

Federal Court



Cour fédérale

Date: 20230104

Docket: IMM-8795-21

Citation: 2023 FC 8

Ottawa, Ontario, January 4, 2023

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

AHMAD, RAUF

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Mr. Rauf Ahmad, a citizen of Pakistan, seeks judicial review of a decision by the Refugee Protection Division of the Immigration and Refugee Board [RPD] dated November 12, 2021, granting the application to cease his refugee protection filed by the Minister of Public Safety and Emergency Preparedness [Minister] pursuant to subsection 108(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act]. The RPD considered the evidence

with respect to Mr. Ahmad's use of his Pakistani passport – acquired after he was granted refugee protection in Canada – to travel back to Pakistan on five occasions, between 2008 and 2014, and determined that the three-part test outlined in *Nsende v Canada*, 2008 FC 531 at paragraph 13, had been met and that Mr. Ahmad had voluntarily reavailed himself of the protection of Pakistan, as provided for in paragraph 108(1)(a) of the Act. Accordingly, pursuant to subsection 108(3) of the Act, Mr. Ahmad's claim for refugee protection was deemed to have been rejected.

[2] For the reasons that follow, I find the RPD's decision unreasonable. The determinative issue in this case was the manner in which the RPD assessed Mr. Ahmad's motivation for acquiring a Pakistani passport and travelling to Pakistan, in its determination of the second aspect of the reavailment test, *to wit*, whether Mr. Ahmad intended by his actions to reavail himself of Pakistan's protection. In *Canada (Citizenship and Immigration) v Galindo Camayo*, 2022 FCA 50 [*Camayo*], the Federal Court of Appeal recently dealt with the manner in which the intention to reavail is to be assessed, and set out a series of factors that the RPD could take into consideration in making an assessment of the subjective element of intention.

[3] Here, Mr. Ahmad provided various reasons outlining his motivation to travel to Pakistan, however other than listing such reasons and his submissions at the outset of its decision, the RPD did not sufficiently engage with those reasons so as to properly assess Mr. Ahmad's subjective intention, contrary to the teachings of the Federal Court of Appeal in *Camayo*. In fairness, *Camayo* was decided after the RPD rendered its decision, which is the subject of the present application, however before me, the reasoning of the RPD must be assessed in light of the

Federal Court of Appeal's recent decision. As a result, this application for judicial review will be allowed.

II. Facts and Underlying Decisions

[4] Mr. Ahmad arrived in Canada in July 2005 and claimed refugee protection because a fundamentalist Sunni imam who lived in the area of his village had accused him of blasphemy, and on account of the fact that he was being pursued because he was active in the promotion of Shia Islam. In April 2006, the RPD allowed Mr. Ahmad's claim for refugee protection, and in February 2007, Mr. Ahmad became a permanent resident of Canada. About five months later, in July 2007, Mr. Ahmad applied for and acquired a new Pakistani passport, and in January 2008, used it to travel to Pakistan, where he stayed until May 2008; the reason for his trip was purportedly to settle an inheritance dispute with his brother following the death of their father.

[5] Mr. Ahmad continued to travel to Pakistan in the years that followed: in January 2009, he obtained an extension of the validity of his Pakistani passport and travelled to Pakistan, where he remained for about four months; he travelled again to Pakistan on his Pakistani passport from June to September 2010. According to Mr. Ahmad, both trips were rendered necessary on account of the ailing health of his wife, who was suffering from depression.

[6] After seeking a further extension of his Pakistani passport in July 2012 and successfully sponsoring his family for permanent residence in Canada, Mr. Ahmad returned to Pakistan for a fourth time in October 2012, where he remained for about a month to assist, he claims, his family in travelling to Canada. Finally, after receiving a new Pakistani passport in July 2013, and with

his family already in Canada, Mr. Ahmad escorted his daughter to Pakistan in May 2014, where she was to be married; he stayed for about a month and attended the wedding.

[7] In addition, since 2017, Mr. Ahmad has used his Pakistani passport to travel several times to the United States for employment purposes as a long-haul truck driver.

