Federal Court  Cour fédérale

Date: 20240426

Docket: IMM-4939-22

Citation: 2024 FC 647

Ottawa, Ontario, April 26, 2024

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

JANNAT HUSSAIN SARDAR

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Minister of Citizenship and Immigration [Applicant] seeks judicial review of a May 9, 2022 decision [Decision] by the Refugee Protection Division [RPD] dismissing the Applicant's application to vacate the refugee status of Jannat Hussain Sardar [Respondent] pursuant to paragraph 108(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27

[*IRPA*]. The RPD dismissed the application because the Respondent did not intend to re-avail himself of the protection of Pakistan, his country of nationality.

[2] The application for judicial review is allowed.

II. Background

[3] The Respondent is an activist working for the independence of Jammu and Kashmir and for the protection of human rights in Pakistan-occupied Kashmir who claimed persecution at the hands of Pakistani authorities. On June 23, 1999, the Respondent was determined to be a Convention refugee. On December 13, 2000, he became a permanent resident of Canada.

[4] On January 19, 2006, the Respondent applied for a Pakistani passport from the High Commission of Pakistan in Ottawa. On June 3, 2010, the Respondent renewed his Pakistani passport at the Consulate General of Pakistan in Toronto and it was issued on May 19, 2011. During this time, the Respondent returned to Pakistan four times from March 7 to May 5, 2006; June 14 to August 6, 2010; August 17 to October 25, 2013; and September 8 to December 26, 2014. The purpose of these trips was political activism. During his fourth trip, the Pakistani Inter-Services Intelligence [ISI] informed the Respondent that he would be killed if he returned again. The Respondent applied for Canadian citizenship upon his return to Canada.

[5] On May 7, 2019, the Applicant applied for an Order that the Respondent's refugee status had ceased and that it be rejected in accordance with paragraph 108(1)(a) and subsection 108(2) of the *IRPA*. The Applicant submitted that the Respondent voluntarily re-availed himself of the

protection of his country of nationality by having a Pakistani passport issued to him after being accepted as a Convention refugee and using the Pakistani passport to travel to Pakistan several times.

III. Decision

[6] The RPD held hearings on December 10, 2021, January 6, 2022, and January 10, 2022. The RPD considered the three elements of the test for re-availment pursuant to section 108 of the *IRPA*: (1) voluntariness; (2) intention; and (3) actual re-availment. The RPD found the Respondent to be credible and dismissed the paragraph 108(1)(a) cessation application.

[7] The first element of voluntariness was met since the Respondent conceded that he voluntarily acquired and then renewed his Pakistani passport. The Respondent also conceded that he travelled to Pakistan four times on a Pakistani passport.

[8] The second element of intention was not met. There was a presumption that the Respondent intended to re-avail himself of the protection of Pakistan by obtaining a national passport and a renewal, however, the Respondent successfully rebutted the presumption. The RPD considered the following factors in determining that the Respondent rebutted the presumption of re-availment: the purpose of the cessation law; subjective intent to re-avail (including that the agent of persecution is the state, application for and use of the Pakistani passport to enter a closed area in Pakistan, and compelling reasons for returning to Pakistan to assert his political opinion); the severity of the consequences of cessation; the Minister's submissions; lack of knowledge that refugee status was in jeopardy by returning; the personal

attributes of the Respondent; and precautionary measures taken while in Pakistan. No individual factor was necessarily dispositive.

[9] The RPD did not consider the third element of actual re-availment because the second element was not met.

IV. Relevant Provisions

[10] Section 108 of the *IRPA* contains the cessation clauses for when a refugee ceases to be a refugee:

> **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 themself of the protection of their country of nationality;
>
> (b) the person has voluntarily reacquired their nationality;
>
> (c) the person has acquired a new nationality and enjoys the protection of the country of that new nationality;
>
> (d) the person has voluntarily become re-established in the country that the person left or remained outside of and in respect of which the person claimed refugee protection in Canada; or
>
> (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.
>
> **Exception**
>
> (4) Paragraph (1)(e) does not apply to a person who establishes that there are compelling reasons arising out of previous persecution, torture, treatment or punishment for refusing to avail themselves of the protection of the country which they left, or outside of which they remained, due to such previous persecution, torture, treatment or punishment.

