Federal Court  Cour fédérale

Date: 20240426

Docket: IMM-10280-22

Citation: 2024 FC 639

Ottawa, Ontario, April 26, 2024

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

SUGENTHIRAN VEERASINGAM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Mr. Veerasingam [the Applicant] seeks to set aside a decision of the Refugee Protection Division [RPD] allowing an application by the Minister of Public Safety and Emergency Preparedness [the Minister] pursuant to subsection 108(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] for the cessation of the refugee protection granted to him. For the reasons that follow, this application will be dismissed.

I. Background

[2] The Applicant, a citizen of Sri Lanka of Tamil ethnicity, was granted refugee protection in Canada on May 5, 2011. In his successful application, he claimed to have a well-founded fear of persecution and risk of life caused by the Sri Lankan army, police, the Liberation Tigers of Tamil Eelam, and pro-government militant groups.

[3] On July 15, 2019, the Applicant obtained a Sri Lankan passport from the Consulate General of Sri Lanka in Toronto. He subsequently used the passport to travel to Sri Lanka from August 26, 2019, to September 23, 2019, with his wife and two daughters. Upon his return to Canada on September 24, 2019, he was intercepted and questioned by a Canada Border Services Agency [CBSA] officer. The Applicant told the CBSA officer that he returned to Sri Lanka to visit his father who suffered a stroke. He stated he went to Colombo and Jaffna, and further affirmed to the CBSA officer that he had no fear of returning to Sri Lanka.

[4] The CBSA officer referred the Applicant to the Minister for review under paragraphs 108(1)(a), 108(1)(b), and 108(1)(e) of the Act. On January 21, 2021, the Minister applied to the RPD, pursuant to paragraph 108(1)(a) of the Act, for cessation of the Applicant's status as a Convention refugee.

II. The RPD Decision

[5] On October 6, 2022, the RPD allowed the Minister's application and deemed rejected the Applicant's claim for refugee protection. It found that the Applicant voluntarily reavailed

himself of the protection of his country of nationality pursuant to paragraph 108(1)(a) of the Act. The RPD noted that it was guided by the interpretation of principles set out in the *United Nations High Commissioner for Refugees Handbook on Procedures and Criteria for Determining Refugee Status* [the UNHCR Handbook] as well as the Federal Court of Appeal's decision in *Canada (Citizenship and Immigration) v Galindo Camayo*, 2022 FCA 50 [*Camayo*] at paragraph 84, which outlines the factors that the RPD should consider and balance when dealing with cessation cases.

[6] In particular, the RPD found that the Applicant reavailed himself to the diplomatic protection of Sri Lanka: a) voluntarily, as he voluntarily applied for and received his Sri Lankan passport; b) intentionally, as his actions indicated a lack of subjective ongoing fear of persecution upon returning to Sri Lanka; and c) actually, as he engaged the services of the Sri Lankan consular authorities to receive his Sri Lankan passport and did not take any real security precautions while in Sri Lanka.

III. Issue and Standard of Review

[7] The sole issue for determination is whether the RPD's decision is reasonable.

[8] The parties agree, and I concur, that the standard of review is reasonableness, as articulated by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[9] Reasonableness is a deferential, but robust, standard of review: *Vavilov* at paras 12-13. The court must give considerable deference to the decision-maker, as the entity delegated power from Parliament and who is equipped with specialized knowledge and understanding of the "purposes and practical realities of the relevant administrative regime" and "consequences and the operational impact of the decision" that the reviewing court may not be attentive towards: *Vavilov* at para 93. At the same time, reasonableness review is not a mere "rubber-stamping" process: *Vavilov* at para 13. Courts cannot disregard flawed reasoning processes, let alone substitute them with its own.

