

Federal Court



Cour fédérale

Date: 20220705

Docket: IMM-6132-21

Citation: 2022 FC 987

Ottawa, Ontario, July 5, 2022

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

MUZAFFER AYDEMIR

Applicant

and

**MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Mr. Aydemir, brings this Application for Judicial Review of the July 30, 2021 decision of the Refugee Protection Division of the Immigration and Refugee Board [the RPD]. The RPD allowed the Respondent's application for cessation of Mr. Aydemir's refugee status pursuant to subsection 108(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act]. The RPD found that Mr. Aydemir had voluntarily reavailed himself of the

protection of his country of nationality pursuant to paragraph 108(1)(a) and as a result, his claim for refugee protection was deemed rejected.

[2] For the reasons that follow, this application is granted.

I. Background

[3] Mr. Aydemir is a Turkish citizen of Kurdish ethnicity. He fled Turkey in 2008 and arrived in Canada in May 2009 via the United States. He filed a claim for refugee protection based on his objection to compulsory military service and his account of repeated detention and mistreatment by Turkish authorities due to his Kurdish ethnicity and his political activities with the pro-Kurdish Democratic Society Party. He was granted refugee status on February 17, 2011, and obtained permanent residence in March 2012.

[4] In 2013, Mr. Aydemir applied through the Turkish consulate in Toronto for a new Turkish passport. Between 2014 and 2017, he travelled to Turkey on his Turkish passport on six occasions, ranging from one week to over two months in duration. He states that these trips were for family reasons, including to visit his ailing father, attend his sister's wedding, attend his own wedding and to arrange to sponsor his wife to Canada.

[5] In 2015, the Canada Border Services Agency received notice from a Canadian immigration officer in Ankara indicating that Mr. Aydemir had travelled to Turkey several times on his Turkish passport, that he had obtained a new Turkish identity card to reflect the change in his civil status, and that he had declared on his application to sponsor his wife that they had held

an engagement ceremony in Turkey with 150 guests. In 2017, Mr. Aydemir declared four trips to Turkey in his application to renew his permanent residence card.

[6] On August 30, 2018, the Minister of Public Safety and Emergency Preparedness applied to the RPD for the cessation of Mr. Aydemir's refugee status on the basis that Mr. Aydemir had voluntarily reavailed himself of Turkey's protection within the meaning of paragraph 108(1)(a) of the Act.

[7] The RPD held an oral hearing on May 20, 2021.

II. The RPD's Decision

[8] The RPD cited and relied on the United Nations High Commissioner for Refugees *Handbook on Procedures and Criteria for Determining Refugee Status* [UNHCR Handbook], noting the three requirements to meet the definition of reavilment: voluntariness, intent to reavail oneself of the country's protection, and obtaining such protection.

[9] The RPD found that Mr. Aydemir had acted voluntarily, without constraint or coercion, in obtaining a new Turkish passport and using it to travel to Turkey on multiple occasions.

[10] With respect to Mr. Aydemir's intent to reavail, the RPD noted the presumption that a refugee who applies for and obtains a national passport intends to reavail themselves of that country's protection. The RPD found that Mr. Aydemir had not rebutted this presumption. The RPD noted Mr. Aydemir's testimony regarding his visits to Turkey, including that other siblings

could have tended to their ailing father. The RPD also noted that Mr. Aydemir had not remained in hiding on his visits to Turkey, but had instead visited stores, restaurants, and large family events with hundreds of guests. The RPD noted that Mr. Aydemir had based his claim for refugee protection on a fear of the Turkish authorities and had reiterated that fear at the hearing. However, the RPD found that Mr. Aydemir's actions demonstrated a lack of subjective fear and an intention to reavail himself of Turkey's protection, which the RPD found "constitutes reavailment."

[11] With respect to the third requirement—that the refugee must actually obtain such protection—the RPD referred to the UNHCR Handbook and UNHCR's *The Cessation Clauses: Guidelines on their Application* [UNHCR Cessation Guidelines]. The RPD cited the UNHCR Cessation Guidelines regarding "Voluntarily Reavailing of the Protection of the Country of Nationality," which refers to diplomatic protection. The RPD stated that it presumed that in travelling on his Turkish passport, Mr. Aydemir obtained the standard form of diplomatic protection accorded to nationals of all countries. The RPD, therefore, found that Mr. Aydemir had reavailed himself of Turkey's protection, noting that Mr. Aydemir did not have any trouble with the authorities during any of his trips.

[12] The RPD also addressed Mr. Aydemir's argument that reavailment should mean availing oneself of state protection (as opposed to diplomatic protection) and that he had not done so.

[13] The RPD distinguished this Court's decision in *Din v Canada (Citizenship and Immigration)*, 2019 FC 425 [*Din*] on its facts and also found that it conflated the notion of state

protection, as traditionally understood in the context of refugee protection, with the notion of diplomatic protection, which applies in the context of reavilment. The RPD stated that no prospective risk analysis is required to show reavilment as this would “have the effect of reopening the original claim for protection and conducting a second evaluation of the merits, which is something that Canadian refugee legislation does not contemplate nor provide for.”

[14] The RPD noted that the jurisprudence, the UNHCR Handbook, and established practice all reflect that it is diplomatic protection that is contemplated by paragraph 108(1)(a), and that acquiring and travelling on a passport can amount to reavilment of such protection.

[15] The RPD concluded that Mr. Aydemir had “failed to rebut the presumption of a voluntary return, intention and reavilment” to Turkey by obtaining a new Turkish passport, after being accepted as a refugee and receiving permanent resident status, and then using his Turkish passport to return to Turkey on several occasions.

[16] The RPD also addressed Mr. Aydemir’s submission that his alleged reavilment should be assessed under paragraph 108(1)(e) because his circumstances fell more within that provision. The RPD considered Mr. Aydemir’s submission that changes in the country conditions and in his personal circumstances, including that the political party he had supported no longer existed and that he had since been exempted from military service, signalled that the reasons he had sought refugee protection no longer existed.

[17] The RPD disagreed and found that paragraph 108(1)(e) did not apply. The RPD found that Kurds continue to face persecution at the hands of Turkish authorities. The RPD noted that Mr. Aydemir had testified to his ongoing fear of the Turkish authorities and of Turkish nationalists. The RPD found that Mr. Aydemir had failed to provide persuasive probative evidence that he would be perceived by his persecutors any differently today and had failed to establish “a compelling operationally effective and durable change in country conditions” such that the reasons for which he required protection had ceased to exist.

[18] In response to Mr. Aydemir’s submission that the effects of cessation pursuant to paragraph 108(1)(a)—loss of his permanent residence, inadmissibility to Canada, and consequent removal—are excessively severe, particularly given that he has been in Canada since 2009, is well established with a wife and two young children, and waited several years for the RPD to hold his hearing, the RPD stated that it was not open to it to consider humanitarian and compassionate [H&C] factors on an application for cessation.

III. The Issues and Standard of Review

[19] The overarching issue is whether the decision of the RPD is reasonable. Mr. Aydemir submits that the decision is not reasonable because:

- The RPD erred by interpreting paragraphs 108(1)(a) and 108(1)(e) in a manner that is internally incoherent and inconsistent with the Refugee Convention; and,
- The RPD erred in finding that Mr. Aydemir had voluntarily reavailed himself of protection in Turkey.

[20] A decision of the RPD in a cessation application has traditionally been reviewed on a standard of reasonableness, as noted in *Thapachetri v Canada (Citizenship and Immigration)*, 2020 FC 600, at para 10. Reasonableness remains the standard. The Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17, 25 [*Vavilov*] establishes that reasonableness is the presumptive standard, including for an administrative decision-maker's interpretation of its enabling statute.

[21] In *Vavilov*, the Supreme Court of Canada provided extensive guidance on what constitutes a reasonable decision, noting among other principles that 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 paras 85, 102, 105-07). A decision should not be set aside unless it contains “sufficiently serious shortcomings ... such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency” (*Vavilov* at para 100).

IV. The Applicant's Submissions

[22] Mr. Aydemir first submits that the RPD erred by interpreting paragraphs 108(1)(a) and (e) in a manner that is inconsistent with Canada's obligations under the Refugee Convention.