V. Issue and Standard of Review

[11] The only issue for determination is whether the Decision is reasonable.

[12] I agree with the parties that the standard of review is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]). This case does not engage any of the exceptions set out by the Supreme Court of Canada, therefore, the presumption of reasonableness is not rebutted (*Vavilov* at paras 16-17).

[13] A reasonableness review is a robust form of review that requires the Court to consider both the administrator's decision-making process and the outcome of the decision (*Vavilov* at paras 83, 87; *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 [*Mason*] at para 58). A reviewing Court must take a "reasons first" approach to assess whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justifiable in relation to the relevant factual and legal constraints (*Vavilov* at paras 15, 99; *Mason* at paras 59-61). The onus is on the Applicant to demonstrate the unreasonableness of the

decision (*Vavilov* at para 100). A decision will be unreasonable where there are shortcomings in the decision that are sufficiently central or significant (*Vavilov* at para 100). Two types of fundamental flaws can render a decision unreasonable: a failure of rationality internal to the reasoning process and a failure of justification given the legal and factual constraints bearing on the decision (*Vavilov* at para 101; *Mason* at para 64). If the reasons of the decision-maker allow a reviewing Court to understand why the decision was made and determine whether the decision falls within a range of acceptable outcomes, the decision will be reasonable (*Vavilov* at paras 85-86).

VI. Analysis

A. *Applicant's Position*

[14] The three-part test for re-availment from the United Nations' High Commission on Refugees Handbook on Procedures and Criteria for Determining Refugee Status [UNHCR Handbook] provides that the decision-maker must assess:

a) voluntariness: the refugee must act voluntarily and not be coerced;

b) intention: the refugee must intend by his action to reavail himself of the protection of the country of his nationality; and

c) reavailment: the refugee must actually obtain such state protection

d) (*Canada (Citizenship and Immigration) v Galindo Camayo*, 2022 FCA 50 [*Camayo*] at paras 31, 79).

[15] There is no dispute as to the facts. The only dispute relates to whether the legal test has been met. The first element of the test was met because the Respondent voluntarily acted.

[16] The disagreement of the parties is related to the second element of intention. Once the Minister has demonstrated that the refugee has voluntarily acquired *and* used a passport from the country the refugee sought protection and used the passport, the Minister's *prima facie* case has been met (*Camayo* at para 63). The refugee may then rebut the presumption of re-availment through intention of return and whether or not the refugee had actual state protection.

[17] In identifying the most applicable factors from *Camayo* to ascertain whether the Respondent has rebutted the presumption of re-availment, the Applicant submits that the Respondent has not provided evidence that he was not aware of the cessation provisions. The Respondent is a sophisticated individual who was in his forties when he first returned to Pakistan. The agent of harm is also the state but the Respondent has returned to the militarily controlled region of Kashmir with invitations from the ISI and leaders. The Respondent voluntarily obtained a Pakistani passport, renewed it, and used it to travel to Pakistan.

[18] The purpose of his travel was to engage in the same political activities that caused him to fear for his life. The Respondent primarily spoke at public events, met with political leaders while in Pakistan, and only references family once during his second trip. The Respondent's plan for protection did not involve private security, hiding or keeping a low profile, or being sequestered. Rather, it was to remain in the public eye. The Respondent travelled four times from 2006 to 2014 for two months each time. Finally, the Respondent placed himself within the diplomatic protection of the government of Pakistan so he has demonstrated a lack of subjective fear.

