Federal Court  Cour fédérale

Date: 20220727

Docket: IMM-1402-21

Citation: 2022 FC 1125

Ottawa, Ontario, July 27, 2022

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

HAMED SAFI

Respondent

JUDGMENT AND REASONS

[1] This is the judicial review of the decision of the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada finding that refugee protection for the Respondent had not ceased pursuant to s 108(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

Background

[2] The Respondent is a citizen of Afghanistan. In October 2016, the RPD determined that he was a Convention refugee by reason of imputed political opinion. The Respondent claimed that he was employed by the Afghanistan Investment Support Agency, a government agency in Kabul, where he occupied a senior position and worked closely with representatives of NATO, United States [US] officials and US companies. He claimed that he was harassed by criminals and threatened by the Taliban in connection with his work and feared that he would be harmed or killed by the Taliban if he returned to Afghanistan.

[3] The Respondent became a permanent resident of Canada on July 12, 2018.

[4] Subsequently, he travelled to Afghanistan twice, using his Afghan passport. He also travelled to India, having obtained a visa, and Australia, although it is unclear if the Respondent utilized his Afghan passport for the latter trip.

[5] Upon his return to Canada in September 2019, Canada Border Services Agency [CBSA] conducted a secondary examination of the Respondent. The Solemn Declaration of the CBSA examining officer records the content of that interview. The Respondent indicated that had travelled to Delhi, India on July 25, 2019, Kabul, Afghanistan from July 26 to September 15, 2019 , Delhi, India on September 15, 2019 and Sydney Australia September 16-25, 2019. He stated that he was pursuing a Ph.D. in developmental studies at the Tata Institute of Social Sciences in Mumbai, India, and the reason he returned to Afghanistan was because his research

work was there. He was working on conflict minerals and needed to collect data for his research, which collected through interviews, focus groups and observations. The Respondent confirmed that he had also returned to Afghanistan on a previous occasion.

[6] On October 9, 2019, the Minister filed an Application to Cessate Refugee Protection seeking to have the Respondent's refugee protection cessated.

[7] By decision dated February 17, 2021, the RPD refused the Minister's application and found that the Respondent's refugee protection had not ceased. That decision is the subject of this application for judicial review.

Decision under review

[8] The RPD noted that the test for reavailment is set out in the 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, [UNHCR Handbook] and has been affirmed by decisions of this Court. The Minister must establish that the refugee: i) acted voluntarily; ii) intended by their action to reavail themselves of the protection of the country of their nationality; and, iii) actually obtained such protection.

[9] The RPD found the Respondent to be credible.

[10] The RPD also found that the circumstances of the Respondent's travel were voluntary. He could have chosen a different research topic for his Ph.D. or conducted his research virtually.

Accordingly, the RPD found that the Respondent voluntarily chose to return to Afghanistan twice and used his Afghan passport to do so.

[11] As to the intention to reavail and actual reavailment, the RPD referenced the UNHCR Handbook as providing that a refugee's use of their passport from their country of origin creates a presumption, in the absence of proof to the contrary, that the refugee intended to reavail and actually reavailed themselves of the protection of their country of origin. The RPD found that the presumption applied in the Respondent's circumstances as there was no dispute that he had travelled to Afghanistan using his Afghan passport.

[12] The RPD stated that the issue then became whether or not the Respondent had rebutted the presumption that he intended to and actually did reavail of the protection of Afghanistan. The RPD accepted the Respondent's submission that while he was aware that he could not travel to Afghanistan when he had a Refugee Travel Document – which clearly stated that travelling to his country of origin was not permitted – when he received his Permanent Resident Card it contained no such wording and he believed that, because his status had changed from being a refugee to a permanent resident, his ability to travel to Afghanistan had also changed. He had spoken to friends and done some internet research and found nothing on the Canadian immigration website that disabused him of this notion. The RPD accepted that the Respondent was unaware that the consequence of travelling to Afghanistan as a permanent resident using his Afghan passport was the potential of cessation proceedings.