[8] On September 5, 2018, over 11 years after Mr. Ahmad first became a Canadian permanent resident, the Minister applied to the RPD pursuant to subsection 108(2) of the Act for the cessation of Mr. Ahmad's refugee protection on the grounds that he had reavailed himself of Pakistan's diplomatic protection, as demonstrated by his multiple return trips using his Pakistani passport; it is diplomatic protection – separate from state protection, which relates to the grounds on which a refugee claim is made – that is the relevant protection in cessation cases (*Lu v Canada*, 2019 FC 1060 at para 60). The Minister argued that he is entitled to rely on the presumption of reavailment that was established when Mr. Ahmad obtained and renewed his Pakistani passport, at which point the burden shifted to Mr. Ahmad to establish that he had not, in fact, sought reavailment (*Li v Canada*, 2015 FC 459 at para 42 [*Li*]); in this case, argued the Minister, the reasons provided by Mr. Ahmad to justify his trips to Pakistan did not alter the voluntary aspect of his conduct (*Cabrera Cadena v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 67 at para 22) and were insufficient to establish that the trips were absolutely necessary under the circumstances so as to rebut the presumption of reavailment.

[9] In its decision, the RPD noted that Mr. Ahmad, when asked why he had applied for a Pakistani passport in July 2007, testified that he did so because he wanted a tool to travel and

protect his family – a Canadian travel document would have prohibited travel to Pakistan. In particular, Mr. Ahmad explained that his father had acted as the male protector of his wife and children after Mr. Ahmad left Pakistan in 2005; however, since his father's death in 2006, there had been no male protector for them, and Mr. Ahmad stated that the purpose of his trip back in 2008 was in fact to provide them with such protection. The RPD determined that if the protection of his family was the compelling reason for his return to Pakistan following the death of his father, Mr. Ahmad would not have waited 18 months following the passing of his father to return, and would in fact have travelled there more often than he actually did.

[10] In its assessment of the nature of each of Mr. Ahmad's trips to Pakistan, the RPD was prepared to accept that Mr. Ahmad was compelled to make his first trip in 2008, in part by the need to settle the inheritance dispute, but it did not accept that Mr. Ahmad was compelled by special circumstances to return to his country the other four times, especially the fifth time, when he travelled to Pakistan for his daughter's wedding. With respect to the second and third trips – supposedly rendered necessary on account of Mr. Ahmad's wife's medical condition – the RPD noted that the illness of his wife was not given as the reason for his absence from Canada in either the residence questionnaire that he completed as part of his 2013 citizenship application or his 2016 application for a permanent residence card, which respectively gave "vacations" and "family visit" as the reasons for his travel to Pakistan. Additionally, while acknowledging that Mr. Ahmad's wife may have been suffering from depression and that Mr. Ahmad played some role in supporting her while in hospital, the RPD found that there was no persuasive evidence that his presence was absolutely necessary for her treatment.

[11] The RPD then addressed Mr. Ahmad's fourth trip, which he supposedly took to assist his family in making arrangements to travel to Canada. When the RPD enquired as to whether his presence in Pakistan on this occasion was absolutely necessary, Mr. Ahmad testified that although his life continued to be in danger in his home community, he was terribly worried about something happening to his wife and children; he also did not want his wife to possibly collapse at the airport. The RPD noted however that Mr. Ahmad had previously testified that his sister, her husband and his wife's brother had accompanied his family to the airport. Thus, the RPD found that there was ample family support for his wife and children, such that Mr. Ahmad's presence in Pakistan was not absolutely necessary.

[12] The RPD noted that Mr. Ahmad's fifth and last trip to Pakistan took place from May 2 to June 3, 2014, thus after his family had arrived in Canada. Mr. Ahmad testified that it was initially planned that his wife would make the trip and escort their daughter for her wedding, but that his wife had had to remain in Canada when their son broke his arm and required hospital treatment in Toronto. He also testified that his daughter, who had never travelled alone, could not travel to Pakistan without being accompanied. The RPD noted that according to Mr. Ahmad's testimony, 2,000 people attended the wedding, and when asked whether he was concerned that his agent of persecution would learn of his presence in Pakistan, Mr. Ahmad testified that he did not perceive any danger.

[13] The RPD structured its analysis based on the three requirements outlined in paragraph 119 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, 2019, UN Doc HCR/1P/4/ENG/REV (Geneva, 2019) [UNHCR Handbook], as well as the relevant case law, to assess the Minister's application under paragraph 108(1)(a) of the Act – namely, whether Mr. Ahmad (a) acted voluntarily; (b) intended to reavail himself of Pakistan's diplomatic protection; and (c) actually reavailed himself of Pakistan's diplomatic protection.