[23] Mr. Aydemir submits, more generally, that the cessation provisions of the Act are no longer fit for their purpose; the jurisprudence has interpreted the provisions in a manner that is inconsistent with the intention of the Refugee Convention and should be revisited. He submits

that his case provides the Court with the opportunity to clarify the law regarding the cessation of refugee status pursuant to section 108.

[24] Mr. Aydemir argues that the RPD interpreted paragraph 108(1)(a) expansively, such that the mere acquisition of a passport and short-term return to one's country of origin are demonstrative of an intent to reavail. He submits that diplomatic protection is about protection of the passport holder's interests by the country that issued the passport while the passport holder is abroad (i.e., in a country other than the country of nationality), and that it is illogical to apply this concept to a passport holder's return to the country of nationality that issued the passport.

[25] Mr. Aydemir argues that his travel on his Turkish passport to Turkey should not mean that he has availed himself of the diplomatic protection of Turkey while in Turkey, as this is illogical and the issue of diplomatic protection would only arise if he were to travel to another country. He argues that where returns to one's country of nationality are considered in the context of reavailment, it only makes sense to consider state protection rather than diplomatic protection.

[26] Mr. Aydemir relies on *Din* as establishing that actual reavailment requires showing the availability of state protection. He contends that the RPD erred in not following *Din*, which he submits is binding on the RPD. Mr. Aydemir submits that in *Din*, the Court correctly found that when assessing a return to the country of nationality, the question is whether state protection is obtained. Mr. Aydemir reiterates that it is illogical to speak of diplomatic protection in the context of a return to the country that issued a passport.

[27] Mr. Aydemir argues that the confusion of these two concepts—diplomatic and state protection—led the RPD to erroneously conclude that his short trips were grounds for cessation or that because of these trips, he had failed to rebut the presumption of reavilment.

[28] He also argues that paragraphs 108(1)(a) and (d) address two different situations; paragraph 108(1)(a) focuses on the actions of a refugee while outside the country of nationality, while paragraph 108(1)(d), which reflects Article 1C(4) of the Convention, addresses a refugee's return to their country of nationality from which they fled and requires re-establishment—not short trips—to warrant cessation. He submits that to determine whether refugee status should cease due to returns to the country of nationality, the issue is whether the refugee has voluntarily re-established themselves in that country.

[29] Mr. Aydemir argues that the principles of statutory interpretation dictate that paragraph 108(1)(a) should not be read as creating grounds for cessation that are explicitly excluded from paragraph 108(1)(d) (i.e., return to the country of nationality). In other words, Mr. Aydemir contends that it would be inconsistent with the Refugee Convention to deem a return to the country of nationality that falls short of re-establishment to be reavilment.

[30] In addition to the interpretation arguments, Mr. Aydemir also submits that the RPD erred in his case in finding that he had reavailed himself of Turkey's protection. He acknowledges that he voluntarily obtained a Turkish passport but disputes that he intended to reavail himself of the protection of Turkey, which he did not expect would be forthcoming. He submits that if acquisition of a new Turkish passport establishes a presumption of reavilment, he has rebutted the presumption.

[31] Relying on *The Law of Refugee Status* (Toronto: Butterworths, 1991), cited in *Canada (Public Safety and Emergency Preparedness) v Bashir*, 2015 FC 51 at para 70 [*Bashir*], Mr. Aydemir argues that the link between the renewal of a passport and the granting of protection is tenuous. He submits that the real question is whether the refugee has a subjective intention to abandon their refugee status for the protection of their country of nationality. He points to the Federal Court of Appeal's decision in *Canada (Citizenship and Immigration) v Galindo Camayo*, 2022 FCA 50 at para 66 [*Camayo*], and submits that the RPD erred by not focussing on the central question of whether he had the subjective intention to reavail.

Mr. Aydemir points to his uncontested testimony that he obtained the passport to travel to Turkey but not to reavail himself of Turkey's protection. He stated that he never believed the Turkish state would afford him protection and always travelled with his Canadian permanent resident card.

[32] Mr. Aydemir also submits that the RPD made inconsistent findings; the RPD found that paragraph 108(1)(e) did not apply because state protection would not be provided to him as a Kurd, yet the RPD refused to consider state protection as relevant pursuant to paragraph 108(1)(a).