[13] The RPD then considered whether this lack of knowledge was sufficient to rebut the presumption of intention to avail and to actually avail. Referencing *Abadi v Canada (Citizenship and Immigration)*, 2016 FC 29 [*Abadi*], *Okojie v Canada (Citizenship and Immigration)*, 2019 FC 1287 [*Okojie*], *Cerna v Canada (Citizenship and Immigration*, 2015 FC 1074 [*Cerna*] and *Mayell* v *Canada (Citizenship and Immigration*), 2018 FC 139 [*Mayell*], the RPD stated that the law on this point is mixed. However, that Justice Furher's decision in *Camayo v Canada (Citizenship and Immigration)*, 2020 FC 123 [*Camayo*] supported the RPD's view that circumstances surrounding a person's subjective intention when they return to their country under diplomatic protection, as the Respondent had done, "would not be complete if there was no understanding as to what his subjective intention was and, along with that, whether or not he understood the consequences of his actions". And, as found in *Camayo*, in cessation cases a narrow interpretation is the only reasonable approach.

[14] The RPD concluded that the Respondent had successfully rebutted the presumption that he had the requisite intention to reavail. While the Respondent could have done more to inform himself of the consequences of returning to Afghanistan under diplomatic protection, the failure to do more investigation was not a determinative factor. The RPD also found that the Applicant had stayed within the confines of his parents' house almost the entire time he was in Afghanistan except for three or four in-person visits and focus groups in Kabul, an afternoon drive and, taking a bus to do interviews. The RPD stated that for the most part the Respondent had tried to keep a low profile, which the RPD took to mean that the Respondent was not comfortable with the idea that the state could protect him, and that these factors were relevant but not determinative as to whether he intended to re-avail.

[15] The RPD concluded by stating, having taken all of the evidence into account, it found that the Respondent had rebutted the presumption of having the intention to reavail, on the balance of probabilities, because even though he used his Afghan passport to return to his country of origin, he was not aware of the severe consequences of doing so and did not intend to accept Afghanistan's diplomatic protection.

Issue and standard of review

[16] The sole issue in this matter is whether the RPD's decision was reasonable.

[17] The parties submit, and I agree, that when the Court reviews the merits of an administrative decision, such as the decision of the RPD, the presumptive standard of review of reasonableness applies (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 23 and 25). On judicial review, the Court "asks whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para 99).

Relevant Legislation

Immigration and Refugee Protection Act, SC 2001, c 27 [IRPA]

> Rejection
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> 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:
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> > (a) the person has voluntarily reavailed themself of the protection of their country of nationality;

> (b) the person has voluntarily reacquired their nationality;
>
> …
>
> (e) the reasons for which the person sought refugee protection have ceased to exist.
>
> Cessation of refugee protection
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> (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).

Positions of the parties

Minister's position

[18] The Minister submits that the main issue arising in this matter is whether the RDP reasonably concluded that the presumption of the intention to reavail and of actual reavailment was rebutted. The Minister submits that the RPD narrowed its consideration almost exclusively to the Respondent's knowledge of cessation and failed to grapple with the evidence more broadly within its cessation analysis. This near-singular focus on the Respondent's subjective knowledge of the consequences of return was an unreasonably narrow interpretation of the law of cessation.

[19] More specifically, that once the presumption is triggered, it is only rebutted where the refugee establishes, on a balance of probabilities, that exceptional circumstances existed to justify the travel to their country of origin. The Minister notes that *Camayo*, relied upon by the RPD, was the subject of an appeal to the Federal Court of Appeal in *Canada (Citizenship and Immigration) v Galindo Camayo*, 2022 FCA 50 [*Galindo Camayo FCA*]. There, the Federal Court of Appeal set out the factors to be considered when assessing whether the presumption has

been rebutted and indicated that the focus of the RPD's analysis should be on whether the refugee's conduct, based on all of the evidence, shows that they intended to waive Canada's protection.

[20] The Minister submits that no single factor identified in *Galindo Camayo FCA* is necessarily dispositive and that all of the evidence going to these factors should be considered and balanced in assessing whether the presumption of reavailment has been rebutted. Further, that it is of note that some of the identified factors are relevant to triggering the presumption in the first place, particularly the use of a passport to travel to the refugee's country of origin.