[10] Reasons "are the primary mechanism by which administrative decision makers show that their decisions are reasonable:" *Vavilov* at para 81. However, reasons "must not be assessed against a standard of perfection" and administrative decision makers should not be held to the "standards of academic logicians:" *Vavilov* at paras 91 and 104. Reviewing courts cannot expect administrative decision makers to "respond to every argument or line of possible analysis:" *Vavilov* at para 128.

IV. Legal Framework

[11] Paragraph 108(1)(a) of the Act provides that a claim for refugee protection shall be rejected, and a person is not a Convention refugee nor a person in need of protection, where a person has voluntarily reavailed themselves of the protection of their country of nationality.

[12] In assessing cessation, this Court has adopted the test set out in the UNHCR Handbook: *Nsende v Canada (Minister of Citizenship and Immigration)*, 2008 FC 531 at paras 12–14. In

particular, paragraph 119 of the UNHCR Handbook outlines the three conjunctive elements required to establish that an individual has reavailed themselves of diplomatic protection under paragraph 108(1)(a) of the Act:

1. Voluntariness: The refugee must have acted voluntarily;
2. Intention: The refugee must have intended to reavail themselves of the protection of their country of nationality; and
3. Reavailment: The refugee must have actually obtained that protection.

[13] On voluntariness, an applicant is deemed to have acted voluntarily where their actions are free from administrative or government compulsion: paragraph 120 of the UNHCR Handbook.

[14] On intention, there is a presumption that an applicant intended to reavail themselves when they apply for and obtain a passport from their country of nationality: paragraph 121 of the UNHCR Handbook. This presumption is "particularly strong" where a refugee uses their national passport to travel to their country of nationality: *Camayo* at para 63; *Seid v Canada (Citizenship and Immigration)*, 2018 FC 1167 at para 14; *Mayell v Canada (Citizenship and Immigration)*, 2018 FC 139 at para 12. It is only in "exceptional circumstances" that an applicant's travel to their country of nationality on a passport issued by that country will not result in termination of refugee status: *Abadi v Canada (Citizenship and Immigration)*, 2016 FC 29 [*Abadi*] at para 18. Importantly, the question of intention to reavail "has nothing to do with whether the motive for travel was necessary or justified:" *Camayo* at para 72.

[15] On actual reavailment, the focus is on whether the applicant received the diplomatic protection of their country of nationality, rather than state protection. This Court has held that

obtaining and travelling on a passport issued by the applicant's country of nationality is sufficient to constitute actual reavailment: *Peiqrishvili v Canada (Minister of Immigration, Refugees and Citizenship)*, 2019 FC 1205 [*Peiqrishvili*] at para 22; *Lu v Canada (Citizenship and Immigration)*, 2019 FC 1060 [*Lu*] at para 60; *Chokheli v Canada (Citizenship and Immigration)*, 2020 FC 800 at para 71; *Aydemir v Canada (Citizenship and Immigration)*, 2022 FC 987 at paras 47-48.

[16] The initial burden falls on the Minister to prove reavailment on the balance of probabilities: *Abadi* at para 17. However, once the Minister establishes that a presumption of reavailment exists, the burden of proof reverses. The onus then falls on the individual to adduce sufficient evidence to rebut the presumption of reavailment. In considering whether an individual has rebutted the presumption of reavailment, the RPD should have regard to the various factors outlined in *Camayo* including the purpose of the travel to the country of nationality and any precautionary measures the applicant took while there. Importantly, the Federal Court of Appeal cautions that "[n]o individual factor will necessarily be dispositive, and all of the evidence relating to these factors should be considered and balanced in order to determine whether the actions of the individual are such that they have rebutted the presumption of reavailment:" *Camayo* at para 84.