[33] Mr. Aydemir further submits that the RPD erred by relying on the same evidence to assess all three aspects of the criteria for reavailment.

[34] Finally, Mr. Aydemir adds that the RPD erred in finding that his family and other life circumstances were not relevant to the RPD's determination of cessation.

V. The Respondent's Submissions

[35] The Respondent submits that the RPD's interpretation of paragraph 108(1)(a) is consistent with the Refugee Convention and its purpose of affording temporary protection to individuals unable to live safely in their countries of origin. The Respondent argues that Mr. Aydemir's suggestion that repeated returns to the country of nationality short of re-establishment should not affect refugee status is inconsistent with this purpose.

[36] The Respondent submits that the RPD reasonably determined that the third requirement of reavilment is not whether a refugee received actual state protection, as traditionally understood, but rather whether the refugee received the diplomatic protection that all passport holders may require. The Respondent argues that the RPD properly found *Din* to be inconsistent with the prevailing jurisprudence and distinguished it on the facts.

[37] The Respondent adds that it would be practically impossible to prove that state protection was or was not available without encountering an event or risk that required that protection.

[38] The Respondent submits that the drafters of the Convention clearly contemplated that the issuance of a national passport may constitute reavilment of the protection of that country. The Respondent argues that this suggests the drafters considered actual return to be evidence of a lack of subjective fear.

[39] The Respondent submits that it is reasonable, and well supported by the jurisprudence, for the RPD to find that Mr. Aydemir reaviled himself of Turkey's protection by voluntarily

obtaining a new Turkish passport and by using that passport for his several return trips to Turkey. The Respondent notes that Mr. Aydemir attended large social gatherings, including weddings of over 500 guests, and visited malls and restaurants, which suggests he was not in hiding. The Respondent disputes the relevance of Mr. Aydemir's permanent residence status and notes that Mr. Aydemir acknowledged that he knew he should not have travelled to Turkey given his refugee status.

[40] The Respondent further submits that the RPD reasonably found that paragraph 108(1)(e) was not applicable in light of the country condition evidence and that this conclusion is not inconsistent with finding that Mr. Aydemir reavailed himself pursuant to paragraph 108(1)(a).

VI. The RPD Did Not Err in Interpreting the Statutory Provisions

[41] As the Court of Appeal explained in *Canada (Citizenship and Immigration) v Bermudez*, 2016 FCA 131 at para 22 [*Bermudez*]:

Cessation of refugee protection is a concept that has formed part of Canada's immigration law since it first ratified the *United Nations Convention Relating to the Status of Refugees*, July 28, 1951, Can TS 1969, No. 6. Its current incarnation is expressed at section 108 of the IRPA and is based on the premise that refugee protection is a temporary remedy against persecution. It is no longer available when the circumstances enumerated in subsection 108(1) of the IRPA arise.

[42] The cessation clauses at Article 1C of the Convention and reflected in section 108 of the Act set out the circumstances for terminating refugee status because the refugee is no longer in need of international protection, including because they no longer have a well-founded fear of

persecution: *Abadi v Canada (Citizenship and Immigration)*, 2016 FC 29 at para 15 [*Abadi*]; *Canada (Citizenship and Immigration) v Nilam*, 2015 FC 1154 at para 22 [*Nilam*]; *Yuan v Canada (Citizenship and Immigration)*, 2015 FC 923 at para 21.

[43] The consequences of cessation of refugee protection pursuant to paragraph 108(1)(a) for a refugee or permanent resident are severe and include the loss of their permanent residence, inadmissibility to Canada and institution of removal proceedings.

[44] In *Bermudez*, at para 25, the Court of Appeal noted the additional consequences:

In addition, the 2012 amendments provide that cessation of refugee protection also entails the following under the IRPA:

- the refugee claim in question is deemed to have been rejected (s. 108(3));
- the person at issue no longer has the right to work or study without a permit (s. 30(1));
- the person at issue has no right of appeal to the Refugee or Immigration Appeal Divisions (para. 110(2)(c), s. 63(3));
- the person at issue is not entitled to a statutory stay of removal pending their judicial review of a cessation decision (ss. 231(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227); and
- the person at issue is subject to removal from Canada “as soon as possible” (ss. 48(2)).