[21] The Minister submits that the RPD failed to balance all of the evidence assessing whether the presumption had been rebutted. In particular, the RPD failed to consider, within the context of exceptional circumstances, the Respondent's lack of precautions to ensure his own safety in Afghanistan and, the purpose of his travel. Further, that the RPD was silent on the issue of subjective fear. Where a refugee has no subjective fear, it can reasonably be concluded that they intended to reavail of their country of nationality's diplomatic protection. The Respondent submits that while there was considerable evidence before the RPD that supported a lack of subjective fear, the RPD unreasonably failed to assess it and to grapple with that question.

[22] The Minister submits that the RPD essentially found that the purpose of the Respondent's travel was not for an exceptional reason but did not consider the consequences of such a finding within the context of its broader cessation analysis. The RPD only considered the purpose of the Respondent's travel in finding that his actions were voluntary, but the purpose of travel also goes

to whether exceptional circumstances are established. The RPD's conclusion on voluntariness conflicts with a finding of exceptional circumstances because the RPD found that the Respondent's trips for academic research were unnecessary.

[23] The Minister submits that the RPD's approach was, in effect, that a simple failure to appreciate the legal consequences of returning to one's country of nationality prevents the application of s 108 of the IRPA without regard to the refugee's broader circumstances. This approach was inconsistent with jurisprudence that existed at the time of the RPD's decision as well as that subsequently set out by the Federal Court of Appeal in *Galindo Camayo FCA*.

[24] The Minister also asserts that the RPD misread *Camayo*, which case was also factually distinct.

Respondent's position

[25] The Respondent submits that the Federal Court of Appeal in *Galindo Camayo FCA* found that a refugee's knowledge of the legal consequences of their travel back to their country of origin – the possible loss of their permanent residence status due to reavailment – is a key but not determinative factor when assessing whether the refugee has rebutted the subjective intention to reavail of the protection of that country.

[26] The Respondent submits that the Minister's focus on the justification or reasons for a refugee's return to their country of origin, and the Minister's view that this must be exceptional, is misplaced and not aligned with *Galindo Camayo FCA.* There, the Court of Appeal held that

this is only one factor to consider and it set out a spectrum when considering the purpose of travel, ranging from compelling to frivolous. The Respondent submits that some purposes may be neutral. Further, that the Court of Appeal did not indicate that it is a key factor. Here, while the purpose of the Respondent's return to Afghanistan was not compelling, nor was it frivolous.

[27] The Respondent submits that it is not only in exceptional circumstances that the presumption can be rebutted. Rather, it can be rebutted by impugning the presumption of intent (subjective intent) or by actual reavailment, the second and third parts of the test. The Respondent submits that the Minister is attempting to elevate exceptional circumstances to a necessary condition to successfully rebut the presumption of reavailment. Alternatively, the Respondent submits that the Minister has taken an excessively narrow interpretation of exceptional circumstances. The ambit of exceptional circumstances should include a refugee's subjective understanding of the consequences of their actions.

[28] The Respondent submits that the RPD did not ignore the purpose of his travel, rather, this was weighed along with broader factors that the RPD set out. The Respondent submits that with respect to the second part of the test for reavailment – subjective intent – the simple purpose of the refugee's return to the country of origin is but one factor to be considered. The Respondent submits that the Minister conflates the issues of subjective intent to reavail and the factors that bear on that issue with the simple question of what was the purpose of the refugee's return to their country of origin and whether that is exceptional or not.

[29] Further, the RPD stated that it had considered all of the evidence when finding that the presumption had been rebutted, therefore, the RPD impliedly considered the reason for the Respondent's return to Afghanistan as part of that assessment.

[30] The Respondent submits that the Minister has not demonstrated any error in the treatment of the evidence by the RPD and that it is not the role of this Court to reweigh the evidence considered by the RPD in making its determination on the intent of the Respondent to reavail himself of the protection of his country of origin.

