") at paras 24-25).

B. *Suspension*

[22] As of August 1, 2014, section 13.1 of the *Citizenship Act* empowers the Minister to suspend the processing of a citizenship application for as long as necessary, specifically where there are admissibility concerns under the *IRPA*:

Suspension of processing	**Suspension de la procédure d'examen**

13.1 The Minister may suspend the processing of an application for as long as is necessary to receive:	13.1 Le ministre peut suspendre, pendant la période nécessaire, la procédure d'examen d'une demande:
(a) any information or evidence or the results of any investigation or inquiry for the purpose of ascertaining whether the applicant meets the requirements under this Act relating to the application, whether the applicant should be the subject of an admissibility hearing or a removal order under the *Immigration and Refugee Protection Act* or whether section 20 or 22 applies with respect to the applicant; and	a) dans l'attente de renseignements ou d'éléments de preuve ou des résultats d'une enquête, afin d'établir si le demandeur remplit, à l'égard de la demande, les conditions prévues sous le régime de la présente loi, si celui-ci devrait faire l'objet d'une enquête dans le cadre de la *Loi sur l'immigration et la protection des réfugiés* ou d'une mesure de renvoi au titre de cette loi, ou si les articles 20 ou 22 s'appliquent à l'égard de celui-ci;
(b) in the case of an applicant who is a permanent resident and who is the subject of an admissibility hearing under the *Immigration and Refugee Protection Act*, the determination as to whether a removal order is to be made against the applicant.	b) dans le cas d'un demandeur qui est un résident permanent qui a fait l'objet d'une enquête dans le cadre de la *Loi sur l'immigration et la protection des réfugiés*, dans l'attente de la décision sur la question de savoir si une mesure de renvoi devrait être prise contre celui-ci.

[23] The Federal Court of Appeal has recognized the Minister's authority to suspend citizenship applications for permanent residents whose refugee status has been challenged for cessation (*Nilam* at para 26). The Federal Court of Appeal has also confirmed that section 13.1 of the *Citizenship Act* permits the Minister to lawfully suspend citizenship applications commenced prior to and not disposed of before that provision came into force on August 1, 2014 (*GPP* at para 1).

[24] The Respondent submits that the Applicant's arguments in this case are a collateral attack on this Court's decision in *Lezama 2019.*

V. **Issue**

[25] The Applicant does not submit that the RPD erred with respect to the merits of its cessation decision. Rather, the sole issue in this application for judicial review is whether the RPD erred in dismissing the Applicant's abuse of process claim.

VI. **Standard of Review**

A. *What is the applicable standard of review?*

[26] The Applicant submits that the applicable standard of review is correctness, and in the alternative, reasonableness. The Respondent submits that the applicable standard of review is reasonableness.

[27] In my view, the RPD's determination with respect to abuse of process is reviewed upon the reasonableness standard.

[28] Under the framework in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("*Vavilov*"), reasonableness is the presumed standard of review. This presumption can be rebutted in two types of situations: where required by legislative intent, or where required by the rule of law. The rule of law requires correctness review with respect to certain categories

of legal questions, namely constitutional questions, general questions of law of central importance to the legal system as a whole, and questions related to the jurisdictional boundaries between two or more administrative bodies (*Vavilov* at para 17).

[29] The Supreme Court of Canada in *Toronto (City) v C.U.P.E., Local 79*, 2003 SCC 63 ("*CUPE*"), previously found that an administrative decision-maker's application of the doctrine of abuse of process attracts a correctness review, as the application of that doctrine was "clearly outside the sphere of expertise" of the administrative decision-maker in question (*CUPE* at para 15).

[30] More recently, the Supreme Court of Canada in *Vavilov* cautioned that *CUPE* must be "read carefully" given that expertise is no longer a relevant consideration in determining the applicable standard of review (*Vavilov* at para 60). Further, the Court affirmed that an administrative decision-maker's application of common law doctrines, including abuse of process, involves a highly context-specific determination that may be reviewed upon a reasonableness standard (*Vavilov* at para 113).