[14] With respect to the first requirement, the RPD determined that the preponderance of evidence established that Mr. Ahmad had acted voluntarily as he was not compelled by any authority to renew his passport or to return to Pakistan. In addition, Mr. Ahmad had not established that his wife's health situation constituted circumstances anticipated by paragraph 125 of the UNHCR Handbook, nor had he introduced persuasive evidence that his wife's mental health had compelled him to return to Pakistan in 2009 and 2010. Furthermore, the RPD found that the duration of his trips and the fact that he travelled on return airline tickets suggested that these trips were in fact planned in advance; according to the RPD, this further implied that no urgency existed that would have necessitated his travels and that these travels were, rather, more likely simply intended as "family visits" – consistent with the manner in which he described the trips in his 2013 and 2016 immigration documents.

[15] With respect to the second requirement, the RPD found that Mr. Ahmad had demonstrated that he intended to reavail himself of the protection of his country by using his passport on multiple occasions to enter and exit Pakistan. In doing so, Mr. Ahmad was representing himself to Pakistan as one of its citizens and not as a protected person of Canada.

Given that he intended to travel to Pakistan, having and using a Pakistani passport was the only way that he could accomplish his various objectives once there.

[16] The RPD acknowledged that there was evidence that Mr. Ahmad took some precautions to avoid his agent of persecution by not returning to his home community in Chak-19, where the imam also lived, and by staying in Sargodha, some 75 kilometres from Chak-19. The RPD found, however, that this evidence was contradicted by his 2013 residence questionnaire, where Mr. Ahmad indicated that he stayed in Chak-19 during his first three trips to Pakistan. The RPD also determined that Mr. Ahmad was required to appear in person at the panchayat, a public forum to secure his inheritance, during his first trip in 2008; that he travelled with his wife to at least two public hospitals while he was in Pakistan in 2009 and 2010; and that he attended a very public family wedding in 2014. The RPD found that all of these events took place in the same general geographic area in Pakistan and that presumably, if Mr. Ahmad's agent of persecution was as powerful and "all-knowing" as purported to be, based on the agent of persecution's many connections in Pakistan, the fundamentalist Sunni imam who lived in the area of his village and who had accused him of blasphemy could reasonably be expected to have known of Mr. Ahmad's presence, in particular either at the panchayat in 2008 or at his daughter's public wedding in 2014. In the end, the RPD determined that Mr. Ahmad was making no more than minimal efforts not to be found by his agent of persecution.

[17] In addition, the RPD dealt with Mr. Ahmad's assertion that the administrative delays in being reunited with his family in Canada while their application for permanent residence was being processed, justified his return to his country in 2008, 2009 and 2010 and therefore cannot

be considered evidence of an intention to reavail. The RPD concluded that no evidence on the issue of his application to sponsor his family to come to Canada was provided and that this issue was addressed only indirectly in his affidavit. The RPD found that Mr. Ahmad left Pakistan in 2005, that he was granted refugee protection in 2006, and that it was open to him at the time to include his family on his application for permanent residence or to sponsor his family at a later date. All that is known from Mr. Ahmad's file, stated the RPD, is that at some point prior to Mr. Ahmad returning to Pakistan in 2012, immigrant visas were issued to his family. It is clear that the RPD did not believe Mr. Ahmad when he testified that he sought to sponsor his family at the same time as when he himself filed for permanent residency in 2006; rather, the RPD concluded that if a refugee claimant chooses to delay bringing their family to Canada, then they bear part of the responsibility for any delay, and that such a delay does not, by itself, create special circumstances permitting the return to the place of one's persecution.

[18] With respect to the third requirement, the RPD found that Mr. Ahmad, in relying on the consular services of Pakistan and in entering that country multiple times, had actually obtained the diplomatic protection of Pakistan. The RPD also found that Mr. Ahmad, in travelling to Pakistan, and later to the United States for purposes of employment, had held out that he was a citizen of Pakistan and not a protected person of Canada. The RPD also determined that, contrary to the submissions by counsel for Mr. Ahmad, one does obtain a passport in order to obtain diplomatic protection while abroad, protection afforded to the person by reason of the passport.

III. Legislative Framework

[19] Subsection 108(1) of the Act reads as follows:

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 themselves of the protection of their country of nationality;

...

(e) the reasons for which the person sought refugee protection have ceased to exist.

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.

...

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;

[...]

e) les raisons qui lui ont fait demander l'asile n'existent plus.

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.

[...]