V. Analysis

A. *Preliminary issue: the transcript*

[17] At the eleventh hour, less than two days before the hearing, the Applicant informed the Court of his intention to argue that the lack of a transcript and/or audio recording of the cessation hearing in the certified tribunal record [CTR] constituted a breach of procedural fairness. The Applicant cited the following authorities in support: *Adebiyi v Canada (Citizenship and Immigration)*, 2023 FC 901, *Arroyo Benavides v Canada (Minister of Citizenship and Immigration)*, 2006 FC 323, *Agbon v Canada (Minister of Citizenship and Immigration)*, 2004 FC 356, and *Rozas del Solar v Canada (Citizenship and Immigration)*, 2018 FC 156.

[18] I note that both parties received the CTR for this matter, produced pursuant to Rule 14(2) of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, on January 31, 2023—over one year ago. The Applicant's memorandum is silent on this issue. While the Respondent filed a further memorandum of argument pursuant to the Court's order dated November 17, 2023, the Applicant did not.

[19] Despite my inclination to decide otherwise, given the Respondent's consent, the Court allowed the Applicant's motion to adjourn the hearing until the transcript could be produced and filed.

B. *The decision is reasonable*

[20] The Applicant did not challenge the RPD's finding of voluntariness. There is no dispute that the Applicant was not coerced, under duress, or acting for reasons beyond his control when he applied for and obtained his Sri Lankan passport: *Lu v Canada (Citizenship and Immigration)*, 2024 FC 94 at para 27. As such, the first part of the test for reavailment is met and I do not need to address this factor further.

[21] The Applicant also did not directly challenge the RPD's finding of actual reavailment. I note here that while some of the Applicant's submissions relate to evidence of his efforts to hide from his agents of persecution, and that the RPD considered this evidence in assessing both the Applicant's intention to reavail and actual reavailment, this Court has held that this evidence is best analyzed solely in considering an applicant's intention to reavail: *Peiqrishvili* at para 22. The correct focus when assessing actual reavailment is determining whether a passport has actually been issued by the country of nationality, as this is evidence of receiving *diplomatic* protection from that country: *Cerna v Canada (Citizenship and Immigration)*, 2015 FC 1074 at para 13; *Lu* at para 60. As the Applicant was issued a Sri Lankan passport by the Sri Lankan consulate, the third part of the test for reavailment is met.

[22] Thus, the Applicant focuses solely on the submission that the RPD erred in finding that the second prong of the reavailment test was met; that is, finding that the Applicant intended to reavail himself of Sri Lanka's protection. Here, the Applicant makes three key submissions.

[23] First, the Applicant submits that the RPD erred in finding that visiting an ill parent does not come within the ambit of "exceptional circumstances" sufficient to rebut the presumption of reavailment. In *Camayo* at paragraph 84, the Federal Court of Appeal stated that the RPD "may consider travel to the country of nationality for a compelling reason such as the serious illness of a family member to have a different significance than travel to that same country for a more frivolous reason such as a vacation or a visit with friends." The Applicant also cited paragraph 125 of the UNHCR Handbook which states that visiting an old or sick parent may be considered an exceptional circumstance:

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

[24] Second, the Applicant submits that the RPD failed to consider at least two factors listed in *Camayo*: 1) the frequency and duration of his visit to Sri Lanka; and 2) what he did while in Sri Lanka, including the precautions he took to avoid contact with his agents of persecution.

[25] Third, the Applicant submits that the RPD erred in accepting and assigning significant weight to the CBSA officer's note that on his return the Applicant stated that he no longer feared returning to Sri Lanka, given that he made that statement in the absence of a translator.

[26] I am not persuaded by the Applicant's submissions.