[45] Paragraph 108(1)(a) incorporates Article 1C(1) of the Convention, which the UNHCR Handbook explains refers to a refugee who remains outside their country of nationality but demonstrates by their actions that they are no longer “unable or unwilling to avail [themselves] of the protection of [their] country of nationality” (para 118, referring to the definition of a Convention refugee). The UNHCR Cessation Guidelines note that this refers to diplomatic

protection. Diplomatic protection is understood as the actions a state may take when the rights of one of its nationals have been violated by another state, but also includes consular assistance such as the renewal of passports (paras 6–7).

[46] Mr. Aydemir has reiterated the arguments made in the submissions of the intervener, the UNHCR, in *Camayo*. As noted above, he submits that obtaining a passport does not signal any intention to reavail oneself of the protection of the country of nationality; rather, a passport is simply a necessary document to permit travel to third countries and also to the country of nationality. He argues that it is illogical to speak of diplomatic protection from the country that issued the passport while in that same country.

[47] The jurisprudence has established that a rebuttable presumption of actual reavilment—the third element of the test—applies where the refugee obtains a passport for the purpose of travel or for return to their country of nationality and has used the passport to travel: *Bashir* at paras 62–63; *Iqbal v Canada (Citizenship and Immigration)*, 2022 FC 387 at para 67 [*Iqbal*]; *Seid v Canada (Citizenship and Immigration)*, 2018 FC 1167 at para 14; *Cerna v Canada (Citizenship and Immigration)*, 2015 FC 1074 at para 13; *Mayell v Canada (Citizenship and Immigration)*, 2018 FC 139 at para 12.

[48] The third element of the test is understood in the jurisprudence as reavilment of diplomatic protection.

[49] I do not agree with Mr. Aydemir that *Din* established that state protection—as opposed to diplomatic protection—is contemplated in the reavilment requirements. The RPD did not err in characterizing *Din* as an outlier in the jurisprudence and did not err in finding that *Din* differed on its facts.

[50] In *Din* the Court noted, at para 43, that there was no indication in that case that the RPD even considered the third requirement of reavilment—i.e., that the refugee must actually obtain protection. The Court went on at paras 44–45 to refer to reavilment pursuant to paragraph 108(1)(a) as contemplating obtaining state protection. However, the Court did not cite any jurisprudence for referring to state protection; the Court did not acknowledge that the jurisprudence and the Convention focus on diplomatic protection; and the Court did not indicate that it had considered any distinction between diplomatic protection and state protection. In addition, *Din* differed in its facts because in that case, the refugee remained in hiding while in his country of nationality.

[51] Mr. Aydemir also suggests that the Court of Appeal’s statement in *Camayo*, at para 63, is an acknowledgement that diplomatic protection is “while travelling” and submits that in contrast, state protection is expected upon arrival, noting the Court of Appeal’s reference to “entrusting their safety to governmental authorities.”

[52] I do not agree that the passage in *Camayo* suggests that anything other than diplomatic protection is contemplated upon return to the country of nationality. The passage at para 63 refers to a stronger presumption of reavilment where the refugee returns to their country of nationality, but does not go so far as distinguishing diplomatic protection from state protection. I

also note that in *Camayo*, at para 61, the Court of Appeal, in addressing whether the RPD reasonably relied on the refugee's lack of subjective knowledge, referred to "knowledge that use of a passport confers diplomatic protection" [emphasis added].

[53] I do not agree with Mr. Aydemir that his case provides an opportunity for the Court to revisit the law regarding the cessation of refugee status pursuant to section 108. The RPD reasonably interpreted the statutory provisions. I decline to depart from the established jurisprudence governing the cessation of refugee protection to find otherwise.

[54] Cessation is in effect a reversal of refugee protection. The long-established principles that underlie refugee protection and the jurisprudence that has interpreted and guided the application of the principles and of the statutory provisions would be implicated in any new approach to cessation. The far reaching implications—which have not been canvassed in this case—require careful consideration.