[20] Canada is a signatory of the *1951 Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137 [Refugee Convention]. Article 1A of the Refugee Convention defines the term “refugee” and that the definition of the term “Convention refugee” has been incorporated into the law of Canada by way of section 96 of the Act. The conditions under which a refugee

ceases to be a refugee are set out in Articles 1C(1) to (6) of the Refugee Convention, which are frequently referred to as the cessation clauses, and are reflected in section 108 of the Act. Article 1C states that “[t]his Convention shall cease to apply to any person falling under the terms of section A if: (1) He has voluntarily re-availed himself of the protection of the country of his nationality”, which corresponds with paragraph 108(1)(a) of the Act.

[21] Paragraph 119 of the UNHCR Handbook sets out the three requirements to be considered in determining whether cessation has occurred under Article 1C(1):

- (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.

IV. Issue and Standard of Review

[22] The sole issue raised in this application for judicial review is whether the RPD’s decision was reasonable. The parties agree that the standard of review is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16-17, 23 [*Vavilov*]). This Court should intervene only if the decision under review does not bear “the hallmarks of reasonableness — justification, transparency and intelligibility” and if the decision is not justified “in relation to the relevant factual and legal constraints that bear on the decision” (*Vavilov* at para 99).

[23] In addition, where the impact of a decision on an individual is high, as is the case where the consequence of a decision is the loss of refugee protection, the level of responsiveness of the

decision must reflect the stakes (*Vavilov* at para 133; *Camayo* at para 50). In the end, and as stated by the Federal Court of Appeal in *Camayo* at paragraph 57, “in cases where the administrative decision maker has to consider the proper meaning of a statutory provision, the reviewing court must be satisfied that the administrative decision maker is ‘alive [either implicitly or explicitly] to [the] essential elements’ of text, context and purpose and has touched on at least ‘the most salient aspects of the text, context [and] purpose’” (*Vavilov* at paras 120-122; *Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156 at para 42).

V. Analysis

[24] As stated, the RPD decision was issued on November 12, 2021. About four months later, on March 29, 2022, the Federal Court of Appeal issued its decision in *Camayo*, which was, in its view, the first opportunity that it had to deal with a cessation case since the Supreme Court’s decision in *Vavilov*.

[25] In *Camayo*, the Federal Court of Appeal reasserted – without necessarily being bound by it – the three-part test of voluntariness, intention to reavail and actual reavailment set out in the UNHCR Handbook to determine whether cessation has occurred; it also reaffirmed the principle found in the UNHCR Handbook that “there is a presumption that refugees who acquire and travel on passports issued by their country of nationality to travel to that country or to a third country have intended to avail themselves of the protection of their country of nationality” (*Camayo* at para 63; *Abadi v Canada (Citizenship and Immigration)*, 2016 FC 29 at para 16 [*Abadi*]; *Mayell v Canada (Citizenship and Immigration)*, 2018 FC 139 at para 12 [*Mayell*]).

[26] Before me, Mr. Ahmad concedes that the application for and receipt of his Pakistani passport, as well as his travels to Pakistan, were voluntary. Therefore, the first aspect of the test for reavilment has been satisfied.

[27] As stated earlier, the determinative issue in this case relates to the second aspect of the test on reavilment, *to wit*, the establishment of the subjective element of intent to reavail. The parties have raised two components inherent in the assessment of the element of intent, the first being the strength of the presumption that may exist favouring a finding of reavilment, and the second being the factors to which a decision-maker should have regard in the assessment of whether the presumption has been rebutted.

[28] On that issue, Mr. Ahmad concedes that while applying for a passport from Pakistan may create, in law, a presumption of reavilment on his part, this presumption is easily rebutted; he argues that a conclusion on cessation of refugee protection requires proof of a refugee's intention to reavail before physical presence in a country will negate refugee status, which in essence implies a heavy burden on the Minister to establish. Thus, evidence limited to the acquisition and use of a passport from a refugee's country of origin cannot, by itself, be interpreted as creating a strong presumption in favour of the intention to reavail, and that "a temporary visit by a refugee to the country where persecution was feared without an intention to permanently reside there should not result in the loss of refugee status" (*Camargo v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1434 at para 35 [*Camargo*]; *Abawaji v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1065 at para 15 [*Abawaji*]; *Chitsinde v Canada (Citizenship and Immigration)*, 2021 FC 1066 at para 39 [*Chitsinde*]).