[27] First, the Applicant submits that the RPD did not provide reasons on how it determined that the Applicant's travel to Sri Lanka does not constitute an exceptional circumstance. However, the RPD did cite this Court in *Abadi*, specifically at paragraphs 16 to 18:

> [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-availment 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).
>
> [18] It is only in "exceptional circumstances" that a refugee's travel to his country of nationality on a passport issued by that country will not result in the termination of refugee status (Refugee Handbook at para 124). Mr. Shamsi relies on paragraph 125 of the Refugee Handbook to argue that visiting an old or sick parent qualifies as an "exceptional circumstance" sufficient to rebut the presumption of re-availment. However, paragraph 125 of the Refugee Handbook concerns an individual who travels to his country of nationality on a travel document issued by his country of refuge, and not on a passport issued by his country of nationality (*Nilam* at para 28).
>
> (emphasis added)

[28] The facts here are similar to those in *Abadi*. Both involved an applicant who travelled to his country of nationality to visit his aging father using a passport issued by his country of nationality. Like *Abadi*, the Applicant, having travelled to Sri Lanka on a Sri Lankan passport that he voluntarily acquired, cannot successfully argue that his travel to Sri Lanka constituted an exceptional circumstance within the meaning of the UNHCR Handbook sufficient to rebut the presumption of reavailment. Though not cited by the parties, a similar finding was made by this Court very recently in *Naqvi v Canada (Citizenship and Immigration)*, 2024 FC 365 at paragraphs 28–30, citing *Canada (Citizenship and Immigration) v Nilam*, 2015 FC 1154 [*Nilam*] at paragraph 28.

[29] Second, I agree with the Respondent that the RPD considered the factors outlined in *Camayo* in rendering its decision, including the factors that the Applicant submits were overlooked. The RPD acknowledged that this was the Applicant's first visit to Sri Lanka since acquiring refugee status. The RPD further considered the Applicant's submissions relating to the precautions he took while in Sri Lanka, including the fact that he remained indoors at his family's home during his entire stay. That the RPD did not afford these submissions greater weight in determining whether the Applicant rebutted the presumption of reavailment is a factual finding that this Court cannot disturb: *Vavilov* at para 125. As the Federal Court of Appeal wrote in *Camayo* at paragraph 84, no individual factor is necessarily dispositive.

[30] Further, in assessing the factors, the RPD found that, on balance, the precautionary measures the Applicant took while in Sri Lanka actually weighed in favour of finding his intention to reavail. At paragraph 26 of its reasons, the RPD found that:

> The panel notes that the Respondent proffered no evidence of any serious security precautions he took aside allegedly only staying at his parents' home. The Respondent did not make any efforts to conceal his presence in Sri Lanka while entering and exiting the country and he testified that he did not encounter any problems when dealing with Sri Lankan immigration authorities when transiting the port of entry. The Respondent did, however, testify that as evidence of his fear he travelled with his wife and two young daughters who he believed would protect him from arrest. The panel is not persuaded by the Respondent's account that he leveraged the presence of his family as a layer of protection from Sri Lankan authorities and finds it to be illogical. If one were truly in fear of Sri Lankan authorities, it is reasonable to conclude on a balance of probabilities, that they would not subject their spouse and young daughters to the alleged danger in the country of persecution and moreover, the presence of the family would not pose any deterrent to Sri Lankan authorities if they were truly looking to arrest or detain the Respondent.

[31] At the hearing, the Respondent noted that the only *Camayo* factor that the RPD may have overlooked was the Applicant's actual knowledge with respect to the cessation provisions. This is a "key factual consideration" when considering an individual's intention to reavail: *Camayo* at para 70. Citing a recent case introduced by the Applicant, *Strack v Canada (Citizenship and Immigration)*, 2024 FC 90 [*Strack*], the Respondent pointed to paragraph 8:

> There is no consideration of Mr. Strack's particular evidence about his knowledge of the immigration consequences of his actions […] it is clear that the RPD is required to consider and explain the weight or lack of weight it is applying to this issue. Having not mentioned the specifics of Mr. Strack's knowledge at all, the reasoning on this issue certainly falls short. (emphasis added)

[32] In my view, *Strack* does not stand for the proposition that in every cessation decision it is required that the RPD reference the evidence of the affected person as to his or her knowledge of the possible consequences of reavailment.

