

Federal Court



Cour fédérale

Date: 20230329

Docket: IMM-2566-22

Citation: 2023 FC 443

Toronto, Ontario, March 29, 2023

PRESENT: Madam Justice Go

BETWEEN:

**Aisha Afzal MALIK,
Hassaan Ahmad MALIK,
Hamda MALIK, and
Hammaad Ahmad MALIK
By his litigation guardian,
Aisha Afzal Malik**

Applicants

and

**MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Ms. Aisha Afzal Malik and her three children, Hassaan, Hammaad, and Hamda [together, the “Applicants”], are citizens of Pakistan. They seek judicial review of the Refugee Protection

Division [RPD]'s decision dated February 28, 2022 to cease the Applicants' refugee protection based on reavailment [Decision].

[2] The Applicants were determined to be Convention refugees on March 27, 2007 due to their fear of persecution in Pakistan from state and non-state actors based on their Ahmadi faith. They became permanent residents along with Ms. Malik's spouse, Mr. Malik, who remained in Pakistan in prior years to care for his ill parents.

[3] The Applicants' first trip to Pakistan after obtaining refugee status occurred from November 19, 2007 to September 21, 2008 [First Trip]. Ms. Malik took the children to Pakistan as she was overwhelmed by raising them on her own – in particular Hammaad, who has intellectual disabilities and other medical issues. Their second trip was taken between August 8, 2009 and September 25, 2009 [Second Trip]. During both these trips, the three children Applicants were minors.

[4] On January 27, 2017, the Minister of Public Safety and Emergency Preparedness [Minister] made an application under subsection 108(2) of the *Immigration and Refugee Protection Act, SC 2001, c 27 [IRPA]* to cease the Applicants' refugee protection [Cessation Application]. The Cessation Application was heard on December 7, 2021.

[5] In the Decision, the RPD accepted that the Applicants had a justified reason to take the First Trip, but not the Second Trip. The RPD further found that the Applicants reavailed

themselves of Pakistan's protection and allowed the Minister's Cessation Application based on paragraph 108(1)(a) of *IRPA*.

[6] I find the Decision unreasonable as the RPD failed to consider several relevant factors set out by the Federal Court of Appeal [FCA] in *Canada (Citizenship and Immigration) v Galindo Camayo*, 2022 FCA 50 [*Camayo*] to assess whether the presumption of reavilment has been rebutted. As such, I grant the application.

II. Issues and Standard of Review

[7] The Applicants raise the following issues before the Court:

- a. the RPD unreasonably rejected the purpose of the Applicants' Second Trip;
- b. the RPD erred in assessing actual reavilment; and
- c. the RPD failed to consider the children's lack of intent and the Applicants' subjective knowledge about the consequences of travelling to Pakistan.

[8] The parties agree that the Decision is reviewable on a reasonableness standard, per *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[9] Reasonableness is a deferential, but robust, standard of review: *Vavilov* at paras 12-13. The 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 and 133-135.

III. Analysis

Preliminary Comments on the Parties' Positions on Camayo

[10] One of the main points of contention between the parties is how the FCA's decision in *Camayo* should be applied to the case at hand.

[11] The Applicants' overarching argument is that the Decision is unreasonable because the RPD failed to consider the evidence and submissions surrounding the factors set out in *Camayo* to assess whether the presumption of reavilment has been rebutted.

[12] While the Applicants highlight that subsequent decisions of this Court have remitted matters back for reconsideration where the RPD failed to effectively consider all of the *Camayo* factors set out at para 84, the Respondent submits, in their written representations, that these factors were outlined as *obiter* remarks.

[13] At the hearing, the Respondent appeared to have retracted from their initial position and acknowledged that *Camayo* is binding. However, the Respondent argued that there are different nuances when applying *Camayo*. Specifically, the Respondent submitted that *Camayo* does not do away with the notion of diplomatic protection (brought about by virtue of the act of obtaining

and using the passport of one's country of nationality to travel). Rather, *Camayo* channels a number of factors that are case-specific. Further, the Respondent submitted that *Camayo* does not alter the fact that cessation is an integral part of the Canadian refugee system, and that refugee status is temporary in nature. The granting of permanent resident status to refugees is a policy choice made by the Canadian government.

[14] The Respondent also drew the Court's attention to Justice Brown's recent decision in *Ali v Canada (Citizenship and Immigration)*, 2023 FC 383 [*Ali*] to illustrate the existence of different points of view on the language provided in *Camayo*.