[29] I cannot agree with Mr. Ahmad. The presumption that is created when a refugee acquires a passport issued by their country of nationality and travels to that country is, in fact, a factual presumption in favour of the subjective element of intent to reavail. That presumption is of course rebuttable (*Mayell* at para 12), however compelling the Minister to establish the subjective element of intent in addition to benefiting from the presumption makes little sense. In any event, it should be kept in mind that *Camargo*, *Abawaji* and *Chitsinde* all involved claims for refugee protection, and the issue was not whether the applicants had reavailed themselves of the protection of their countries after obtaining refugee protection, but rather whether their return to their countries of nationality – the countries of the feared persecution – prior to coming to Canada to claim refugee protection was conduct inconsistent with that of persons who fear persecution. Here, both the context and issue are very different.

[30] The presumption has been characterized as “particularly strong” when the refugee has traveled to their country of nationality on the strength of the passport issued by that country: In *Abadi*, Mr. Justice Fothergill stated:

[16] In my view, the RPD properly applied the test for re-availment and reasonably found that Mr. Shamsi had failed to rebut the presumption that he intended to re-avail himself of Iran’s protection by acquiring an Iranian passport and travelling to that country. When a refugee applies for and obtains a passport from his country of nationality, it is presumed that he intended to re-avail himself of the diplomatic protection of that country (*Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* at para 121 [Refugee Handbook]; *Nsende v Canada (Minister of Citizenship and Immigration)*, 2008 FC 531 at para 14). The presumption of re-availment is particularly strong where a refugee uses his national passport to travel to his country of nationality. It has even been suggested that this is conclusive (Guy Goodwinn-Gill and

Jane McAdam, *The Refugee in International Law*, 3rd ed., at page 136).

[17] However, the prevailing view is that the presumption of re-availing may be rebutted with evidence to the contrary (Refugee Handbook at para 122). The onus is on the refugee to adduce sufficient evidence to rebut the presumption (Canada (Minister of Citizenship and Immigration) v Nilam, 2015 FC 1154 at para 26 [Nilam], citing Li v Canada (Minister of Citizenship and Immigration), 2015 FC 459 at para 42).

[Emphasis added.]

[see also *Seid v Canada (Citizenship and Immigration)*, 2018 FC 1167 at para 14 [*Seid*]; *Hamid v. Canada (Citizenship and Immigration)*, 2022 FC 1541 at para 15 [*Hamid*]]

[31] In *Camayo*, the Federal Court of Appeal stated the following:

[63] As noted earlier, there is a presumption that refugees who acquire and travel on passports issued by their country of nationality to travel to that country or to a third country have intended to avail themselves of the protection of their country of nationality. This is because passports entitle the holder to travel under the protection of the issuing country. This presumption is even 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.

...

[65] Constraining case law from the Federal Court, suggests, however, that the presumption is a rebuttable one. The onus is on the refugee to adduce sufficient evidence to rebut the presumption of reavailing: Canada (Minister of Citizenship and Immigration) v. Nilam, 2015 FC 1154 at para. 26; Li v. Canada (Minister of Citizenship and Immigration), 2015 FC 459 at para. 42

[Emphasis added.]

[32] It seems to me that if travel to a refugee's country of nationality on the strength of a passport issued by that country renders the presumption of reavailing "even stronger", the

presumption of re-availment was already strong when the refugee simply acquired and travelled with the passport. As stated by Justice Barnes in *Ortiz Garcia v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1346, “[r]e-availment typically suggests an absence of risk or a lack of subjective fear of persecution. Absent compelling reasons, people do not abandon safe havens to return to places where their personal security is in jeopardy”: at para 8 (cited with approval in *Camayo* at para 64).

[33] That said, as the presumption is rebuttable, it comes down to the number of shekels, minas and talents needed to tip the historic scales. The issue was well articulated by Justice O’Reilly in *Li*, where he stated:

[39] The presumption of re-availment is a factual presumption. Proof that someone obtained a passport creates a presumption that the person re-availed himself or herself of the protection of the issuing state. However, as mentioned, it is not the classification of the presumption that really matters. The real question relates to the quantum of evidence required to defeat it.

...

[42] The Minister has the burden of proving re-availment on the balance of probabilities. In doing so, the Minister is entitled to rely on the presumption of re-availment by proving that the refugee obtained or renewed a passport from his or her country of origin. Once that has been proved, the refugee has the burden of showing that that he or she did not actually seek re-availment. As stated in the UNHCR Handbook, where there is proof that a refugee has obtained or renewed a passport “[i]t 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” (para 121).