[31] Applying the guidance in *Vavilov*, my colleague Justice Fuhrer held in *Immigration Consultants of Canada Regulatory Council v Rahman*, 2020 FC 832 ("*Rahman*") at para 12, that *CUPE* does not support correctness review for all questions of abuse of process before an administrative decision-maker, especially with respect to narrowly construed issues. In that case, the Discipline Committee of the Immigration Consultants of Canada Regulatory Council applied

the doctrine of issue estoppel, found it was bound to a previous Small Claims Court decision, and therefore dismissed the disciplinary action (*Rahman* at para 2).

[32] Considering the above, I find that the RPD's refusal to assess the Applicant's abuse of process argument is not a type of question that requires correctness review under the rule of law. While abuse of process generally is central to the importance of the legal system as a whole, it does not follow that the RPD's contextual interpretation of how that doctrine applies must be reviewed for correctness (*Rahman* at para 13). The RPD is merely applying the doctrine to the case before it, not resolving jurisprudential conflicts and articulating its parameters (*Victoria University (Board of Regents) v GE Canada Real*, 2016 ONCA 646 at paras 88-93).

[33] It is worth reiterating that my conclusion on the applicable standard of review is made in light of the changes brought by *Vavilov*, which affirmed that reasonableness is the presumptive standard of review and removed the consideration of expertise in determining which standard applies (*Vavilov* at paras 10, 31). Further, I note that this conclusion accords with the jurisprudence of this Court that pre-dates *Vavilov*, which held that the RPD's application of the abuse of process doctrine is subject to review under the standard of reasonableness, unless abuse of process is characterized as an issue of procedural fairness (*Ogiamien v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 30 at para 17, citing *B006 v Canada (Citizenship and Immigration)*, 2013 FC 1033 at paras 35-36). In this case, the Applicant has not alleged a breach of procedural fairness.

B. *What does reasonableness entail?*

[34] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13). The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified (*Vavilov* at para 15). 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). Whether a decision is reasonable depends on the relevant administrative setting, the record before the decision-maker, and the impact of the decision on those affected by its consequences (*Vavilov* at paras 88-90, 94, 133-135).

[35] For a decision to be unreasonable, an applicant must establish the decision contains flaws that are sufficiently central or significant (*Vavilov* at para 100). A reviewing court must refrain from reweighing the evidence that was before the decision-maker, and it should not interfere with factual findings absent exceptional circumstances (*Vavilov* at para 125).

VII. **Analysis**

[36] The doctrine of abuse of process protects against proceedings that are "unfair to the point that they are contrary to the interest of justice" or constitute "oppressive treatment" (*CUPE* at para 35). As affirmed in *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, delay may constitute an abuse of process in rare instances:

> [115] I would be prepared to recognize that unacceptable delay may amount to an abuse of process in certain circumstances even where the fairness of the hearing has not been compromised. Where inordinate delay has directly caused significant psychological harm to a person, or attached a stigma to a person's reputation, such that the human rights system would be brought into disrepute, such prejudice may be sufficient to constitute an abuse of process. […] It must however be emphasized that few lengthy delays will meet this threshold. I caution that in cases where there is no prejudice to hearing fairness, the delay must be clearly unacceptable and have directly caused a significant prejudice to amount to an abuse of process.

[37] In assessing the Applicant's abuse of process argument, the RPD held that it could only consider delay resulting from administrative procedures before the RPD:

> [59] For the delay to qualify as an abuse of process, it must have been a part of an administrative or legal proceeding that was already under way. In *Seid*, the court held that in assessing whether there was an abuse of process, the RPD could only consider the delay related to the administrative procedures before the RPD.
>
> [60] The delay in question is the delay in processing of the respondent's citizenship application. This is a process that is external to the RPD proceedings. The respondent has not alleged that the Minister has acted improperly with respect to delay or other aspects of the cessation application. Therefore, the RPD is not able to assess the respondent's abuse of process argument with respect to the suspension of his citizenship application.