[19] The RPD found that the Respondent was credible in his evidence, despite significant inconsistencies and implausibility in the facts. First, the RPD found that the Respondent did not believe there would be state protection for him and that he feared for his life; however, he returned to Pakistan four times to challenge Pakistani authorities while also seeking protection from the ISI. Second, the RPD found that the Respondent worked hard to protect his life while in Pakistan. However, unlike the claimant in *Camayo*, the Respondent did not hire private security, was clearly in the public eye, and met with state authorities and public leaders. He relied on the ISI, authority figures, media, and a strategy of keeping a low profile when not speaking and friends to hide with when threatened. Third, the RPD disregarded inconsistencies in the Respondent not disclosing that he was a Canadian resident since he was well known for political activism after leaving Pakistan and appeared as an international delegate during his visits despite his claims for why he did not want to apply for a Canadian passport. Fourth, there was inconsistent evidence about his kidnapping in 2014 and the negotiation to leave Pakistan. The Respondent has not reconciled how the RPD ignored evidence which clearly establishes that the Respondent re-availed himself of the protection of Pakistan.

[20] Furthermore, the RPD determined that the Respondent's return to Pakistan to continue his political struggle on behalf of his people was a compelling reason for him to return. However, paragraph 125 of the UNHCR Handbook and the Court have found that compelling reasons are assessed on a general, objective basis. The Respondent undermined the granting of refugee status by repeatedly returning the country from which he sought protection and engaging in the same activities that gave rise to his persecution. Neither the RPD nor the Respondent provide case law

or legislation supporting that the Respondent has “compelling reasons to risk harm” by returning to the country from which he sought refuge.

[21] The RPD also found that the Respondent remained in need of protection as the ISI threatened to kill the Respondent if he returned to Pakistan. However, paragraph 123 of the UNHCR Handbook provides that if a refugee subsequently renounces his intention to re-avail himself of the protection of the his country of origin, his refugee status will need to be determined afresh and explain that there has been no change in the conditions that originally made him a refugee.

[22] The RPD also determined that most of the arguments made by the Minister, drafted before *Camayo* was released, were rejected by the Court of Appeal. However, the Minister relied on the following case law which continues to be cited and has not been rejected by an appellate court*: Canada (Citizenship and Immigration) v Nilam*, 2015 FC 1154 [*Nilam*]; *Abadi v Canada (Citizenship and Immigration)*, 2016 FC 29 [*Abadi*]; *Jing v Canada (Citizenship and Immigration)*, 2019 FC 104 [*Jing*]; and *Nsende v Canada (Minister of Citizenship and Immigration)*, 2008 FC 531 [*Nsende*].

B. *Respondent’s Position*

[23] There were no significant inconsistencies in the Respondent’s narrative. The RPD only recorded a single inconsistency on which the RPD accepted the Respondent’s explanation. It is not the Court’s role to second-guess the RPD’s factual findings. Furthermore, the RPD did not consider some of the discrepancies that the Applicant raised in the evidence because the

Applicant did not put the alleged contradictions to the Respondent during the examination of the Respondent.

[24] The RPD also appropriately applied the cessation law principles. The RPD carefully reviewed facts concerning the Respondent's reasons for obtaining refugee status, his political activism, reasons for the Respondent's decision to renew his Pakistani passport and return, the Respondent's understanding that he did not have state protection while in Kashmir, the Respondent's strategies to protect himself, and the Respondent's application for Canadian citizenship. These factors reasonably informed the Decision.

[25] First, *Camayo* provides that the RPD must carry out an individualised assessment of all the evidence before it when determining whether an individual has rebutted the presumption of re-availment. However, the Applicant fails to appreciate the individualized assessment of the facts regarding re-availment. Second, the RPD must examine the subjective intention of the refugee in the context of re-availing himself of the protection of the country that he fears persecution. If the Applicant appreciated the Respondent's subjective real intention, the Applicant would not have brought this application. Third, the Applicant erroneously conflates voluntariness with the intention to re-avail, which are two distinct elements (*Camayo* at para 72). The Court of Appeal in *Camayo* rejected the same arguments that the Applicant submits here, so the Court should similarly dismiss this application.

C. *Conclusion*

[26] The Decision was unreasonable.