[43] Mr Li relies on a statement in a legal article on cessation in which the authors state that the “benefit of the doubt must be given to the refugee, as is consistent with the restrictive interpretation appropriate to the cessation clauses” (Joan Fitzpatrick and Rafael Bonoan, “Cessation of Refugee Protection” in Erika Feller, Volker Türk and Frances Nicholson, eds, *Refugee Protection in International Law: UNHCR’s Global Consultations on*

International Protection (New York: Cambridge University Press, 2003) 491 at 525). However, just above that statement, the authors actually cite the UNHCR Handbook which clearly places a legal burden on refugees to rebut the presumption of re-availment on a balance of probabilities. In that context, I take the authors to mean that refugees should be given the benefit of the doubt as to whether they have rebutted the presumption. They do not say that refugees merely have to raise a doubt about re-availment.

[Emphasis added.]

[34] In the determination of whether there existed “sufficient evidence to rebut the presumption of reavailment” it was incumbent on the RPD to have carried out an individualized assessment of all of the evidence before it, including the evidence adduced by Mr. Ahmad as to his subjective intent, in determining whether the presumption of reavailment has been rebutted in this case (*Camayo* at paras 65 and 66).

[35] As to the factors to which a decision-maker should have regard in dealing with cessation cases, I must agree with Madam Justice Go in *Hamid* that the effect of the Federal Court of Appeal’s decision in *Camayo* was to introduce a series of factors (at paragraph 84) to which the RPD should have regard – beyond simply determining whether the circumstances necessitating the travel were exceptional (see *Seid v Canada (Citizenship and Immigration)*, 2018 FC 1167, para 20; *Abadi* at para 18) – when considering and balancing the evidence in order to determine whether the presumption of reavailment has been rebutted. It follows that other elements of the evidence should then be assessed and weighed by the RPD so as to arrive at a final determination on which side of the reavailment analysis the scales fall, with the onus, here, being on Mr. Ahmad to convince the RPD, on the balance of probabilities, that he did not intend to reavail himself of the protection of Pakistan once his acquisition of his Pakistani passport and his travels back to Pakistan were put into evidence.

[36] Mr. Ahmad asserts that the RPD failed to conduct any meaningful assessment of his central arguments in relation to whether he intended to reavail himself of Pakistan's diplomatic protection. Before the RPD, Mr. Ahmad argued that the risk he would face during a short, temporary stay in Pakistan would likely be much lower than the risk presented by the imam that a permanent return to that country would carry. Mr. Ahmad states that he weighed in his mind this lower risk against the reasons for his travel, which Mr. Ahmad states were important reasons that required his presence in Pakistan. Mr. Ahmad asserts, in essence, that he never stopped fearing his agent of persecution, however, the threat posed by this non-state actor and his subjective level of fear of persecution had to be assessed in context; the threat from the imam was tethered to Mr. Ahmad remaining in his village and continuing to pursue his religious beliefs in the manner that he pursued them prior to fleeing the country in 2005 – a determination that would have been easily arrived at, argues Mr. Ahmad, had the RPD reviewed the decision that had granted him refugee protection in the first place. Once he was granted refugee protection in Canada, the threat posed by the imam abated because Mr. Ahmad no longer posed a threat to him and his teachings back in Pakistan. However, such a threat would surely resurface, he argues, if he was to return to his village for a prolonged period of time. In short, Mr. Ahmad submitted that the fact that the agent of persecution was rid of Mr. Ahmad had calmed the waters, and Mr. Ahmad no longer felt the same degree of risk if he returned to his area for short periods of time and, in essence, kept his head down while he was there.

[37] In addition, Mr. Ahmad claims that with each trip, he was reasonably emboldened to continue to take the risk of returning to his country of nationality, but only when it was necessary. Therefore, he argues, any assessment of his subjective intention to reavail himself of

the protection of Pakistan had to take into account his level of perceived risk where he was only to remain in the village for a short period of time while taking precautions to remain clear of his agent of persecution, as weighed against his determination as to the necessity of returning to Pakistan; however, the RPD failed to do just that.

[38] I must agree with Mr. Ahmad.

[39] The RPD, in its assessment of Mr. Ahmad's subjective intention to reavail himself of the protection of Pakistan, began its analysis with the presumption created by Mr. Ahmad's acquisition of his Pakistani passport and his travels to Pakistan; that is fair enough. However, what followed is troubling.

