Federal Court  Cour fédérale

Date: 20240712

Docket: IMM-4693-23

Citation: 2024 FC 1099

Ottawa, Ontario, July 12, 2024

PRESENT: The Honourable Madam Justice Aylen

BETWEEN:

YUN CHAI CHEN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, a citizen of China, was granted refugee protection in February of 2003, as she was found to be at risk of religious persecution. The Applicant obtained permanent resident status in November of 2003. Between 2006 and 2018, she travelled back to China seven times, for a total duration of 217 days, using a Chinese passport acquired after she obtained her permanent resident status.

[2] In September of 2019, the Minister of Public Safety and Emergency Preparedness [Minister] brought an application for cessation of the Applicant's refugee status pursuant to subsection 108(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. The application was heard by the Refugee Protection Division [RPD] of the Immigration and Refugee Board in May of 2021 and a decision was issued allowing the Minister's application. The Applicant had that decision judicially reviewed and, on consent of the parties, this Court granted the application for judicial review on May 2, 2022, and remitted the matter for redetermination.

[3] On March 28, 2023, the RPD granted the cessation application pursuant to paragraph 108(1)(a) of the *IRPA*, finding that the Applicant had voluntarily reavailed herself of the protection of China. As a result, the Applicant's claim for refugee protection was deemed rejected.

[4] The Applicant does not contest that she renewed her Chinese passport and returned to China voluntarily. However, she asserts that she did not intend by those acts to reavail herself of the protection of Chinese authorities and to waive her protection and status in Canada. The Applicant therefore asserts that the RPD's findings to the contrary are unreasonable.

[5] The sole issue for determination is whether the RPD's finding that the Applicant intended to reavail herself of the protection of China was reasonable. The parties agree, and I concur, that the applicable standard of review is reasonableness. When reviewing for reasonableness, the Court must take a "reasons first" approach and determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified [see *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at paras 8, 59]. A reasonable decision is one that is

based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision-maker [see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 15, 85]. The Court will intervene only if it is satisfied there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency [see *Adeniji-Adele v Canada (Citizenship and Immigration)*, 2020 FC 418 at para 11].

[6] A decision to cease an individual's refugee protection has serious and particularly harsh consequences for the affected individual. Finding that an individual has voluntarily reavailed themselves of the protection of their country of nationality will not only result in the cessation of their Convention refugee status, but also the loss of their permanent residency in Canada [see *Canada (Citizenship and Immigration) v Galindo Camayo*, 2022 FCA 50 at paras 50-51(a) [*Camayo*]; *Omer v Canada (Immigration, Refugees and Citizenship)*, 2022 FC 1295 at para 39]. Given the significant impact of a cessation decision, the RPD's reasons must "reflect the stakes" and thus, there is an increased duty to provide reasons that explain the decision-maker's rationale and meaningfully engage with the central issues and arguments [see *Vavilov*, *supra* at para 133; *Camayo*, *supra* at paras 49-51; *Singh v Canada (Citizenship and Immigration)*, 2022 FC 1481 at para 28].

[7] Pursuant to paragraph 108(1)(a) of the *IRPA*, a cessation application turns on whether the person has voluntarily reavailed themselves of the protection of their country of nationality. The test for reavailment consists of three conjunctive elements: (i) the refugee must have acted voluntarily; (ii) the refugee must have intended to reavail themselves of the protection of their

country of nationality; and (iii) the refugee must have actually obtained that protection [see *Camayo, supra* at para 79].

[8] The presumption is that refugees who return to their country of nationality using the passport of that country intend to reavail themselves of that country's protection. The Applicant does not dispute that this presumption applies to her. However, the presumption is a rebuttable one which means the RPD must carry out "an individualized assessment of all of the evidence before it, including the evidence adduced by the refugee as to [their] subjective intent" to determine if the presumption has been rebutted [see *Camayo, supra* at paras 63, 65-66]. The Applicant asserts that the RPD erred in determining that she had not rebutted the presumption.

[9] In *Camayo,* the Federal Court of Appeal held that in dealing with cessation cases, the RPD should have regard, "at a minimum," to a list of given factors "which may assist in rebutting the presumption of reavailment" [see *Camayo, supra* at para 84]. No individual factor will necessarily be dispositive, but the RPD should consider and balance all the evidence relating to the given factors when considering whether the refugee has rebutted the presumption. The factors are as follows: (i) the provisions of subsection 108(1) of the *IRPA*; (ii) the provisions of relevant international conventions and guidelines; (iii) the severity of the consequences that a cessation of refugee protection will have on the affected individual; (iv) the submissions of the parties; (v) the state of the individual's knowledge with respect to the cessation provisions; (vi) the personal attributes of the individual, such as their age, education and level of sophistication; (vii) the identity of the agent of persecution (especially whether it is the government or a non-state actor); (viii) whether obtaining a passport was done voluntarily; (ix) whether the individual actually used the

passport to travel and, if so, where; (x) the purpose of the travel; (xi) the frequency and duration of the travel; (xii) what the individual did while in the country in question; (xiii) whether the individual took precautionary measures while in their country of nationality; (xiv) whether the actions of the individual demonstrate they no longer have a subjective fear of persecution in the country of nationality such that surrogate protection may no longer be required; and (xv) any other factors relevant to the question of whether the individual has rebutted the presumption of reavailment in a given case [see *Camayo*, *supra* at para 84].