[38] The Applicant submits it was unreasonable for the RPD not to consider the Applicant's abuse of process argument. The Applicant notes that the cessation proceedings before the RPD commenced in October 2013, during the period when the citizenship application was unlawfully suspended between September 2013 and August 2014.

[39] The Respondent asserts it was reasonable for the RPD not to address the Applicant's abuse of process argument, as that argument only relates to the Minister's decision to suspend the citizenship application and in no way attacks the Minister's conduct during the cessation application.

[40] In my view, the RPD's decision is internally coherent and justified in relation to the relevant facts and law (*Vavilov* at para 85).

[41] In *Seid*, the case relied upon by the RPD, the applicant obtained refugee status in 2000 and permanent residence the following year. In 2016, the Minister instituted cessation proceedings, claiming that the applicant had re-availed himself of state protection in his country of origin by renewing his passport and returning to the country on multiple occasions. The RPD granted the cessation application in 2018 (*Seid* at paras 1-2).

[42] The applicant in *Seid* argued that the Minister had engaged in abuse of process by filing the application for cessation in March 2016, despite having known since 2009 that the applicant had returned to his country of origin. Justice LeBlanc of this Court (as he then was) rejected this argument, holding that for a delay to constitute an abuse of process, it "must have been part of an administrative or legal proceeding that was already under way," which he found were the cessation proceedings commenced before the RPD in 2016. Accordingly, the delay between the filing of the cessation application and the time when the Minister knew that the applicant had returned to his country of origin could not be used to calculate an unreasonable delay resulting in abuse of process (*Seid* at paras 28-31).

[43] In my view, the RPD's conclusion is justified in relation to *Seid* and the relevant jurisprudence (see also *Torre v Canada (Citizenship and Immigration)*, 2015 FC 591 at para 32, aff'd, 2016 FCA 48; *Ching v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 839 at para 79; *Ismaili v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 427 at paras 28-30). The delay in question arose from the Minister's decision to suspend the citizenship application, not in relation to the cessation application before the RPD. Relying on *Seid*, the RPD thus reasonably held that such a delay fell beyond the scope of what it could consider as part of an abuse of process argument, as the delay was external to the RPD's proceedings.

[44] The proper method for the Applicant to address the delay in processing the citizenship application arising from its suspension was to challenge that decision on judicial review. Indeed, that is precisely what the Applicant did in *Lezama 2019*, which, it bears repeating, confirmed the Minister's suspension authority under the *Citizenship Act*.

[45] I further find that it was reasonable for the RPD to conclude that the Applicant's insecurity as to his immigration status occasioned by the suspension, "in and of itself, is not so oppressive as to cause a significant prejudice of such magnitude that the public's sense of decency and fairness is affected." The Applicant asserts the suspension was unlawful because it was made prior to section 13.1 of the *Citizenship Act* coming into force. However, as noted by the RPD, section 13.1 authorizes the Minister to suspend citizenship applications made before that provision came into force and not finally disposed of before that date (*Nilam* at para 26; *GPP* at para 1; *Lezama 2019* at para 19). It was therefore within the Minister's right not to grant the Applicant citizenship before initiating cessation proceedings, and it was therefore reasonable

for the RPD to hold that the consequences flowing from the Minister's suspension were not oppressive.

[46] Having determined that the RPD's decision is reasonable, I find it unnecessary to address the Respondent's argument of whether this application for judicial review constitutes a collateral attack on *Lezama 2019*.

VIII. **Conclusion**

[47] I find the RPD's decision is reasonable. The RPD reasonably refused to consider the Applicant's abuse of process argument as the delay that lies at its root did not arise in the context of the RPD cessation proceedings. Moreover, the RPD's decision is internally coherent and justified in light of the relevant facts and the law. I therefore dismiss this application for judicial review.

[48] The parties have not proposed a question for certification, and I agree that none arises.

JUDGMENT in IMM-1070-20

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. There is no question to certify.

"Shirzad A."

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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