[40] The RPD proceeded to acknowledge that a simple Canadian travel document would not have allowed Mr. Ahmad to travel to Pakistan, and noted Mr. Ahmad's assertion that he obtained and renewed his passport as a tool to travel and protect his family. However, the RPD did not assess in any way the reasonableness of Mr. Ahmad's claim as to the reason why he acquired the passport; rather, the RPD simply stated that if Mr. Ahmad had truly needed to protect his family, the RPD would have expected him to have travelled to Pakistan more than only five times in 13 years. I find the RPD's analysis unintelligible and calls for sheer speculation, especially where additional travel to Pakistan may well have strengthened the argument in favour of reavailment. The RPD failed to address the reason why Mr. Ahmad had only travelled to Pakistan five times since obtaining permanent residence in Canada, an issue that I would have expected would be relevant in the determination of his subjective intent to reavail. Mr. Ahmad

asserted that he needed the passport to be able to travel to Pakistan to act as the male protector of his family when the situation required it; that assertion was never tested by the RPD. The RPD then acknowledged that Mr. Ahmad did make some effort not to be found by his agent of persecution, but no more than minimal effort at best.

[41] The RPD also discounted Mr. Ahmad's assertion that the administrative delays in the processing of his family's immigrant visas, which prevented him from reuniting with his family in a timely fashion, justified his return to Pakistan; the RPD found there to be no evidence on the issue – which was only addressed indirectly in his affidavit – and faulted Mr. Ahmad for not having applied to bring his family to Canada at an earlier stage.

[42] However, the presumption of reavailment is a rebuttable one, and it seems to me that the key to the assessment of the reasonableness of the RPD's finding on intent is whether it engaged with the evidence that arguably went to possibly defeating that presumption. I do not see that it did. In *Ortiz Garcia v Canada (Citizenship and Immigration)*, 2011 FC 1346, Mr. Justice Barnes observed, at paragraph 8, that “[r]eavailment typically suggests an absence of risk or a lack of subjective fear of persecution.” At no point in the assessment of Mr. Ahmad's subjective intent to reavail did the RPD address the principal argument that he made, *to wit*, that the assessment of his intent to reavail himself of the diplomatic protection of Pakistan had to take into account his perceived level of risk or fear of persecution within the context of the circumstances of his return to his country. As stated by the Federal Court of Appeal in *Camayo* at paragraph 71, “without this analysis, the RPD's conclusion on reavailment was not a defensible outcome based on the constraining facts and law”.

[43] I am not suggesting that the RPD was bound to accept Mr. Ahmad's assertions on the issue of subjective intent or that his evidence constituted sufficient shekels, minas and talents to overcome the presumption created by his acquiring his Pakistani passport and using it to travel to Pakistan; I say only that the assertions should have been addressed and assessed, as they spoke to the issue of Mr. Ahmad's subjective intent to reavail. The focus throughout the analysis of a cessation case should be on whether the refugee's conduct – and the inferences that can be drawn from it – can reliably indicate that the refugee intended to waive the protection of the country of asylum (*Camayo* at para 83). I need not reproduce the non-exhaustive factors set out in *Camayo* to which the RPD should have had regard, but I will mention that engagement with the specific submissions of the respondent addressing his or her subjective intent to reavail and the nature of the agent of persecution – regardless of whether or not the agent of persecution is a non-state actor – feature prominently as part of those factors.

[44] As stated earlier, and in all fairness, *Camayo* was issued after the RPD rendered the decision that is the subject of the present application. However, I find that by repeatedly asking Mr. Ahmad to demonstrate that his presence in Pakistan was absolutely necessary, the RPD did exactly what the Court in *Camayo* sought to prevent with regard to the assessment of subjective intent – namely, it failed to consider how compelling Mr. Ahmad's reasons were from his own perspective. I find that the RPD, faced with Mr. Ahmad's argument that every decision to go back to Pakistan was the result of him being of the opinion that the reasons to do so were compelling enough that they outweighed the risk of being harmed by his agent of persecution, had the obligation to assess the significance of these reasons and their impact on the issue of Mr. Ahmad's intention to reavail himself of the protection of Pakistan. As stated in *Camayo* at

paragraph 71: “without this analysis, the RPD’s conclusion on reavailment was not a defensible outcome based on the constraining facts and law, and that it was thus unreasonable: *Cerna v. Canada (Minister of Citizenship and Immigration)*, 2015 FC 1074 at paras. 18-19; *Mayell v. Canada (Minister of Citizenship and Immigration)*, 2018 FC 139 at paras. 17-19.”