[55] I note that similar submissions were made to the Court of Appeal in *Camayo* by the intervener, the UNHCR. Although the Court of Appeal provided significant guidance for cessation proceedings, it did not seize the opportunity to clarify the distinction between diplomatic and state protection or to comment on the question of whether diplomatic protection while in the country that issued the passport is logical. Nor did it address the distinction between reavailment and re-establishment.

[56] The issues Mr. Aydemir raises regarding the distinction between diplomatic and state protection and whether it is logical to speak of diplomatic protection while in the country that issued the passport are best considered by policy makers and legislators with the benefit of broad consultation and consideration of the implications for the refugee protection regime in both the domestic and international context.

VII. The RPD's Finding That Mr. Aydemir Had Not Rebutted the Presumption of an Intent to Reavail Is Unreasonable

[57] As noted by the RPD, the three-part test for cessation on grounds of reavilment requires (1) voluntariness: the refugee must act voluntarily; (2) intention: the refugee must intend by their action to reavail themselves of the protection of their country of nationality; and (3) reavilment: the refugee must actually obtain such protection.

[58] There is no dispute that Mr. Aydemir acted voluntarily in applying for and obtaining his Turkish passport.

[59] With respect to the intention to reavail, the jurisprudence establishes that when a refugee applies for and obtains a passport from their country of nationality, it is presumed they intended to reavail themselves of the protection of that country: *Abadi* at para 16; *Iqbal* at para 59; *Jing v Canada (Citizenship and Immigration)*, 2019 FC 104 at para 17; *Nsende v Canada (Minister of Citizenship and Immigration)*, 2008 FC 531 at paras 14–15; *Nilam* at para 25. However, this presumption can be rebutted with sufficient evidence (*Camayo* at para 65).

[60] As the Respondent notes, the UNHCR Handbook contemplates the application of the reavilment clause to a refugee who applies for and receives a new passport with the intention of returning to their country of nationality (see for instance paras 122–23). Mr. Aydemir also acknowledged that this presumption has often been relied on in cases where a refugee obtains a new passport and travels to their country of nationality.

[61] In *Camayo*, the Court of Appeal confirmed that this presumption of the intent to reavail not only applies but is 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 governmental authorities upon their arrival” (*Camayo* at para 63; see also *Iqbal* at para 60; *Abadi* at para 16). The Court of Appeal noted, at para 64, the observation made in *Ortiz Garcia v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1346 at para 8, that one of the rationales underlying this presumption is that reavilment may suggest an absence of risk or a lack of subjective fear of persecution.

[62] The RPD’s reliance on the presumption that Mr. Aydemir intended to reavail himself of Turkey’s protection given that he voluntarily obtained a Turkish passport and used it for several return trips to Turkey is reasonable. However, the issue is whether the RPD reasonably found that Mr. Aydemir had not rebutted this presumption.

[63] The RPD is required to assess all the evidence, including of subjective intention, and to consider all the circumstances to determine whether the presumption of the intent to reavail has been rebutted: *Abadi* at para 17; *Camayo* at para 66. In *Camayo*, at para 84, the Court of Appeal set out a non-exhaustive list of factors to be considered in determining whether a refugee has

reavailed. These factors include the person's knowledge of the cessation provisions as well as their education and other personal attributes, the identity of the agent of persecution, the voluntariness of obtaining the passport, whether the passport was used for travel purposes to a third country or the country of nationality, the purpose of the travel, the frequency of travel, whether the person took precautionary measures in their country of nationality, the submissions of the parties, and whether the actions of the person demonstrate that they no longer have a subjective fear of persecution such that international protection may no longer be required.

[64] In assessing whether Mr. Aydemir rebutted the presumption, the RPD considered many of the same factors set out in *Camayo*, despite not having this guidance at the time of the RPD's decision. Among other things, the RPD considered that Mr. Aydemir had travelled to Turkey several times primarily for personal, social and family-related reasons, had not been in hiding while there, and had acknowledged that travelling to Turkey could put his status in jeopardy. However, the RPD did not focus on Mr. Aydemir's submissions and his subjective intention, which the Court of Appeal emphasized in *Camayo* at paras 66—in other words, whether he continues to have an ongoing subjective fear of persecution in his country of nationality and continues to require international protection: *Abadi* at para 21; *Nilam* at para 30.