Analysis

[31] Article 1(C)(1) of the *United Nations Convention Relating to the Status of Refugees* [Convention] provides that the Convention shall cease to apply in the specified circumstances, including where they have voluntarily reavailed of the protection of their nationality. This is reflected in s 108(1)(a) of the IRPA.

[32] It is not in dispute that, for refugee protection to cease pursuant to s 108 of the IRPA, three conditions must be met: (i) the refugee must act voluntarily; (ii) the refugee must intend by their action to reavail themselves of the protection of the country of their nationality; and (iii) the refugee must actually obtain such a protection (see: the UNHCR Handbook; and, for example, *Maqbool v Canada (Citizenship and Immigration)*, 2016 FC 1146 at para 33; *Siddiqui v Canada (Citizenship and Immigration)*, 2015 FC 329 at para 28, aff'd 2016 FCA 134 at para 28; *Seid v. Canada (MCI)*, 2018 FC 1167 [*Seid*] at para 13) s 14-15 and 20; *Ahmed v Canada (Minister of Citizenship and Immigration), 2022 FC 884* at para 22 [*Ahmed*].

[33] The onus is on the Minister to prove, on the balance of probabilities, that the person subject to the cessation application has voluntarily reavailed themselves of the protection of the country they fled from to avoid persecution. However, if the Minister is able to demonstrate that the person has obtained or renewed a passport from that country, then the burden of proof is reversed (*Abadi* at para 17; *Canada (Citizenship and Immigration) v Nilam*, 2015 FC 1154 at para 26 [*Nilam*]; *Li v Canada (Citizenship and Immigration)*, 2015 FC 459 at para 42 [*Li*]). It is then presumed that the refugee intended to reavail themselves of the protection of the country in question. It is also presumed that the refugee has obtained the actual protection of that country when the Minister establishes that the refugee has used that passport to travel (*Seid* at para 14; *Mayell* at para 12). As noted in *Seid*, this Court has characterized that presumption as "particularly strong" when the refugee has used his or her passport to travel to the country of nationality (*Seid* at para 14, citing *Abadi* at para 16; see also *Galindo Camayo FCA* at para 63).

[34] Reavailment brings into question a refugee's fear of returning to their country of origin. "Reavailment 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" *(Ortiz Garcia v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 1346 at para 8; *Galindo Camayo FCA* at para 64).

[35] However, the presumption of reavailment may be rebutted. The onus is on the refugee to adduce sufficient evidence to rebut the presumption (*Nilam* at para. 26; *Li* at para. 42; *Galindo Camayo FCA* at para 65).

[36] In *Galindo Camayo FCA*, the Federal Court of Appeal found that the RPD should have carried out an individualized assessment of all of the evidence before it, including evidence adduced by the refugee as to her subjective intent, in determining whether the presumption of reavailment had been rebutted. This included whether she subjectively intended by her actions to depend on the protection of her country of nationality. Because the RPD in *Camayo* had failed to find that the refugee's evidence on that point lacked credibility, the RPD was deemed to have accepted her claim that she did not know that using her Columbian passport to return to Columbia, and to travel elsewhere, could result in her being deemed to have reavailed herself of Columbia's protection, and that this was not her intent.

[37] In responding to the Minister's submission that the cessation provisions of the IRPA would be stripped of any meaning if it was sufficient for an individual faced with a cessation application to simply state that they did not know that their actions could have put their status in Canada in jeopardy, the Court of Appeal stated:

> [70] An individual's lack of actual knowledge of the immigration consequences of their actions may not be *determinative* of the question of intent. It is, however, a key factual consideration that the RPD must either weigh in the mix with all of the other evidence, or properly explain why the statute excludes its consideration.
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> (emphasis original)

[38] The Court of Appeal stated that the RPD was required to take account of the state of the applicant's actual knowledge and intent before concluding that she had intended to reavail herself of Columbia's protection and, without such an analysis, the RPD's decision was unreasonable (citing *Cerna* at paras 18-19; *Mayell* at paras 17-19).

[39] Ultimately, the Federal Court of Appeal agreed with the Federal Court that the outcome in each cessation proceeding will be largely fact-dependent and that the test for cessation should not be applied in a mechanistic or rote manner. The Court of Appeal held that the 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:

> [84] Thus, in dealing with cessation cases, the RPD should have regard to the following factors, at a minimum, which may assist in rebutting the presumption of reavailment. 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.
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> - The provisions of subsection 108(1) of *IRPA*, which operate as a constraint on the RPD in arriving at a reasonable decision: *Vavilov* SCC, above at paras. 115-124;
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> - The provisions of international conventions such as the *Refugee Convention* and guidelines such as the *Refugee Handbook*, as international law operates as an important constraint on administrative decision makers such as the RPD. Legislation is presumed to operate in conformity with Canada's international obligations, and the legislature is "presumed to comply with ... the values and principles of customary and conventional international law": *Vavilov* SCC, above at para. 114, citing *R. v. Hape*, 2007 SCC 26 at para. 53; *R. v. Appulonappa*, 2015 SCC 59 at para. 40; see also *IRPA*, paragraph 3(3)(*f*).
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> - The severity of the consequences that a decision to cease refugee protection will have for the affected individual. Where the impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes: *Vavilov* SCC, above at paras. 133-135;
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> - The submissions of the parties. The principles of justification and transparency require that an administrative decision maker's reasons meaningfully engage with the

central issues and the concerns raised by the parties: *Vavilov* SCC, above at paras. 127-128;

- The state of the individual's knowledge with respect to the cessation provisions. Evidence that a person has returned to her country of origin in the full knowledge that it may put her refugee status in jeopardy may potentially have different significance than evidence that a person is unaware of the potential consequences of her actions;

- The personal attributes of the individual such as her age, education and level of sophistication;

- The identity of the agent of persecution. That is, does the individual fear the government of her country of nationality or does she claim to fear a non-state actor? Evidence that a person who claims to fear the government of her country of nationality nevertheless discloses her whereabouts to that same government by applying for a passport or entering the country may be interpreted differently than evidence with respect to individuals seeking passports who fear non-state actors. In this latter situation, applying for a passport or entering the country will not necessarily expose the individual to their agent of persecution. This may be especially so when all the individual has done is apply for a passport: applying for a passport may have little bearing on the risk faced by a victim of domestic violence, for example, or her level of subjective fear;

- Whether the obtaining of a passport from the country of origin is done voluntarily;

- Whether the individual actually used the passport for travel purposes. If so, was there travel to the individual's country of nationality or to third countries? Travel to the individual's country of nationality may, in some cases, be found to have a different significance than travel to a third country;

- What was the purpose of the travel? 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;

- What the individual did while in the country in question;

- Whether the individual took any precautionary measures while she was in her country of nationality. Evidence that an individual took steps to conceal her return, such as remaining sequestered in a home or hotel throughout the visit or engaging private security while in the country of origin, may be viewed differently than evidence that the individual moved about freely and openly while in her country of nationality;

- Whether the actions of the individual demonstrate that she no longer has a subjective fear of persecution in the country of nationality such that surrogate protection may no longer be required;

- Any other factors relevant to the question of whether the particular individual has rebutted the presumption of reavailment in a given case; and

- The frequency and duration of the travel.

[40] Three questions had been certified in *Camayo*. The Federal Court of Appeal found that the first question no longer needed to be answered and it reformulated the second and third questions as follows, answering them both in the affirmative:

1. Is it reasonable for the RPD to rely on evidence of the refugee's lack of subjective [let alone any] knowledge that use of a passport confers diplomatic protection to rebut the presumption that a refugee who acquires and travels on a passport issued by their country of origin has intended to avail themselves of that state's protection?

2. Is it reasonable for the RPD to rely upon evidence that a refugee took measures to protect themselves against their agent of persecution [or that of their family members who is the principal refugee applicant] to rebut that presumption that a refugee who acquires [or renews] a passport issued by their country of origin and uses it to return to their country of origin has intended to avail themselves of that state's protection?

