Federal Court  Cour fédérale

Date: 20220729

Docket: IMM-3192-20

Citation: 2022 FC 1145

Ottawa, Ontario, July 29, 2022

PRESENT: Madam Justice Pallotta

BETWEEN:

YUMING DU AND FENG SHUANG SUN

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicants, Yu Ming Du and his spouse Feng Shuang Sun, seek to set aside a decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board that determined their refugee protection had ceased, and that their claims for protection were deemed rejected, because they had reavailed themselves of the protection of China within the meaning of paragraph 108(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[2] The applicants are citizens of the People's Republic of China who were found to be Convention refugees in 2008, based on a fear of religious persecution by Chinese authorities. They became permanent residents of Canada in 2009.

[3] In September 2014 the Minister of Public Safety and Emergency Preparedness (Minister) filed an application for cessation of the applicants' refugee status, alleging they had voluntarily reavailed themselves of China's protection: ss 108(1)(a) and 108(2) of the *IRPA*. On consent, this Court set aside a first RPD decision that had allowed the Minister's application, and remitted the matter for redetermination by a different RPD panel. This application for judicial review relates to the redetermination decision of March 11, 2020 (Decision).

[4] The applicants submit the Decision is unreasonable because the RPD failed to consider important issues and countervailing evidence of whether the applicants had the requisite intention to reavail themselves of China's protection. Also, the applicants submit the RPD erred in finding there was actual reavailment of China's protection, merely because the applicants obtained Chinese passports and used them to make multiple trips to China and other countries.

[5] For the reasons below, I find that the Decision is unreasonable. This application for judicial review is allowed.

II. **Issues and Standard of Review**

[6] The sole issue is whether the RPD's decision is unreasonable. The applicants' memorandum of argument divides their arguments under two main headings and I have divided my analysis in the same way:

1) Did the RPD fail to consider important issues and countervailing evidence when assessing the applicants' intention to reavail?

2) Did the RPD err in finding there was actual reavailment?

[7] The parties agree that the applicable standard of review is reasonableness.

[8] Following the guidance set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], the reasonableness standard of review requires a deferential but robust form of review: *Vavilov* at paras 12-13, 75 and 85. The reviewing court must ask whether the decision bears the hallmarks of reasonableness—justification, transparency and intelligibility: *Vavilov* at para 99. A reasonable decision is based on an internally coherent and rational chain of analysis, and it is justified in relation to the facts and law that constrain the decision maker: *Vavilov* at para 85. The party challenging the decision bears the onus of demonstrating that it is unreasonable: *Vavilov* at para 100.

III. **Analysis**

[9] Section 108 of the *IRPA* is the governing provision for cessation of refugee protection. The RPD determined that the applicants' claims for refugee protection had ceased by operation of paragraph 108(1)(a):

Cessation of Refugee Protection	**Perte de l'asile**
Rejection	**Rejet**
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;
[. . .]	[. . .]
Cessation of refugee protection	**Perte de l'asile**
(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).	**(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).
[. . .]	[. . .]

[10] The test for reavailment under paragraph 108(1)(a) has three requirements, namely that the refugee: (i) acted voluntarily, (ii) intended by their actions to reavail themself of the protection of their country of nationality, and (iii) actually obtained such protection: *Siddiqui v Canada (Minister of Citizenship and Immigration)*, 2016 FCA 134 [*Siddiqui*] at para 6, citing *Nsende v Canada (Minister of Citizenship and Immigration)*, 2008 FC 531 [*Nsende*].

[11] The Minister bears the onus to establish reavailment on a balance of probabilities: *Li v Canada (Minister of Citizenship and Immigration)*, 2015 FC 459 at para 42. However, there is a rebuttable presumption that refugees who acquire passports issued by their country of nationality to travel to that country or to a third country have intended to avail themselves of the protection of their country of nationality, because passports entitle the holder to travel under the protection of the issuing country: *Canada (Minister of Citizenship and Immigration) v Galindo Camayo*, 2022 FCA 50 at para 63. The refugee bears the onus to adduce sufficient evidence to rebut the presumption of reavailment: *Ibid* at para 65.

[12] Mr. Du obtained a Chinese passport in 2010 and used it to return to China four times: 3.5 months in 2012, 10 days in 2014, 1 month in 2016, and 1 month in 2018. Ms. Sun obtained a Chinese passport in 2011 and accompanied Mr. Du on three of the four visits to China. The applicants also used their Chinese passports to travel to the United States in 2017 and to Cuba in 2019.

A. *Did the RPD fail to consider important issues and countervailing evidence when assessing the applicants' intention to reavail?*

(1) Parties' Submissions

[13] The applicants submit the key issue on this application for judicial review relates to their intention according to the second requirement of the test for reavailment. They argue the test for assessing intention is to determine whether the refugee, through their conduct, genuinely intended to entrust their interests to the state's protection: *Nsende* at para 18. In this regard, a number of factors have been considered in the jurisprudence, including the necessity of visits, the frequency and duration of visits, safety measures taken during visits, and other reasons for the visits: *Yuan v Canada (Minister of Citizenship and Immigration)*, 2015 FC 923 at para 35 [*Yuan*]; *Siddiqui* at para 31; *Tung v Canada (Minister of Citizenship and Immigration)*, 2018 FC 1224 at paras 41 and 43.

[14] According to the applicants, it is not the refugee's actions that are dispositive—rather, it is the intent behind those actions that is paramount: *Kuoch v Canada (Citizenship and Immigration)*, 2015 FC 979 at paras 1, 24. They note that an analysis of the refugee's objective risk is not strictly necessary for a finding that the refugee's protection ceased due to reavailment: *Balouch v Canada (Minister of Public Safety and Emergency Preparedness)*, 2015 FC 765 at para 19 [*Balouch*]; *Yuan* at para 25. It is the lack of subjective fear of persecution, implicit in the finding of intent, that reconciles the law of reavailment with the broader framework of refugee protection: *Yuan* at para 21.

[15] Although their several trips to China raise a presumption of reavailment, the applicants submit the finding is not automatic and their motives and intentions must be examined. Specifically, they had compelling reasons to travel to China—Mr. Du's mother was ill, and Ms. Sun's father passed away—and they took steps to avoid the Chinese authorities while they were there. Furthermore, they testified that they only obtained and used Chinese passports as a matter of routine, and did not appreciate the legal ramifications of such actions. They were not aware they could travel without a Chinese passport, as they did not know they could also travel by applying for a Canadian travel document.

[16] The applicants point to three errors in the Decision relating to the RPD's analysis of their intention to reavail themselves of China's protection. They allege the RPD: (i) failed to consider uncontradicted evidence that they made no contact with Chinese officials while outside of Canada, and they made conscious efforts to avoid detection by the local police while in China; (ii) failed to consider that their trips to China were made in circumstances of family emergencies; (iii) unreasonably focused exclusively on the act of travelling to Cuba for vacation in February 2019 using Chinese passports, and made a speculative finding, without a clear factual or legal basis, that they knew they could have applied for a Canadian travel document.

[17] The respondent submits it is only in "exceptional circumstances" that a refugee's decision to travel to their country of nationality using a passport issued by that country will not result in the termination of refugee protection: *Din v Canada (Minister of Citizenship and Immigration)*, 2019 FC 425 at para 46 [*Din*]; *Abadi v Canada (Minister of Citizenship and Immigration)*, 2016 FC 29 at para 18. The applicants concede the first requirement under the test, and the RPD

reasonably found that the applicants had failed to rebut the presumption that they intended to reavail themselves of China's protection.

[18] The respondent contends the RPD drew reasonable conclusions from the applicants' actions in obtaining Chinese passports, repeatedly returning to China between 2012 and 2018 for reasons of family necessity, and travelling to the United States in 2017 and to Cuba in 2019 for tourism. The applicants entered China openly using their Chinese passports, and made no attempt to evade officials or disguise their presence in the country. In addition, the RPD noted that the applicants returned to China several times after receiving notice of the cessation application in 2014, and they travelled to Cuba with Chinese passports in February 2019, after learning of the possibility of travelling with a Canadian travel document in October 2018, at the first cessation hearing.

(2) Analysis

[19] When conducting a reasonableness review, the Court must focus on the decision the administrative decision maker actually made, including the justification offered for it: *Vavilov* at paras 15, 83. While a reviewing court may "connect the dots on the page where the lines, and the direction they are headed, may be readily drawn", it must not speculate as to what the decision maker was thinking, supply the reasons that might have been given or make findings of fact that were not made: *Vavilov* at para 97.

[20] In my view, the respondent's submissions supply reasons for the Decision that the RPD did not give.

[21] The RPD did not find that the applicants entered China openly using their Chinese passports, or that they made no attempt to evade officials or disguise their presence in the country—these points are not mentioned in the Decision.

[22] While the RPD did note that the applicants returned to China several times after receiving notice of the cessation application in 2014, it is unclear how this factored into the analysis under paragraph 108(1)(a) of the *IRPA*. It appears that the RPD considered the number of trips to be relevant only to the first and third requirements of voluntariness and actual reavailment. The RPD does not mention the number of trips in the analysis under the second requirement of intentional reavailment. Regarding voluntariness and actual reavailment, the RPD stated:

> [16] The panel finds that the evidence demonstrates that the respondents returned to China voluntarily on multiple occasions. The panel finds that although the respondents may have returned in order to attend to family matters, the returns were nevertheless voluntary.
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> […]
>
> [25] The panel agrees with the Minister's submission that the respondents actually obtained protection from China through issuance of new passports. This allowed the respondents entry into China on each of the several occasions they returned. Actual re-availment was also established when the respondents traveled to China on multiple occasions using their Chinese passports.

[23] The RPD does not rely on the fact that trips were made after the applicants learned about the cessation application as part of its analysis under any part of the test, except for the trip to Cuba, which is discussed below.

[24] I agree with the applicants that the RPD's finding of intentional reavailment focused exclusively on the act of travelling to Cuba using Chinese passports in 2019. The RPD's full reasoning is as follows:

> [22] The panel notes that the possibility of obtaining a Canadian travel document was discussed at the October 11, 2018 hearing as the male respondent was asked why he did not obtain one instead of using his Chinese passport. The male respondent stated that he did not know about it. His counsel made oral submissions at the October 11, 2018 hearing and stated again that the respondents were not aware they could obtain a Canadian travel document.
>
> [23] The respondents were therefore aware of the possibility of travelling on a Canadian travel document on October 11, 2018 and they nevertheless used their Chinese passports to travel to Cuba for a February, 2019 vacation.

[25] The RPD's reasoning is not sufficiently justified, transparent and intelligible on the question of intentional reavailment. It seems the RPD believed that, since the applicants were aware of the possibility of travelling with a Canadian travel document, they also knew that travelling with a Chinese passport confers diplomatic protection and/or they knew that travelling with a Chinese passport could jeopardize their refugee status under Canadian law. It seems the RPD also believed that awareness of the possibility of travelling with a Canadian document was determinative of the second requirement under the test—and therefore it did not need to address the applicants' evidence and submissions that were put forward in an attempt to rebut the presumption that they had intentionally reavailed themselves of China's protection. However, the RPD does not analyze or explain how an awareness of the possibility of travelling with a Canadian travel document relates to the test under paragraph 108(1)(a), or explain why, based on the law and/or the facts of this case, this single factor was apparently sufficient to demonstrate intentional reavailment. The Decision states that the RPD was mindful of the relevant jurisprudence but it does not refer to any jurisprudence. As noted above, it is not within the

reviewing Court's role to speculate as to what the decision maker was thinking, supply the reasons that might have been given or make findings of fact that were not made: *Vavilov* at para 97.

[26] For these reasons, I find there are sufficiently serious shortcomings in the Decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency: *Vavilov* at para 100.

B. *Did the RPD err in finding there was actual reavailment?*

[27] I will briefly address this argument, even though it is not necessary to do so in view of my findings regarding the RPD's analysis of intentional reavailment. I note that the applicants did not address it in oral arguments.

(1) Parties' Submissions

[28] The applicants acknowledge that the weight of this Court's jurisprudence indicates that obtaining a passport, and the consequent conferral of *diplomatic protection,* is sufficient to establish the third requirement of actual reavailment. However, they submit there is at least one decision where this Court questioned whether a refugee obtains protection from their country of nationality where country condition evidence confirms that *state protection* is not available, and the state is a persecutor of the group to which the refugee belongs: *Din* at para 41. The applicants submit the "meaning of 'state protection' for the purposes of reavailment analysis is not closed". They say this Court has certified a serious question of general importance about this issue on two occasions (*Balouch*, and *Norouzi v Canada (Minister of Citizenship and*

Immigration), 2017 FC 368 [*Norouzi*]) but there is no decision by the Federal Court of Appeal because the appeals were not pursued. The applicants question the distinction between diplomatic protection and state protection, noting that a state can persecute its own citizen, even where it has issued a passport to that citizen.

[29] The respondent submits it was reasonable for the RPD to conclude from the applicants' repeated travels using their Chinese passport that, in so doing, they had actually obtained the protection of China.

(2) Analysis

[30] I am not persuaded by the applicants' arguments. First, the questions that were certified in *Balouch* and *Norouzi* related to whether the RPD should consider a forward-looking risk of persecution upon return to the country of nationality in the context of a cessation proceeding. While it is true that the appeals were abandoned in those cases, Federal Court jurisprudence is not favourable to the applicants' position. A number of decisions have rejected an applicant's attempt to import a risk of persecution or state protection analysis into a cessation proceeding, and this Court has recognized that the diplomatic protection conferred by travelling on a passport issued by a refugee's country of nationality can constitute actual reavailment: see for example *Peiqrishvili v Canada (Minister of Immigration, Refugees and Citizenship)*, 2019 FC 1205 at para 22; *Lu v Canada (Minister of Citizenship and Immigration)*, 2019 FC 1060 at para 60; *Chokheli v Canada (Minister of Citizenship and Immigration)*, 2020 FC 800 at para 71; *Aydemir v Canada (Minister of Citizenship and Immigration)*, 2022 FC 987 at paras 47-48.

[31] The applicants have not satisfied me, on the basis of this Court's reasons in *Din*, that the RPD erred by concluding that the applicants obtained China's protection when they acquired Chinese passports and used them to travel.

IV. **Conclusion**

[32] The applicants have established that the RPD's analysis of intentional reavailament is unreasonable. This application for judicial review is allowed.

[33] At the end of the hearing, the applicants suggested that the Court should consider certifying the same question that was certified in *Balouch* and *Norouzi*. The respondent objected, relying on *Adeosun v Canada (Minister of Citizenship and Immigration)*, 2021 FC 1089 and this Court's November 5, 2018 *Practice Guidelines for Citizenship, Immigration, and Refugee Law Proceedings* which states that a party intending to propose a certified question shall notify opposing counsel at least five days prior to the hearing. While I accept that the applicants should have provided notice, I am also of the view that a question of general importance should not be certified in this case. 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: *Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22 at para 46. The proposed question is not determinative of this application for judicial review and would not be dispositive of an appeal.

JUDGMENT IN IMM-3192-20

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed.

2. The Decision is set aside and the matter shall be redetermined by a different panel of the RPD.

3. There is no question to certify.

"Christine M. Pallotta"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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