[65] Mr. Aydemir's testimony was that it was not his intention to reavail himself of Turkey's protection; he continued to fear the Turkish police and nationalists and never believed they would afford him protection, and he always travelled with his Canadian permanent resident card knowing he had the right to return to Canada at any time.

[66] In assessing Mr. Aydemir's intent to reavail, the RPD found that Mr. Aydemir's voluntary acquisition of the Turkish passport to travel to Turkey did not demonstrate "exceptional circumstances" and added:

Whether it was [Mr. Aydemir's] intention to obtain the Turkish passport to deal with family matters is immaterial when, once obtained, [Mr. Aydemir] then voluntarily used and relied upon that document to return to the country of nationality multiple times, against which he had earlier filed a claim for protection. By returning to Turkey on his new Turkish passport, [Mr. Aydemir] has established his intent to reavail.

[67] Although, as the Respondent notes, Mr. Aydemir's actions in repeatedly returning to Turkey and attending several large gatherings appear to belie his fear, the RPD's finding that his intention in obtaining the passport and travelling to Turkey "is immaterial" does not reflect the guidance in *Camayo* that all the evidence adduced regarding subjective intention be considered.

[68] In addition, the RPD made inconsistent findings based on the same evidence and testimony.

[69] The RPD noted Mr. Aydemir's testimony about his ongoing fear of Turkish authorities but found that his actions in making repeated returns to Turkey demonstrated a lack of subjective fear. However, in addressing Mr. Aydemir's argument that paragraph 108(1)(e) should apply because the circumstances had changed, the RPD stated, "[i]t is clear from [Mr. Aydemir's] own testimony that he as a Kurd was in fear of the Turkish authorities and the Nationalist Turkish people during his many returns to Turkey. The country documents submitted by [Mr. Aydemir's] counsel clearly show that Kurds continue to face persecution at the hands of the Turkish authorities even today."

[70] The RPD’s findings based on the same testimony—in the absence of any credibility finding—are inconsistent. The RPD accepted Mr. Aydemir’s testimony that he feared persecution as a Kurd and due to his involvement in political activities in support of Kurdish people, and that he feared the police and nationalist Turkish people during his return trips. The RPD found, based on the country condition evidence and Mr. Aydemir’s testimony, that his protection had not ceased under 108(1)(e) because the “alleged change in country conditions ... was not operationally effective and durable enough to ground a permanent cessation of [his] claim.”

[71] While different considerations are at play in the context of reavilment pursuant to paragraphs 108(1)(a) and (e), the two findings based on the same testimony cannot be reconciled—on one hand, that Mr. Aydemir’s actions demonstrated a lack of subjective fear and that he had not rebutted the presumption of an intent to reavail; and, on the other hand, that he remained in fear of persecution as a Kurd in Turkey and would not be protected by the authorities.

[72] The RPD also appears to have followed the approach that the Court of Appeal cautioned against in *Camayo* at para 79—of relying on the voluntary acquisition of a passport and return to the country of nationality as meeting all three elements of the test for reavilment, thereby “leaving little room” for other evidence as to intention.

[73] With respect to Mr. Aydemir’s submission that his personal circumstances should have been considered, the RPD did not err in finding it had no discretion to consider H&C factors.

[74] In *Bermudez*, at paras 38ff the Court of Appeal found that a CBSA officer has no discretion to consider H&C factors in assessing whether an application for cessation of refugee protection should be submitted to the RPD for a determination based on subsection 108(1). The Court of Appeal's finding applies equally to hearings officers and the RPD in the context of cessation. As noted at para 38, "non-citizens, whether they be foreign nationals or permanent residents, do not have the right to have H&C considerations imported and read into every provision of the IRPA, the application of which could jeopardize their status" [references omitted].

[75] The Court of Appeal noted the clear wording of subsection 108(1) and the criteria, which do not include H&C factors, and stated, at para 39, "[t]he scope of section 108 is clearly defined and leaves very little room for discretion in terms of the circumstances that trigger its application." The Court of Appeal added, at para 40, that if Parliament intended that H&C considerations should be taken into account in the cessation process, "it would have used language to that effect. It has not done so."