[15] I find the Respondent's argument somewhat inapt. The application of the *Camayo* factors, by virtue of its open-ended and fact-dependant nature, will necessarily be case-specific and nuanced. Whether or not *Camayo* does away with the notion of diplomatic protection is beside the point. Most importantly, the FCA made clear that, "at a minimum", the RPD should consider the list of non-exhaustive factors when assessing whether the presumption of reavilment is rebutted in any given case: at para 84. The use of the term "at a minimum" signals a strong expectation from the FCA that these factors will be considered.

[16] I also find nothing in Justice Brown's decision in *Ali* suggests that the RPD can ignore the *Camayo* factors. In declining to certify a question of whether the FCA's decision in *Camayo* "summarized the law or whether *Camayo* intended to change the law to require tribunals assessing [cessation] to consider the factors ... enumerated at paras 83 and following", Justice Brown noted at para 57:

The [FCA] has spoken and very recently on this point. It is up to the RPD, RAD, other decision makers, counsel and the Courts to determine the meaning of *Camayo*'s reasons and conclusions. These may or may not give rise to further questions to consider for certification in another case.

[17] In my view, Justice Brown's comment reiterates the need for decision-makers to interpret and apply the factors in *Camayo* when conducting an assessment of a cessation application.

[18] With these comments in mind, I now turn to three of the issues raised by the Applicants where I find the RPD committed reviewable errors.

A. *Actual Reavailment*

[19] In their post-hearing written submissions to the RPD, the Applicants argued that they had no intention to reavail by obtaining Pakistani passports. They explained that they were not seeking the protection of the Pakistani state by obtaining a passport, but did so for the purpose of travelling. The Applicants further noted Ms. Malik's testimony that she "never expected protection from the Pakistani state", as "they did not expect the police to protect them from extremists, and so took steps to protect themselves, including avoiding Ahmadi religious activities."

[20] The RPD dismissed the Applicants' submissions when finding the presumption of actual reavailment was not rebutted.

[21] The RPD also dismissed the Applicants' counsel's reliance on *Din v Canada (Citizenship and Immigration)*, 2019 FC 425 [*Din*] to submit that the RPD should consider whether the

Applicant had actually received protection from Pakistan: at para 45. The RPD found that subsequent jurisprudence from the Court diverged from *Din*, and confirmed that the focus of the actual reavailment analysis is whether the Applicants received the *diplomatic* protection of Pakistan: see for example *Okojie v Canada (Citizenship and Immigration)*, 2019 FC 1287 at para 30; *Lu v Canada (Citizenship and Immigration)*, 2019 FC 1060 at para 60; *Chokheli v Canada (Citizenship and Immigration)*, 2020 FC 800 at para 34. In this case, the RPD found that the Applicants' use of their passport to travel to Pakistan without incident clearly demonstrated that they received diplomatic protection.

[22] Before this Court, the Applicants argue that the RPD erred in assessing actual reavailment by dismissing the precautions they took. The Applicants recall the evidence demonstrating the extraordinary and unsustainable precautions they took to avoid non-state agents of persecution, such as religious extremists. By relying on the finding that the Applicants did not take precautions to protect themselves from the state itself, the Applicants assert that the RPD's dismissal of the precautions overall resulted in an incomplete analysis.

[23] The Applicants cite *Camayo* to support their argument that a reasonable assessment of reavailment includes consideration of precautions taken: at paras 76-78. The Applicants submit that subsequent jurisprudence from this Court confirms that it is a reviewable error when the RPD fails to adequately assess a refugee's reasons for return and precautions taken: see for example *Canada (Citizenship and Immigration) v Safi*, 2022 FC 1125 [*Safi*] at paras 39 and 55-56; *Ahmad v Canada (Citizenship and Immigration)*, 2023 FC 8 at paras 36-37; *Canada (Public Safety and Emergency Preparedness) v Zinali*, 2022 FC 1371 [*Zinali*] at paras 20-21.

[24] The Applicants also highlight the FCA's statement in *Camayo* 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. The Applicants maintain that they have always acted in accordance with a fear of non-state actors and never relied on the state to protect them from this risk, especially given the country condition evidence indicating that state protection is not forthcoming to Ahmadi Muslims in Pakistan.

[25] The Applicants note that the failure to assess the actual protection received was found to be a reviewable error in *Din*: at paras 45-46. The Applicants submit that by treating this evidence as irrelevant or not determinative, and by dismissing *Din* as an "outlier", the RPD failed to actually assess whether the risk presented by non-state actors persisted.

[26] The Respondent argues that the RPD reasonably found that the Applicants did not take precautions aimed at avoiding Pakistani authorities, who were also a stated agent of persecution in their refugee claims. The Respondent submits that the Applicants' argument constitutes a disagreement with the RPD's analysis on this ground, and that the Decision is supported by the record when the evidence, including the Applicants' original refugee claim, is viewed as a whole. The Respondent maintains that the Applicants did not meet their burden to rebut the presumption of reavailment, even in light of *Camayo*, based on Justice Strickland's comment at para 57 of *Safi*:

[...] 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 reavilment.

[27] With respect, I do not find the above quoted passage from *Safi* supports the Respondent's position. Justice Strickland's comment confirms that, while not necessarily determinative, evidence of measures taken by an applicant to protect themselves against their agent of persecution must be addressed.

[28] In this case, I agree with the Applicants that the RPD only considered the issue of actual reavilment *vis-à-vis* the Pakistani government, but failed to consider the issue with respect to non-state actors, including religious extremists, which formed a primary part of their initial refugee claims.

[29] In finding that the Applicants demonstrated an intention to reavail themselves and that there was actual reavilment during the Second Trip, the RPD relied on the following factors:

- The Applicants obtained Pakistani passports and used the passports to travel to Pakistan;
- The Applicants had no issues entering or exiting Pakistan;
- The United Nations' High Commission on Refugees Handbook on Procedures and Criteria for Determining Refugee Status [UNHCR Handbook] and specifically the section under "Voluntary Re-availing of the Protection of the Country of Nationality";
- The National Document Package documents with respect to the persisting persecution of Ahmadis by Pakistani government; and
- The measures the Applicants took to hide from the agents of persecution.

[30] On the last point, the RDP explained:

[61] When asked what precautions they took while in Pakistan during their trip in 2009, they indicated that they did not engage with their community, they did not attend a mosque, and they stayed at a rental property which was secluded from other community members.

[62] The panel has reviewed the precautions by the [Applicants], and while the panel appreciates, they may have made efforts to avoid agents of persecution within their community, they have failed to establish precautions taken against the government of Pakistan [...]

[31] It is clear from these reasons that while the RPD acknowledged the precautions taken by the Applicants, it failed to consider these measures in light of actual reavailment with respect to the non-state actors. Nor did the RPD consider the Applicants' stated lack of faith in the Pakistani government to protect them against the non-state actors.

[32] Recalling *Camayo*, one of the factors that decision-makers must assess is whether the individual took any precautionary measures while they were in their country of nationality: at para 84. I find therefore that the RPD's failure to consider the actual reavailment *vis-à-vis* the non-state agents of persecution constitutes a reviewable error.

B. *Children's intent*

[33] The Applicants argue that the RPD failed to address the children's lack of voluntariness or intent to reavail, as they were minors at the time of the two trips. The Applicants also highlight their submission about the lack of intention or voluntariness in Hammaad's case, given his cognitive disability. Despite the RPD's brief acknowledgement of these submissions in the Decision, the Applicants assert that the RPD failed to expressly reject the arguments or provide

reasons for doing so. The Applicants highlight *Zinali* at paras 15-16, where the Court found that the lack of capacity in making one's own travel arrangements can be indicative of a lack of subjective fear of the authorities or intent to reavail.

[34] The Respondent argues that the RPD did not err by not treating the children separately from their mother in this case, noting that the RPD acknowledged that the children's refugee claims were derived from that of Ms. Malik. The Respondent submits that decisions made by parents as designated representatives of children in refugee claims can have legal consequences on the children: *Charalampis v Canada (Citizenship and Immigration)*, 2009 FC 1002 [*Charalampis*] at para 39; *Tobar Toledo v Canada (Citizenship and Immigration)*, 2013 FCA 226 [*Toledo*] at para 67. The Respondent asks this Court to apply the same reasoning to the context of cessation applications.

[35] At the hearing, the Respondent further added that in considering whether the decision-maker was responsive to the core argument of the parties, *Vavilov* does not invite a court to overturn a decision when the overlooked submission was simply one of many, and was a non-viable submission in light of the established jurisprudence.

[36] I acknowledge that the cases cited by the Respondent confirm generally that in the refugee claim context, children's claims should be considered as part of parents' claims, and that children will sometimes "suffer the consequences" of their parents' actions as a result: *Toledo* at para 67. However, these cases were decided in different contexts. *Charalampis* dealt with a constitutional argument regarding the exclusion of children in permanent residence applications

due to their parents' prior misrepresentation: at para 14. In *Toledo*, the FCA upheld an inadmissibility finding where the applicant previously applied for and was refused refugee protection as an accompanying minor to their parent's claim: see para 78. In both of these circumstances arising outside of the realm of cessation applications, the notions of "intent" or "voluntariness" were not determinative factors.

[37] In the cessation context, where an individual's intent, and the voluntariness of one's action is embedded in the assessment of whether the presumption of reavilment is rebutted, it becomes less clear whether children must bear the 'sins' of their parents as a general rule. The Court in *Zinali* alluded to the need to consider a person's mental capacity in the context of voluntariness: para 16. Further, while the proposed certified question in *Camayo* concerning whether a minor is subject to cessation was no longer at issue, the FCA casts doubt on the strict application of this general rule in the cessation context. Namely, the FCA did enumerate the personal attributes of an individual such as age, education and level of sophistication, as one of the factors to be considered in rebutting the presumption of reavilment: *Camayo* at para 84.

[38] In this case, the Applicants provided ample evidence to support that all three children Applicants were minors at the time of the trips, and that one of these children suffers from severe cognitive challenges.

[39] The RPD only considered the children when determining Ms. Malik's voluntariness in returning to Pakistan. The RPD did not consider how the issues of voluntariness or intent should apply to the children themselves. In light of *Camayo*, I find that the RPD erred by not turning its

mind to the age and other personal attributes of the children to determine whether the presumption of reavailment should prevail in their circumstances, and with it the cessation of their status.

C. *Applicants' Subjective Knowledge*

[40] The Applicants further argue that the RPD failed to address the written submissions and testimony about their lack of subjective knowledge on how they could lose their refugee protection by travelling to Pakistan on their Pakistani passports. Again, while the RPD acknowledged this submission, it did not address it in the Decision. Pursuant to the FCA's answer to the following certified question in *Camayo* at para 85, the Applicants argue that the RPD committed a reviewable error in doing so:

Is it reasonable for the RPD to rely upon 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?

Yes.

[41] The Applicants submit as further support subsequent cases decided by this Court confirming that the RPD must take into account whether the refugee was aware that they could lose their protection by returning to their home country: *Hamid v Canada (Citizenship and Immigration)*, 2022 FC 1541 at paras 27-28; *Safi* at para 57.

[42] The Respondent distinguishes this case from *Camayo*, arguing that the RPD did not explicitly accept the Applicants' statement that they were unaware of the immigration

consequences of their Second Trip. The Respondent contends that the Applicants' testimony was not necessarily that they were unaware of the immigration consequences of their actions, but rather that they did not intend to avail themselves of Pakistan's protection.

[43] The Respondent's characterization of the testimony, in my view, is contradicted by the Decision. At para 20, the RPD noted:

Mrs. Malik testified that she did not understand that she was jeopardizing their status in Canada by obtaining Pakistani passports.

[44] As the FCA in *Camayo* explained at para 70:

[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.

[Emphasis added]

[45] In this case, the RPD simply did not consider Ms. Malik's stated lack of subjective knowledge, nor did it reject or explain its reasons for rejecting the statement along with the other evidence. This constitutes yet another reviewable error.

[46] As the Applicants readily acknowledge, none of the above noted factors, on their own, are determinative. However, the RPD's failure to consider these factors, per *Camayo*'s instruction, renders the Decision unreasonable.

[47] Given my findings above, I need not consider the Applicants' remaining arguments.

IV. Conclusion

[48] The application for judicial review is granted.

[49] There is no question for certification.

JUDGMENT in IMM-2566-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.
2. The matter is returned for redetermination by a differently constituted panel of the RPD.
3. There are no questions to certify.

"Avvy Yao-Yao Go"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2566-22

STYLE OF CAUSE: AISHA AFZAL MALIK, HASSAAN AHMAD MALIK,
HAMDA MALIK AND HAMMAAD AHMAD MALIK
BY HIS LITIGATION GUARDIAN, AISHA AFZAL
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PLACE OF HEARING: HELD VIA VIDEOCONFERENCE

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AND JUDGMENT:** GO J.

DATED: MARCH 29, 2023

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