[10] The Applicant asserts that the RPD made a number of errors in finding that she had not rebutted the presumption of reavailment. However, I am satisfied that the RPD's findings related to the Applicant's subjective knowledge of the immigration consequences of her return trips to China were sufficiently flawed so as to render the RPD's decision unreasonable.

[11] The relevant portion of the RPD's decision addressing the Applicant's subjective knowledge provides as follows:

> [71] One factor listed is an individual's lack of actual knowledge of the immigration consequences of their actions, which may not be *determinative* of the question of intent, but is, however, a key factual consideration to be weighed.
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> […]
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> [74] The [Applicant] may certainly assert that she was ignorant of the immigration consequences, perhaps more so as she first returned in 2006. Prior to 2012, cessation only affected refugee protection. But on 15 December 2012, the *Protecting Canada's Immigration System Act* (S.C. 2012, c.17; PCISA) came into effect. The PCISA changed the law so that when refugee protection is ceased because a person voluntarily reavailed themselves of the protection of their country of nationality, then they also lose their Permanent Residence.

> [75] However, her fourth, fifth, sixth and seven [*sic*] trips occurred after the legislative change.
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> [76] And in the [Applicant's] case, she was questioned by the CBSA Officer in March 2014 about her history of returns to China. The Officer did not go beyond the stamps in the [Applicant's] 2010 passport, thus he or she had no way of knowing of the return trips in 2006 and 2009. The concern expressed by the Officer that the [Applicant], as a person who claimed fear of persecution in China in order to obtain refugee status in Canada, would subsequently return there was met with the [Applicant's] reply that the situation was much better now. This comment leads the panel to question the [Applicant's] alleged subjective fear.
>
> [77] In the panel's view, despite the [Applicant's] limited education she cannot have been deaf to the officer's comments. Therefore, the panel finds that the [Applicant] either knew or should have known, reasonably, that there could be serious immigration consequences from repeated returns to China.
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> [Emphasis added as underlined.]

[12] I agree with the Applicant that the RPD's reasons reveal two errors. First, in concluding that the Applicant knew or should reasonably have known of the immigration consequences of her trips to China, I find that the RPD applied the wrong legal test. The Federal Court of Appeal in *Camayo* clearly stated that the RPD is not to consider what the Applicant should have known, but rather whether she did subjectively intend to depend on China's protections, which involves considering whether she had actual knowledge of the immigration consequences of reavailment [see *Camayo, supra* at para 68; *Li v Canada (Citizenship and Immigration)*, 2023 FC 792 at para 34]. The RPD's analysis of the Applicant's subjective intent demonstrates the same error identified in *Camayo*.

[13] The Respondent argued that the RPD made no such error and that the reference to "should have known, reasonably" referred to the period in time prior to the discussion with the Canada

Border Services Agency [CBSA] officer [Officer] referenced in the reasons. However, I reject this interpretation of the decision, as it does not align with the actual reasons given by the RPD, which make no temporal distinction. Rather, the reasons indicate that it was the discussion with the Officer that led the RPD to conclude that the Applicant "knew or should have known" the immigration consequences of returning to China.

[14] The Respondent further asserted that evidence of the Applicant's actual knowledge was ambiguous, which could explain why the RPD concluded that she knew or should have known of the consequences of her actions. However, in its reasons, the RPD did not conduct any analysis of the specific evidence given by the Applicant as to her actual knowledge, nor did it conclude that her evidence was ambiguous. It is not open to the Respondent to attempt to bolster the decision under review by advancing new reasons not reflected in the decision itself.

[15] Second, I find that the RPD's decision demonstrates an error of reasoning. The RPD's reasons refer to the CBSA's questioning of the Applicant in March of 2014 and accurately reflect what is contained in the Officer's notes of that questioning — namely, that the Officer spoke to the Applicant about the danger of persecution in China and asked whether she still feared persecution. Neither the Officer's notes, nor the RPD's reasons, refer to any discussion or mention of the immigration consequences of reavailment. However, the RPD inferred that, based on a discussion about the risk of persecution, the Applicant knew or ought reasonably to have known that she could lose her status in Canada by making these trips. This inference is flawed as it conflates the issue of whether the Applicant knew that she should not return to China due to a risk of persecution with the Applicant's understanding of the immigration consequences of

reavailment. As recognized by this Court in *Shah v Canada (Citizenship and Immigration)*, 2023 FC 1332 at paragraph 18, the two issues are both logically and factually distinct. It does not follow from the fact that the Applicant returned to China knowing that her personal safety would be at risk that she also knew doing so might put her refugee status in Canada in jeopardy.

[16] I acknowledge that an applicant's lack of actual knowledge of the immigration consequences of their actions may not be determinative of the question of intent to reavail. However, it is a key factual consideration that the RPD must examine, along with the other relevant factors, to determine whether the Applicant has rebutted the presumption. Having failed to properly do so, I find that the RPD's determination that the Applicant did not rebut the presumption under the second element of the reavailment test was unreasonable. As such, the decision shall be set aside and the Minister's cessation application shall be remitted to the RPD for redetermination by a different member.

[17] The parties propose no question for certification and I agree that none arises.

JUDGMENT in IMM-4693-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted, the decision of the Refugee Protection Division dated March 28, 2023, is hereby set aside and the matter shall be remitted to the Refugee Protection Division for redetermination by a different member.

2. The parties proposed no question for certification and none arises.

"Mandy Aylen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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