[76] In conclusion, the RPD did not err in its interpretation of subsection 108(1)(a), nor did it err in relying on the presumption of the intent to reavail or in finding that it had no discretion to consider H&C factors in determining whether cessation of refugee status should ensue once the criteria were established. However, the RPD's finding that Mr. Aydemir had not rebutted the presumption of an intention to reavail does not reflect a coherent and rational chain of analysis given that the RPD accepted Mr. Aydemir's testimony, in the context of considering paragraph 108(1)(e), that he continued to fear persecution by the Turkish police and nationalists in Turkey

given his identity as a Kurd and that he continued to need protection. In determining whether the test for cessation is made out, the RPD is required to assess all the evidence, including the refugee's evidence of their subjective intent, to determine if the presumption is rebutted.

[77] The RPD must reconsider whether Mr. Aydemir has reavailed himself of the protection of Turkey by obtaining a Turkish passport and returning to Turkey on several occasions, based on an assessment of all the evidence, including his testimony regarding his subjective fear, and his objective conduct, with the guidance provided by the Court of Appeal in *Camayo*.

VIII. Proposed Certified Questions

[78] Mr. Aydemir initially proposed two certified questions; the first focussed on whether the test for reavilment refers to state protection or diplomatic protection and the second focussed on whether returns to the country of nationality are appropriately considered under paragraph 108(1)(a). The Respondent opposed the questions and proposed an alternative question about whether proof of state protection as understood under section 96 is required.

[79] Given the guidance from the Court of Appeal in *Camayo*, at paras 40–45, that where statutory interpretation is the issue, the certified questions should be framed using reasonableness language, the Court asked the parties to reformulate a possible question for certification.

[80] The parties then proposed the following question:

Is it reasonable for the RPD to base a paragraph 108(1)(a) of *IRPA* reavilment finding on a refugee's visits to their country of nationality absent compelling reasons, and on the passport of that

country, where such visits fall short of re-establishment in that country as required by paragraph 108(1)(d)?

[81] The parties were unable to agree on a reformulated question regarding the place, if any, of state protection in the reavailment analysis and each proposed questions.

[82] The Applicant proposed the following question:

Where the RPD has, in adjudicating a cessation application, found that state protection, as understood and applied under sections 96 and 97 of the *IRPA*, is not available in a refugee's country of nationality, is it reasonable for the RPD to rely on his or her travel to that country as evidence of the refugee's intent to re-avail himself or herself of the diplomatic protection of that country for purposes of s. 108(1)(a) of the *IRPA*?

[83] The Respondent proposed an alternative question:

Does reasonableness require the RPD to find that state protection, as understood and applied under sections 96 and 97 of the *IRPA*, is available in the country of nationality to a Convention refugee who voluntarily acquires and uses the passport of his/her country of nationality for international travel, including to the country of nationality, before it can find that the refugee has re-availed under paragraph 108(1)(a) of the *IRPA* and is not a refugee under section 108(3)?

[84] Given the Court's conclusion that it will not engage in reinterpreting paragraph 108(1)(a) and that the dispositive issue is the RPD's finding that Mr. Aydemir did not rebut the presumption of an intention to reavail of Turkey's protection, the certified questions would not be determinative of an appeal.

[85] As noted in *Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22 at para 46, a certified question “must be a serious question that is dispositive of the appeal, transcends the interests of the parties and raises an issue of broad significance or general importance.” The proposed questions do not meet the first criterion.

[86] However, the proposed questions highlights that these issues continue to be a source of debate and, as noted above, require further consideration by policy makers.

JUDGMENT in file IMM-6132-21

THIS COURT'S JUDGMENT is that:

1. The Application for Judicial Review is granted.
2. The matter is remitted to the RPD for redetermination.
3. There is no question for certification.

"Catherine M. Kane"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-6132-21

STYLE OF CAUSE: MUZAFFER AYDEMIR v MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: HELD BY VIDEOCONFERENCE

DATE OF HEARING: JUNE 14, 2022

**REASONS FOR JUDGMENT
AND JUDGMENT:** KANE J.

DATED: JULY 5, 2022

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