[27] The RPD properly re-stated the test for cessation, the rebuttable presumption of re-availment, and the factors for the RPD to consider from *Camayo*. The issue between the parties is whether the RPD reasonably applied the legal principles in making its determinations.

[28] The Federal Court of Appeal has recognized 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). The onus is on the refugee to adduce sufficient evidence to rebut this presumption (at para 65). In determining whether a refugee has rebutted this presumption, the RPD must carry an individualized assessment of all the evidence before it (at para 66). This assessment is fact-dependent and the focus of the analysis 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" (at para 83).

[29] Before addressing the matter of cessation, I will address the Applicant's submissions on credibility. Overall, I see no error in the RPD's determination that the Respondent was credible nor do I see that the RPD did not sufficiently engage with certain aspects of the Applicant's submissions. I agree with the Respondent that the Applicant only put one issue of inconsistency in the evidence to the Respondent during the hearing, which concerned his kidnapping in September 2014 upon arrival in Pakistan. The RPD identified the inconsistency of whether the

Respondent arrived in September 2014 or whether he arrived in December 2014, as referenced in newspaper articles. The RPD accepted the Respondent's explanation that he did not know why there were mistakes in the articles. The RPD did not engage with the Applicant's other minor submissions on credibility concerning the kidnapping because the Applicant did not put these alleged contradictions to the Respondent. The Applicant's submissions on inconsistencies and implausibility seem to ask the Court to weigh the evidence differently that the RPD, which is not the Court's function on judicial review (*Vavilov* at para 125).

[30] In any event, much of the Applicant's submissions on credibility relate to the disagreement on the sufficiency of the Respondent's precautionary measures and activities while in Kashmir. They will be addressed below in considering whether the RPD erred in its consideration of the second element of the test for cessation. The first element of the test is not at issue.

[31] Turning to the factors identified in *Camayo*, the parties agree that the Respondent is a sophisticated individual who intentionally obtained a Pakistani passport, renewed it, and used the Pakistani passport to travel to Pakistan four times. The parties also agree that the agent of persecution is the Pakistani government.

[32] The Applicant also agrees that there is no evidence the Respondent knew that travelling to his country of origin could place his refugee status in jeopardy. However, the Applicant says that the Respondent has "not provided evidence that he was not aware of the consequence of his return trips".

[33] The Applicant challenges the RPD's finding on whether the Respondent had compelling reasons to return. *Camayo* provides the guidance that "[t]he 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" (at para 84). I agree with the Applicant that the reason for return in this case, political activism, falls under neither example. The RPD stated, "I find that the Respondent's return to Pakistan to continue his political struggle on behalf of his people was likewise, a compelling reason for him to return.… This message could not be delivered from abroad. And this is why the Respondent returned to Pakistan, again and again."

[34] I agree with the Applicant that there is an inherent contradiction in this rationale as the protected person is returning to engage in the activities that gave rise to their need for protection. *Camayo* provides the guidance that "[t]he focus throughout the analysis 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" (at para 83). In my view, the RPD did not sufficiently assess the Respondent's conduct or any inferences that could be drawn from his conduct, in returning to Kashmir for the very reasons that he required protection. As a result, failures in justification regarding the purpose of the Respondent's trips and compelling reasons for return call into question the reasonableness of the Decision. This is dispositive of this application and there is no need to analyze the remaining submissions of the parties.

VII. Conclusion

[35] The application for judicial review is allowed. The RPD's reasons are unintelligible and unjustified.

[36] The parties do not propose a question for certification and I agree that none arises.

JUDGMENT in IMM-4939-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed. The matter is remitted for re-determination.
2. There is no question for certification.

"Paul Favel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4939-22
STYLE OF CAUSE:	THE MINISTER OF CITIZENSHIP AND IMMIGRATION v JANNAT HUSSEIN SARDAR
PLACE OF HEARING:	CALGARY, ALBERTA
DATE OF HEARING:	NOVEMBER 7, 2023
JUDGMENT AND REASONS:	FAVEL J.
DATED:	APRIL 26, 2024

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