[41] I note in passing here that while the RPD, in making the decision that is the subject of review in this matter relied on *Camayo*, did not have the benefit of the reasons of the Federal Court of Appeal in *Galindo Camayo FCA.*

[42] In this matter, it is not disputed that the presumption of the intention to reavail and of actual reavailment was triggered when the Respondent, who had been granted refugee protection in Canada and held permanent residence status, used his Afghan passport to twice travel to Afghanistan. At issue is whether the RPD erred in its determining the Respondent had rebutted the presumption of having the intention to reavail because he claimed that he was not aware of the severe consequences of doing so and that he did not intend to accept Afghanistan's diplomatic protection.

[43] Given the RPD's reliance on *Camayo* and the Federal Court of Appeal's determinations in *Galindo Camayo FCA,* set out above, it is clear that it was reasonable for the RPD to consider, when assessing whether the Respondent had rebutted the presumption of reavailment, the subjective state of his knowledge with respect to the cessation provisions. The RPD found the Respondent to be credible. It accepted his evidence that he was unaware that the consequence of travelling to Afghanistan using his Afghan passport could be the commencement of cessation proceedings and the loss of his permanent residence status.

[44] Similarly, it was reasonable for the RPD to consider, with respect to the rebutting of the presumption of his intention to reavail, the Respondent's evidence that he took measures to protect himself from the Taliban.

[45] The Minister takes exception to the RPD's treatment of the Respondent's evidence. The Minster submits that the evidence should have been assessed differently. For example, the RPD failed to reasonably consider the Respondent's conduct in Afghanistan. This included his testimony indicating that his activities in Afghanistan were more extensive than suggested by the RPD, were far from clandestine, and he made his presence widely known to others. The Minister submits that the RPD also failed to engage with the fact that the Respondent provided no evidence of any concrete precautions taken to protect him during his stay in Kabul, where he claimed to have been at risk from the Taliban.

[46] However, the Minister does not point to an actual error of fact nor do its submissions support a finding of a fundamental misapprehension of, or failure to account for, the evidence. And, having read the transcript of the cessation hearing, I am satisfied that the decision accurately describes the Respondent's testimony and the RPD's reasons demonstrate that it considered and balanced all of the evidence before it. In essence, the Minister disagrees with the RPD's findings of fact and is challenging the weight afforded to the evidence by the RPD. However, it is not the role of this Court to reassess and reweigh the evidence and it should not interfere with factual findings absent exceptional circumstances. As stated by the Supreme Court in *Vavilov*, "[i]t is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from 'reweighing and reassessing the evidence considered by the decision maker': *CHRC*, at para. 55; see also *Khosa*, at para. 64; *Dr. Q*, at paras. 41-42" (*Vavilov* at para 125; see also *Owolabi v. Canada (Citizenship and Immigration)*, 2021 FC 2 at paras 25-27).

[47] The Minster also submits that the RPD failed to balance all of the evidence *within the context of exceptional circumstances*. In particular, the Respondent's lack of precautions to ensure his own safety in Afghanistan and the purpose of his travel.

[48] The term "exceptional circumstances" appears to originate in section 124 of the UNHCR Handbook:

> **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 re-availment 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 re-availment of protection" and will not deprive a person of refugee status.
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> …
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> **124. Obtaining a national passport or an extension of its validity may, under certain exceptional conditions, not involve termination of refugee status (see paragraph 120 above).** This could for example be the case where the holder of a national passport is not permitted to return to the country of his nationality without specific permission.
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> (emphasis added)

[49] Prior jurisprudence of this Court has made reference to the requirement of "exceptional circumstances". For example, holding that the onus is on an applicant to rebut the presumption of reavailment and, therefore, they must show that there were exceptional circumstances which caused them to travel to their country of origin (*Chokheli v. Canada (Citizenship and*

Immigration), 2020 FC 800 at paras 52, 56). And, "[a]mong other things, if a refugee returns to his or her country of origin on a passport issued by that country, he or she will have to prove that the trip was necessary due to exceptional circumstances to rebut that presumption" (*Seid* at para 15) and that "[i]t is well-recognized in the case law that it is only in 'exceptional circumstances' that a refugee who travels to his/her country of nationality on a passport issued by that country will not result in the termination of refugee protection" (*Din v. Canada (MCI)*, 2019 FC 425 at para 46; *Abadi* at para 18). In *Nilam* this Court stated:

> [26] The prevailing view is, however, that the presumption of re-availment may be rebutted with evidence to the contrary: *Refugee Handbook*, at para. 122. That said, it will only be in "exceptional circumstances" that travel by a refugee to his or her country of nationality on a passport issued by that country will not constitute termination of his or her refugee status: *Refugee Handbook*, at para. 124. The onus is on the refugee to adduce sufficient evidence to rebut the presumption of re-availment: *Li v. Canada (Minister of Citizenship and Immigration)*, 2015 FC 459 at para. 42, [2015] F.C.J. No. 448.

[50] While *Galindo Camayo FCA* does not address the term "exceptional circumstances", it is of note that the broad list of factors that the Federal Court of Appeal set out which are to be considered and balanced by the RPD when assessing whether a refugee's actions have rebutted the presumption of reavailment include not only the UNHCR Handbook as a constraining element, but also whether the obtaining of the passport from the country of origin was done voluntarily and the propose of travel, more specifically, whether travel was for a "compelling reason".

[51] Given this, in my view, it is not necessary in this application to determine the scope of the term "exceptional circumstances". *Galindo Camayo FCA* makes it clear that voluntariness

and purpose of travel (compelling reasons), as well a whether by their actions the refugee has demonstrated that they no longer have a subjective fear of persecution in the country of their nationality, are some of the factors to be considered in determining if the presumption of reavailment has been rebutted. As will be discussed below, in its reasons the RPD addressed these factors.

[52] That said, the Court of Appeal in *Galindo Camayo FCA* also found that in *Camayo* the RPD had "conflated the question of voluntariness with that of intention to reavail and this led, in part, to an unreasonable decision", stating "that the question of whether one intended to reavail oneself of the protection of one's country of origin *has nothing to do with whether the motive for travel was necessary or justified*" (emphasis added). As the Respondent submits, on its face, this would seem contradicted by the list of factors to be considered when assessing whether the presumption of reavailment has been rebutted – which include voluntariness and purpose of travel (compelling reasons), that is, the motive for travel, as well as subjective knowledge of the cessation provisions and the potential consequences of reavailment.

[53] However, reading *Galindo Camayo FCA* in whole, I understand it to find that when determining if the presumption of the intention to reavail as been rebutted, the RPD must be alert to the fact that each cessation case will be highly fact dependant, which requires the RPD to conduct an individualized assessment of all of the evidence before it in the context of the broad list of factors identified by the Court of Appeal, including the purpose of travel (compelling reasons).

[54] In this matter, the crux of the Minister's submission is, essentially, that the RPD erred as it narrowed its analysis of whether the presumption of reavailment to the issue of his knowledge of the consequences of return.

[55] In that regard, I note that the RPD set out the three-part test for cessation. It found that the circumstances under which the Respondent used his passport were not sufficiently compelling to establish that they were not voluntary. Further, given his use of his passport, the presumption arose that he intended to and actually did reavail of the protection of Afghanistan. When considering whether he had rebutted that presumption, the RPD found the Respondent to be credible and accepted his evidence that he was unaware that the consequence of travelling to Afghanistan, while he was a permanent resident of Canada, was the potential of commencement of cessation proceedings. The RPD then stated that the question was "whether this lack of knowledge is sufficient to rebut the presumptions of intention to reavail and to actually reavail". The RPD found that while the Respondent could have done more to inform himself of the consequences of return and that the failure to do more investigation was a factor to be considered but was not a determinative one. And, when asked about efforts he took to protect himself from potential harm, the RPD found that for the most part, the Respondent tried to keep a low profile which the RPD took to mean he was "not comfortable" with the idea that the state could protect his. This again was found to be a non-determinative factor as to whether he intended to reavail. The RPD then concluded that taking all of the evidence into account, the presumption was rebutted "[b]ecause even though he used his passport to return to his country of origin, he was not aware of the severe consequences of doing so and did not intend to accept Afghanistan's

diplomatic protection". For that reason, the evidence did not meet all of the criteria to support the application for cessation.

[56] Viewing the RPD's reasons together with the record, in particular the transcript of the cessation hearing, I am satisfied that the RPD's focus in its analysis was on whether the Respondent's conduct established that he intended to waive the protection of the country of asylum, Canada, and that it reasonably found that he did not. Further, the reasons also indirectly address subjective fear in the context of the steps the Respondent took to keep a "low profile" while he was in Kabul. The question of subjective fear was also addressed at the cessation hearing, including the Respondent's denial of the validity of a portion of the content of the Solemn Declaration of the CBSA examining officer that records that the Respondent had indicated that he had no fear of returning to Afghanistan.

[57] I agree with the Minister that the RPD took a narrow approach. However, in essence, the RPD's reasons touched on all of factors subsequently set out by the Federal Court of Appeal in *Galindo Camayo FCA* when assessing whether the presumption was rebutted while focusing on the Respondent's state of knowledge of the cessation provisions and, fleetingly, precautionary measures and subjective fear. Further, *Galindo Camayo FCA* held that an individual's lack of knowledge of the immigration consequences of their action "may not" be determinative but is a "key factual consideration" that the RPD must weigh with all of the other evidence when. Key to whether such an assessment is reasonable is whether the RPD could rely on the refugee's evidence that they took measures to protect themselves against their agent of persecution to rebut the presumption of reavailment. That evidence is also not necessarily determinative of the issue

of intent but must be considered and addressed. Further, that none of the factors identified are necessarily dispositive and all of the evidence relating to these factors should be considered and balanced in order to determine whether the actions of the refugee are such that they rebutted the presumption of reavailment.

[58] Given this, and the RPD's reasons, its approach was reasonable. The fact that the Respondent returned voluntarily to Afghanistan and that his reason for doing so was not compelling was not necessarily dispositive of the question of whether he had rebutted the presumption of intention to reavail.

[59] It is also true that the RPD did not explicitly address the fact that the Respondent's reason for returning to Afghanistan was not due to an exceptional circumstance, or was not compelling, in the context of its assessment of whether the presumption of reavailment was rebutted. But it made a clear finding that the Respondent's reason for return was voluntary and its conclusion stated that it had taken all of the evidence into account when determining that the presumption had been rebutted. A failure to mention something explicitly is not necessarily a failure of justification, intelligibility or transparency (*Vavilov* at paras 94 and 122;*Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156 at para 32).

[60] While the Minister may not agree with the RPD's assessment of this evidence, and in my view aspects of it could certainly have been otherwise interpreted and assessed, this does not establish that the decision was not reasonable (see *Ahmed* at para 56; *Canada (Citizenship and Immigration) v Antoine*, 2020 FC 370 at para 41)). As noted above, "the decision maker may

assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from ‘reweighing and reassessing the evidence considered by the decision maker’” (*Vavilov* at para 125). In this matter, I am so constrained.

JUDGMENT IN IMM-1402-21

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed;

2. There shall be no order as to costs; and

3. No question of general importance for certification was proposed or arises.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1402-21
STYLE OF CAUSE:	THE MINISTER OF CITIZENSHIP AND IMMIGRATION v HAMED SAFI
PLACE OF HEARING:	BY VIDEOCONFERENCE USING ZOOM
DATE OF HEARING:	JULY 19, 2022
JUDGMENT AND REASONS:	STRICKLAND J.
DATED:	JULY 27, 2022

APPEARANCES:

Robert L. Gibson	FOR THE APPLICANT
Robert J. Kincaid	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada Vancouver, British Columbia	FOR THE APPLICANT
Robert J. Kincaid Law Corporation Barrister & Solicitor Vancouver, British Columbia	FOR THE RESPONDENT