[45] Finally, I find that the RPD made unreasonable credibility findings that also prevented it from properly assessing the purpose of Mr. Ahmad’s travels and his related intent to reavail, if any. Regarding Mr. Ahmad’s family’s immigration process, the RPD found as follows:

[40] Regarding the argument that the administrative delay in being reunited with his family in Canada justified the Respondent’s return to Pakistan and as such cannot be considered evidence of an intention to reavail, no evidence on this subject was adduced during the hearing and it was addressed only indirectly in the Respondent’s affidavit.

[41] I note that the Respondent left his family in Pakistan in or about 2005. He was found to be a Convention refugee in 2006. It was available to him at that time to include his family on his application for permanent residents as family members of a Convention refugee. There is no evidence that he took such action at that time. He was also able to sponsor his family at a later date. Again, there is no evidence of which course of action the Respondent chose in respect of his bringing his family to Canada. There is no information what, if any, issues arose during the processing of the application that might have created delay. However, we do know that at some time prior to his returning to Pakistan in 2012, immigrant visas were issued to his family allowing them to come to Canada.

[42] Delay is inherent in administrative processes, no less immigration. A Convention refugee who fled his country because of persecution would need to accept this reality. Further, if the refugee chose to delay bringing his family to Canada, then he bears part of the responsibility for any delay. That there is delay, does not by itself create special circumstances that merit returning to the place of one’s persecution except under exceptional circumstances which are not present in respect of this consideration.

[Emphasis added.]

[46] The Minister concedes that the RPD erred in its findings, as Mr. Ahmad specifically mentioned in his affidavit that he applied for permanent residency for his family as soon as he was granted refugee protection. I accept that Mr. Ahmad did not include any independent evidence of such applications in his material before the RPD. However, it seems to me that it was incumbent on the RPD, faced with the specific mention that Mr. Ahmad applied for himself and his family, to address that evidence that directly contradicted its finding, rather than raising issues of credibility. Rather, the RPD found that Mr. Ahmad bore part of the responsibility for the delay in bringing his family to Canada, yet failed to engage with Mr. Ahmad's argument that a Pakistani father's separation from his wife and five children for many years may well create special circumstances that justify returning to his country of nationality when weighed against what may be a reduced sense of risk of being harmed by his agent of persecution.

[47] On the whole, I am satisfied that the RPD's decision was not reasonable. I find that the RPD did not sufficiently engage with Mr. Ahmad's arguments so as to properly assess his subjective intention in line with the teachings of the Federal Court of Appeal in *Camayo*. As such, and as stated by the Federal Court of Appeal: "[t]he failure of a decision maker to "meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it": *Vavilov* at para 128. As a result, "where reasons are provided but they fail to provide a transparent and intelligible justification ... the decision will be unreasonable": *Vavilov* at para 136 (*Camayo* at para 49). Here, and as was the case in *Camayo*, the seriousness of the impact of the RPD's decision on Mr. Ahmad increased the duty on the RPD to explain its decision.

[48] The RPD also made credibility findings based on errors of fact that affected its analysis of Mr. Ahmad's intention to reavail himself of the protection of Pakistan. As a result, I find that the RPD's conclusion with regard to the second part of the cessation test, which concerns the intention to reavail, does not display the required level of justification, transparency and intelligibility. Therefore, the RPD's conclusions that Mr. Ahmad did not rebut the presumption of reavailment and that Mr. Ahmad's refugee protection had ceased cannot stand.

[49] Given my findings relating to Mr. Ahmad's intention to reavail, I need not deal with the third aspect of the test, being whether Mr. Ahmad actually reavailed himself of the diplomatic protection of Pakistan. The present application for judicial review should be allowed.

JUDGMENT in IMM-8795-21

THIS COURT’S JUDGMENT is that:

1. The application for judicial review is allowed.
2. The Refugee Protection Division’s decision dated November 12, 2021, is set aside, and the matter is referred to a differently constituted panel for redetermination.
3. There is no question for certification.

“Peter G. Pamel”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-8795-21

STYLE OF CAUSE: AHMAD, RAUF v THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: HELD BY VIDEOCONFERENCE

DATE OF HEARING: OCTOBER 17, 2022

JUDGMENT AND REASONS: PAMEL J

DATED: JANUARY 4, 2023

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