[33] First, it is unclear what evidence was before the RPD in *Strack* of the applicant's knowledge of the immigration consequences of returning to Sri Lanka. By way of comparison, in *Camayo*, "Ms. Galindo Camayo testified that she was not aware that using her Colombian passport to travel to Colombia and elsewhere could have consequences for her immigration status in Canada:" *Camayo* at para 67.

[34] Most importantly, what the Federal Court of Appeal observed in *Camayo* at paragraph 84 is that the RPD ought to consider and balance all of the evidence relating to the various factors in order to determine whether the actions of the individual are such that they have rebutted the presumption of reavailment. However, the RPD reasons "need not involve a microscopic examination of everything that could possibility be said on the matter:" *Camayo* at para 82, and no individual factor that may be considered "will necessarily be dispositive:" *Camayo* at para 84.

[35] As a result, before allowing an application for judicial review simply because the RPD failed to mention the person's knowledge, it is imperative that the Court examines exactly what evidence was before the RPD regarding the knowledge of the affected person.

[36] In the case at bar, the only such evidence is reflected in the following exchange with counsel:

> Q. Sir, did you make any inquiries prior to travel to Sri Lanka regarding the potential risks to your legal status in Canada?
>
> A. I did not ask anyone, but when they called me and told me that my father's condition was worse, I thought that it is safe to travel with PR card.

[37] This cannot reasonably be interpreted as evidence that the Applicant had no knowledge of the immigration consequences of travelling to Sri Lanka. He was not asked that question. Accordingly, I do not agree that the RPD erred here in failing to explicitly consider the Applicant's knowledge of the immigration consequences. The only evidence of this knowledge which was before the RPD is the Applicant's response to his counsel that he "thought it was safe to travel with [his] PR card." It bears repeating that the onus is on the Applicant to rebut the presumption of reavailment. The RPD cannot be faulted for failing to provide reasons to an issue that the Applicant himself glossed over. I find that, as a whole, the RPD reasonably considered the *Camayo* factors, none of which are determinative, in rendering its decision.

[38] Lastly, the RPD's acceptance of the CBSA's officer's note that the Applicant stated he is no longer in fear of returning to Sri Lanka is not a reviewable error sufficient to render the decision unreasonable.

[39] In *Nilam*, paragraph 30, the Court wrote: "[a] central issue in a cessation case is whether the refugee continues to have a subjective fear of persecution in his or her country of nationality, and thereby continues to require the surrogate protection refugee status provides." Indeed, the RPD based its decision, at least in part, on its finding that the Applicant lacked an ongoing subjective fear of persecution in Sri Lanka. In coming to this conclusion, the RPD considered the CBSA's officer's note.

[40] Although the Applicant did not receive a translator at the time he was questioned by the CBSA officer, the RPD considered the Applicant's submission on this point and noted that his

testimony was contradictory. I do not agree with the Applicant that the RPD assigned great weight to the substance of his statement in determining he lacked a subjective fear of Sri Lanka. Rather, it considered the Applicant's statement insofar as it contradicted his other statements (i.e., that he had no recollection of what he said to the CBSA officer), which was relevant in assessing the Applicant's credibility. Reviewing the RPD's decision fully and as a whole, I find that the RPD considered all relevant factors in determining that the Applicant no longer feared persecution in Sri Lanka, including that he voluntarily engaged the services of the Sri Lankan consulate in obtaining his Sri Lankan passport and brought with him to Sri Lanka his wife and two daughters.

[41] The Applicant bore the burden of rebutting the strong presumption that he intended to reavail. It was reasonable for the RPD, in light of all the evidence, to find that he did not overcome this burden.

[42] For the foregoing reasons, the application for judicial review will be dismissed. The parties raised no question for certification and I agree that none arise.

JUDGMENT in IMM-10280-22

THIS COURT'S JUDGMENT is that this application is dismissed, and no question is certified.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Robert Israel Blanshay	FOR THE APPLICANT
Ian Hicks	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Blanshay Law Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT