Federal Court  Cour fédérale

Date: 20220728

Docket: IMM-4780-21

Citation: 2022 FC 1143

Ottawa, Ontario, July 28, 2022

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

LUIS CARLOS ALBARRACIN CABALLERO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Luis Carlos Albarracin Caballero, seeks judicial review of a decision of the Refugee Protection Division ("RPD") dated June 15, 2021, ceasing the Applicant's Convention refugee status pursuant to subsection 108(2) of the *Immigration and Refugee*

Protection Act, SC 2001, c 27 ("*IRPA*"). The RPD found that the Applicant had voluntarily reavailed himself of the protection of Colombia.

[2] The Applicant became a permanent resident of Canada on August 10, 2011, following the success of his refugee claim based on a fear of persecution in Colombia at the hands of individuals connected with the Revolutionary Armed Forces of Colombia ("FARC").

[3] The Applicant submits that the RPD's decision is unreasonable because the RPD erred in its finding of reavailment where the agents of persecution is a non-state actor and failed to properly assess whether the Applicant intended to reavail himself of the protection of Colombia.

[4] For the reasons that follow, I find the RPD's decision to be reasonable. I therefore dismiss this application for judicial review.

II. **Facts**

A. *The Applicant*

[5] The Applicant is a 47-year-old citizen of Colombia. His wife, Catherine Juliet Chacon Ceballos ("Ms. Chacon"), is also a citizen of Colombia. Together, they have one son: Pablo Albarracin Chacon (age 5). The Applicant also has three adult children from a previous relationship, one of whom received permanent resident status in Canada upon being sponsored by the Applicant under the Family Class.

B. *The Applicant's Refugee Claim*

[6] The Applicant's family own land and properties in the Barranquilla region of Colombia. In February and August 1997, the Applicant states that individuals connected with the FARC threatened his family, attempted to kidnap members of his family and robbed his family home.

[7] In 2008, the Applicant's sister received intimidating phone calls inquiring about her father's properties. This prompted her and her husband to seek asylum in Canada.

[8] On March 27, 2009, the Applicant alleges that two men came to his home and inquired about the land owned by his father. On the same day, the Applicant received a threatening phone call. On March 29, 2009, the Applicant fled to the United States. On April 16, 2009, he crossed into Canada and made a refugee claim based on his fear of persecution from the FARC.

[9] On June 28, 2010, the Applicant was granted Convention refugee status in Canada.

C. *Travels to Colombia and Cessation Application*

[10] On October 7, 2011, the Applicant obtained a Colombian passport.

[11] Between December 2011 and January 2020, the Applicant made nine trips to Colombia. He alleges that every trip was for the purpose of spending time with Ms. Chacon and his children who reside in Colombia. The Applicant was in Colombia during the following periods:

1. December 22, 2011 – January 6, 2012;
2. December 24, 2012 – January 16, 2013;
3. December 23, 2013 – January 16, 2014;
4. December 24, 2014 – January 16, 2015;
5. June 26, 2015 – August 26, 2015;
6. March 1, 2016 – October 3, 2016;
7. January 2018 (for a duration of "three to four weeks");
8. January 2019 (for a duration of "three to four weeks"); and
9. January 2020 (for a duration of "three to four weeks");

[12] On January 2, 2016, upon re-entering Canada from the US, a Canada Border Services officer ("CBSA Officer") questioned the Applicant about his multiple trips to Colombia. The CBSA Officer referred the Applicant to the Minister for cessation of his refugee status.

[13] On August 10, 2020, the Minister made an application to the RPD for the cessation of the Applicant's refugee protection pursuant to subsection 108(2) of the *IRPA.*

D. *Decision Under Review*

[14] In a decision dated June 15, 2021, the RPD allowed the Minister's application for cessation of the Applicant's refugee status. The RPD found the Applicant had voluntarily reavailed himself of the protection of Colombia.

[15] In considering whether the Applicant voluntarily reavailed himself of Colombia's protection pursuant to paragraph 108(1)(a) of the *IRPA*, the RPD cited the United Nations' High Commission of Refugees Handbook on Procedures and Criteria for Determining Refugee Status ("UNHCR Handbook") and laid out the three-part test for reavailment. At paragraphs 118-121, the UNHCR Handbook sets out the requirements for making a finding that a refugee has voluntarily reavailed themselves of the protection of their country of nationality, pursuant to Article 1 C(1) of the Refugee Convention:

> 118. […] A refugee who has voluntarily reavailed himself of national protection is no longer in need of international protection. He has demonstrated that he is no longer "unable or unwilling to avail himself of the protection of the country of his nationality".
>
> 119. This cessation clause implies three requirements:
>
> a) voluntariness: the refugee must act voluntarily;
>
> b) intention: the refugee must intend by his action to reavail himself of the protection of the country of his nationality;
>
> c) reavailment: the refugee must actually obtain such protection.
>
> 120. If the refugee does not act voluntarily, he will not cease to be a refugee. If he is instructed by an authority, e.g. of his country of residence, to perform against his will an act that could be interpreted as a reavailment of the protection of the country of his nationality, such as applying to his Consulate for a national passport, he will not cease to be a refugee merely because he obeys such an instruction. He may also be constrained, by circumstances beyond his control, to have recourse to a measure of protection from his country of nationality. He may, for instance, need to apply for a divorce in his home country because no other divorce may have the necessary international recognition. Such an act cannot be considered to be a "voluntary reavailment of protection" and will not deprive a person of refugee status.
>
> 121. In determining whether refugee status is lost in these circumstances, a distinction should be drawn between actual reavailment of protection and occasional and incidental contacts

> with the national authorities. If a refugee applies for and obtains a national passport or its renewal, it 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. On the other hand, the acquisition of documents from the national authorities, for which non-nationals would likewise have to apply – such as a birth or marriage certificate – or similar services, cannot be regarded as a reavailment of protection.

[16] The RPD found that the exceptions laid out in paragraphs 120-121 of the UNHCR Handbook do not apply to the Applicant's case since he applied for and obtained a Colombian passport voluntarily, and returned to Colombia two months after the issuance of his Colombian passport. As of the date of the RPD hearing, the RPD noted that the Applicant had returned to Colombia at least nine times.

[17] During the hearing before the RPD, the Applicant provided explanations for his return visits to Colombia and testified that all of his visits to Colombia were necessary and family-related. The Applicant indicated that he returned to visit his children and Ms. Chacon, and to care for Ms. Chacon when she was unwell. The RPD found that the nine visits, "on a balance of probabilities, were clearly not emergency visits to attend to any urgent family matter".

[18] The Applicant testified that his seven-month stay in Colombia from March 1, 2016 to September 27, 2016 was due to his wife's high-risk pregnancy. However, the RPD noted that the Applicant did not stay in Colombia for the birth of his son, which occurred on January 29, 2017. The RPD accepted the medical documentation demonstrating Ms. Chacon's pregnancy complications, yet found that the Applicant's 2016 stay in Colombia was not motivated by his wife's poor health. In particular, the RPD noted that the pregnancy did not even begin until two

months after the Applicant's March 2016 arrival. Moreover, the Applicant went on a vacation to Florida with Ms. Chacon when she was five-months pregnant, demonstrating that Ms. Chacon's medical state did not require the Applicant to remain in Colombia.

[19] The Applicant also testified that he mostly stayed in Ms. Chacon's apartment while in Colombia. However, the RPD noted that the Applicant attended a wedding reception with approximately 110 guests on January 5, 2013. Relying on this Court's decision at paragraph 26 in *Abechkhrishvili v Canada (Citizenship and Immigration),* 2019 FC 313, the RPD decision underlines that a person must actually be in hiding to successfully rebut the presumption of reavailment.

[20] The RPD determined that whether the Applicant intended to obtain a Colombian passport to deal with family matters is immaterial since he voluntarily used his Colombia passport to return to Colombia multiple times and failed to demonstrate that there were exceptional reasons in his case for procuring a Colombian passport. By applying for, obtaining and returning to Colombia on his new Colombian passport, the Applicant established his intent to reavail. The RPD also found that the act of returning to Colombia demonstrates the Applicant's lack of subjective fear, and that his intention constitutes reavailment. The Applicant was not under any duress in choosing to return to Colombia. He also voluntarily presented himself before the Colombian consulate and obtained a passport to travel to and from the very country against which he made his refugee claim.

III. **Issue and Standard of Review**

[21] The sole issue in this application for judicial review is whether the RPD's decision is reasonable.

[22] The parties concur that the applicable standard of review is reasonableness. I agree (*Ahmed v Canada (Citizenship and Immigration),* 2022 FC 884 at para 13; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("*Vavilov*") at para 25).

[23] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13). The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified (*Vavilov* at para 15). 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 (*Vavilov* at para 85). Whether a decision is reasonable depends on the relevant administrative setting, the record before the decision-maker, and the impact of the decision on those affected by its consequences (*Vavilov* at paras 88-90, 94, 133-135).

[24] For a decision to be unreasonable, the applicant must establish the decision contains flaws that are sufficiently central or significant (*Vavilov* at para 100). Not all errors or concerns about a decision will warrant intervention. A reviewing court must refrain from reweighing evidence before the decision-maker, and it should not interfere with factual findings absent exceptional circumstances (*Vavilov* at para 125). Flaws or shortcomings must be more than

superficial or peripheral to the merits of the decision, or a "minor misstep" (*Vavilov* at para 100; *Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156 at para 36).

IV. **Analysis**

[25] Pursuant to paragraph 108(1)(a) of the *IRPA*, a claim for refugee protection shall be rejected and a person is no longer a Convention refugee if they voluntarily reavail themselves of the protection of their country of nationality. As noted by the Federal Court of Appeal in *Canada (Citizenship and Immigration) v Bermudez*, 2016 FCA 131, cessation of refugee protection "[…] is based on the premise that refugee protection is a temporary remedy against persecution. It is no longer available when the circumstances enumerated in subsection 108(1) of the IRPA arise" (at para 22).

[26] In *Canada (Citizenship and Immigration) v Galindo Camayo*, 2022 FCA 50 ("*Camayo*"), the Federal Court of Appeal recently affirmed that the outcome of each cessation proceeding will be largely fact-dependent (at para 83). At paragraph 84 of *Camayo,* the Court provides guidance regarding rebutting the presumption of reavailment, including a list of factors to consider, and notes:

> […]No 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.

[27] The Applicant submits that the RPD erred by failing to consider how the agents of persecution he fears in Colombia (FARC) are non-state actors, and not the Colombian government. The Applicant argues that by acquiring a Colombian passport and travelling to Colombia, he did not expose himself to the FARC. He also did not intend to reavail himself of the protection of Colombia, nor did he in fact actually obtain such protection. The Applicant submits that there is a distinction between actual reavailment of protection and occasional and incidental contacts with authorities. Since the FARC does not control entries and exits to Colombia, nor does it issue passports, it does not follow that the Applicant reavailed himself by obtaining a Colombian passport.

[28] The Applicant further submits that the RPD failed to adequately consider the Applicant's circumstances and to "[…]carry out an individualized assessment of all the evidence before it […]" (*Camayo* at para 66). The Applicant argues that he obtained his Colombian passport because his refugee travel document did not allow him to return to Colombia and that he kept a "low profile" while in Colombia. He also maintains that he returned to Colombia for reasons beyond his control: to attend to the health needs of his wife, including a high-risk pregnancy and mental health issues, and to support his three children who could not leave Colombia.

[29] The Respondent submits that the Applicant's arguments attempt to minimize the fact that he voluntarily chose to travel back to Colombia several times for non-urgent matters on a Colombian passport, which he willingly obtained in 2011 for the purpose of international travel. The Respondent argues that the RPD reasonably noted that "diplomatic protection" is what is relevant when considering cessation, and not the availability of state protection. Moreover, it

was reasonable of the RPD to conclude that the Applicant had actually obtained the protection of Colombia. Ultimately, the Applicant failed to rebut the presumption that he intended to reavail himself of the protection of Colombia. The Respondent also maintains that the RPD did not fail to consider any of the Applicant's evidence or his specific circumstances and adequately considered the Applicant's testimony, including his responses to the RPD's questions regarding the nature and purpose of his travels to Colombia.

[30] I agree with the Respondent's position. With respect to the Applicant's arguments regarding the agents of persecution, the focus of the three-part reavailment test is on the Applicant's actions: the refugee protection regime does not distinguish between state and non-state actors (See *Chowdhury v Canada (Citizenship and Immigration),* 2021 FC 312 at para 23). This was also clearly noted by the RPD in its decision, when it addressed the Applicant's submissions that his refugee claim was based on a fear of persecution from non-state actors (FARC) and not based on a fear of the government of Colombia:

> The [Applicant] based his claim for refugee protection on a fear of the FARC in Colombia. Regarding this, the [Applicant] submitted that it was a non-state actor that had compelled him to originally seek refugee protection. The panel finds this to be not a relevant argument in an analysis of diplomatic protection. The Minister has referred to the Federal Court in *Chowdhury* where the Court has confirmed that the test for reavailment does not distinguish between state and non-state actors and that the focus of the test is the [Applicant]'s actions. The panel finds that the act of returning to Colombia demonstrates the [Applicant]'s lack of alleged subjective fear.

[31] Additionally, while the Applicant argues that he kept a "low profile" while in Colombia, I find that the RPD reasonably concluded that the Applicant had not demonstrated he was in

hiding while in Colombia. As rightly pointed out by the Respondent, over 100 guests attended the Applicant and Ms. Chacon's wedding in Colombia, and the couple honeymooned in the city of Cartagena. This is not behaviour indicative of a person who is taking steps to conceal their presence in a country.

[32] I also disagree with the Applicant's arguments that the RPD failed to account for the Applicant's circumstances or the evidence on record. As noted by the RPD, the Applicant returned to Colombia on at least nine occasions, and remained in Colombia for a cumulative period of roughly fifteen months over those nine visits. I find that the RPD considered the Applicant's reasons for his return trips to Colombia, including his explanation for why these trips were necessary. Based on this, the RPD reasonably concluded that the Applicant's visits to Colombia were not undertaken in "exceptional circumstances".

[33] Furthermore, as noted by the Respondent, the evidence does not indicate that the Applicant's trips to Colombia were emergency visits to attend to urgent family matters. Rather, the evidence demonstrates that the Applicant travelled on his own terms and his annual visits coincided with his available time off work, often over the Christmas holidays. The RPD accepted the medical evidence showing Ms. Chacon's high-risk pregnancy, yet properly concluded that the pregnancy was not the Applicant's primary motivation for travelling to Colombia in 2016, since Ms. Chacon only became pregnant a few months after the Applicant's arrival to Colombia.

[34] As rightly noted by counsel for the Respondent during the hearing, it is not enough for the Applicant to provide reasons for his travel – these reasons must explain why the circumstances surrounding the nine visits to Colombia were exceptional. In my view, it was reasonable of the RPD to find the Applicant's explanations unsatisfactory. I also find that the RPD's decision shows adequate engagement with the Applicant's circumstances and evidence.

[35] Overall, I find that the RPD considered all three elements of the test for cessation of refugee protection and that the RPD's decision complies with this Court's jurisprudence, including the factors recently outlined in *Camayo.*

V. **Conclusion**

[36] For the reasons above, I find the RPD's decision to be reasonable. I therefore dismiss this application for judicial review. No questions for certification were raised and I agree that none arise.

JUDGMENT IMM-4780-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question to certify.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4780-21
STYLE OF CAUSE:	LUIS CARLOS ALBARRACIN CABALLERO v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	BY VIDEOCONFERENCE
DATE OF HEARING:	JUNE 21, 2022
JUDGMENT AND REASONS:	AHMED J.
DATED:	JULY 28, 2022

APPEARANCES:

Omolola Fasina	FOR THE APPLICANT
Neeta Logsetty	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Omolola Fasina Barrister and Solicitor London, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT