Federal Court  Cour fédérale

Date: 20230606

Docket: IMM-6169-22

Citation: 2023 FC 792

Ottawa, Ontario, June 6, 2023

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

QIN FAN LI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Qin Fan Li, seeks judicial review of a decision of the Refugee Protection Division ("RPD") dated June 3, 2022, finding that the Applicant's refugee status is ceased pursuant to subsection 108(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*").

[2] The RPD granted the Minister's application for cessation of the Applicant's refugee protection and found that the Applicant had reavailed himself of China's protection by returning there on several occasions and obtaining a new Chinese passport.

[3] The Applicant submits that the RPD erred in finding that he had the subjective intent to reavail himself of China's protection, rendering the decision unreasonable.

[4] For the reasons that follow, I find that the RPD's decision is unreasonable. This application for judicial review is therefore granted.

II. Facts

A. *The Applicant*

[5] The Applicant is a 59-year-old citizen of China.

[6] Since 2007, the Applicant has been an adherent of the Guan Yin Method ("GYM"), a spiritual practice that is suppressed in China. In December 2007, Chinese Public Security Bureau ("PSB") officers appeared at a GYM group session that the Applicant was attending. The Applicant went into hiding out of fear. While in hiding, the Applicant learned that PSB officers visited his home in search of him and accused him of being involved in an "illegal and evil cult." When they could not locate him, they left a summons for the Applicant to report to the PSB upon his return.

[7] In 2008, the Applicant made a claim for refugee protection in Canada on the basis of his fear of persecution at the hands of PSB for his adherence to GYM. In a decision dated March 23, 2010, the RPD granted the Applicant's claim and found him to be a Convention refugee.

[8] On June 2, 2011, the Applicant became a permanent resident of Canada. In September 2011, the Applicant applied for and obtained a new Chinese passport.

[9] In 2013, the Applicant travelled to China to visit his older brother, who was seriously ill. He was in China for 28 days. The Applicant claims that prior to leaving Canada, he had his cousin inquire with the PSB to see whether it would be safe for him to return to China. He claims that his cousin confirmed that it was safe. Once in China, the Applicant claims that he stayed in a different area than where he lived before and only left the house to visit his brother in the hospital.

[10] In 2014, the Applicant travelled to China again and remained there for 52 days to visit his ailing brother. In 2017, the Applicant once again travelled to China, this time to visit his older sister, who had also become seriously ill. This trip lasted 30 days. On both of these trips, the Applicant claims that he only left the house to visit the hospital.

[11] On September 5, 2019, the Applicant completed his application for Canadian citizenship.

[12] On February 25, 2021, the Minister of Public Safety and Emergency Preparedness (the "Minister") made an application for the cessation of the Applicant's refugee protection, pursuant

to section 108 of *IRPA*. The Minister stated that the Applicant voluntarily returned to China on several occasions since being found to be a Convention refugee in 2010, had obtained a Chinese passport in 2011, and had used this passport for travel to China. Therefore, the Minister submitted that the Applicant should be found to have reavailed himself of China's protection.

B. *Decision Under Review*

[13] In a decision dated June 3, 2022, the RPD allowed the Minister's cessation application and rejected the Applicant's refugee claim.

[14] Section 108 of *IRPA* sets out the grounds upon which an application for cessation of refugee protection can be granted. In the Applicant's case, the RPD considered that a claim for refugee protection shall be rejected if the person has "voluntarily reavailed themselves of the protection of their country of nationality" as per subsection 108(1)(a) of *IRPA*.

[15] In considering voluntary reavailment under subsection 108(1)(a), the RPD noted paragraphs 118 to 125 of the United Nations High Commission on Refugees' *Handbook on Procedures and Criteria for Determining Refugee Status* (the "UNHCR Handbook"), which states that cessation of refugee protection implies three requirements: 1) the refugee must act voluntarily; 2) the refugee must intend to reavail himself of the protection of the country of his nationality, and; 3) the refugee must actually obtain such protection. This test was recently affirmed and applied by the Federal Court of Appeal ("FCA") in *Canada (Citizenship and Immigration) v Galindo Camayo* , 2022 FCA 50 at paragraph 18 ("*Camayo*").

[16] The consequences of cessation of refugee status involve the inability to appeal the cessation finding to the Immigration Appeal Division or the Refugee Appeal Division, the inability to seek a Pre-Removal Risk Assessment or an application for permanent residence on humanitarian and compassionate grounds for at least one year, and inadmissibility to Canada for an indeterminate period, with removal enforced "as soon as possible" as per subsection 48(2) of *IRPA*. Following changes to the *IRPA* brought about by *Protecting Canada's Immigration System Act*, SC 2012, c 17, a successful cessation application also results in the loss of an individual's permanent residence status.

[17] On the first prong of the test for cessation, the RPD noted the examples of involuntary reavailment outlined in the UNHCR Handbook and found that none of these examples applies to the Applicant's case. The RPD found that the Applicant voluntarily obtained a Chinese passport to travel back to China and applied for this passport using his own identity documents. The RPD concluded that the Applicant's actions in obtaining this passport, doing so just over a year following the regularization of his Canadian status, and using it to travel back to China on several occasions, demonstrates the voluntariness of his reavailment. The RPD referenced the decision in *Li v Canada (Citizenship and Immigration)*, 2015 FC 459, where this Court found that acquiring a national passport and using it to return to the country of nationality creates a rebuttable presumption of reavailment.

[18] The RPD acknowledged the Applicant's submission that the illness of his family members constituted exceptional circumstances that compelled him to return to China. The RPD referenced *Tung v Canada (Citizenship and Immigration)*, 2018 FC 1224, where my colleague

Justice McDonald found that returning to one's country of nationality to address the needs of a family member, such as caring for an ill parent, does not constitute an exceptional circumstance, particularly if the claimant's presence is not absolutely necessary and where evidence shows that other persons may have carried out the same caregiving duties in their absence (at para 41). Similarly, the RPD found that in this case, the Applicant's repeated returns to China undermine his subjective fear of persecution by Chinese authorities for his religious beliefs. The RPD therefore found that the element of voluntariness is made out in the Applicant's case.

[19] On the second consideration, relating to whether the Applicant demonstrated an intention to reavail himself of China's protection, the RPD again noted that the Applicant failed to provide sufficient evidence to rebut the presumption of reavailment. The RPD found that the intention to reavail is established through the Applicant's actions and that the Applicant travelled to China "frequently and freely," with no evidence of interactions or issues with government authorities. The RPD concluded that the Applicant's intention to reavail is established on the grounds that he obtained a Chinese passport, travelled back to China repeatedly despite assertions of a subjective fear of Chinese authorities, and had no issues with government officials during his trips.

[20] On the final prong of the test for cessation, the RPD considered whether the Applicant actually reavailed himself of China's protection. The RPD referenced paragraph 122 of the UNHCR Handbook, which states that "obtaining an entry permit or a national passport for the purposes of returning will, in the absence of proof to the contrary, be considered as terminating refugee status." The RPD found that on the basis of the evidence, the Applicant demonstrated a wish to return to his country of nationality and obtained a travel document in order to do so.

Relying on this Court's decision in *Cerna v Canada (Citizenship and Immigration)*, 2015 FC 1074 ("*Cerna*") at paragraph 13, the RPD found that obtaining a passport equated to actual protection from the Chinese state.

[21] For these reasons, the RPD granted the Minister's application for cessation of the Applicant's refugee protection.

III. Issue and Standard of Review

[22] This application raises the sole issue of whether the RPD's decision is reasonable.

[23] The standard of review is not in dispute. The parties agree the applicable standard of review is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17, 23–25) ("*Vavilov*"). I agree.

[24] 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).

[25] For a decision to be unreasonable, an 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

[26] The Applicant submits that the RPD erred in assessing the Applicant's subjective intention to reavail himself of China's protection. Specifically, the Applicant submits that the RPD failed to meaningfully assess the Applicant's lack of actual knowledge of the consequences of his returning to China, namely that he was unaware that he would lose his permanent residence status. The Applicant submits that in *Camayo*, the FCA found that the RPD's failure to assess an applicant's actual knowledge of the immigration consequences of their actions is a reviewable error (paras 69-71).

[27] The Applicant also relies on the recent decision in *Ahmed v Canada (Citizenship and Immigration)*, 2022 FC 884 ("*Ahmed*"), where this Court emphasized that decision-makers "must consider the question of whether the Applicant lacked actual knowledge of the immigration consequences of his actions" (at para 8). In *Ahmed*, the Court found that the RPD reasonably found that the applicant would be aware of the consequences of returning to his country of nationality due to the applicant's own acknowledgement that he should not be returning there (at

para 41). The Applicant submits that his case can be differentiated from *Ahmed* because the RPD's reasons do not include a transparent analysis of the Applicant's actual knowledge or his evidence on this point.

[28] The Applicant submits that he did not know or understand the consequences of returning to China after being granted refugee protection and only realized that he would lose his permanent resident status upon receiving the letter from Immigration, Refugees and Citizenship Canada ("IRCC") regarding the cessation application in 2021. The Applicant contends that the RPD's failure to engage with the issue or evidence related to his actual knowledge of the immigration consequences of returning to China is sufficient to render the decision unreasonable as a whole.

[29] The Respondent maintains that the RPD's finding on the cessation application is reasonable in light of the evidence and jurisprudence. The Respondent submits that the RPD's analysis of the tripartite test for cessation properly considers all relevant factors, including the Applicant's individual circumstances, and the decision ultimately accords with the available evidence. The Respondent submits that the RPD reasonably found that based on the evidence, the Applicant was not compelled to return to China by exceptional circumstances and that there is insufficient evidence proffered by the Applicant to rebut the presumption of reavailment.

[30] The Respondent submits that the Applicant's submission that he lacked actual knowledge of the consequences of his returning to China lacks merit. Firstly, the Respondent contends that it is open to the RPD to presume that the Applicant had knowledge of these consequences, given

that he left China at 45 years of age, was able to initiate the process to claim refugee protection, was able to obtain permanent resident status, and was able to apply for and obtain a Chinese passport. The Respondent submits that the Applicant's actions do not demonstrate a lack of sophistication and it is therefore reasonable that he would aware of the immigration consequences of returning to China.

[31] Secondly, the Respondent submits that the Applicant's case is distinguishable from *Camayo*, where the applicant gained refugee status as a child and cessation proceedings were initiated against her when she was only 21 years old and still a student. The Respondent submits that in contrast, the Applicant gained refugee status when he was 45 years old and initiated the claim himself and his subjective belief is therefore not objectively reasonable on the facts. The Respondent submits that a reasonable person, viewing the situation objectively, could not conclude that he lacked actual knowledge of the potential consequences of acquiring a Chinese passport and repeatedly returning to China after obtaining permanent residency in Canada. The Respondent contends that even if the Applicant was unaware of these consequences, the FCA in *Camayo* clarified that the issue of actual knowledge need not be determinative of the cessation application (at para 70).

[32] I agree with the Applicant that the RPD's failure to meaningfully engage with the issue of the Applicant's actual knowledge of the consequences of returning to China is sufficient to render the decision unreasonable. The FCA's recent clarification on the key considerations in a cessation application at paragraphs 67 to 71 of *Camayo*, particularly on the issue of actual knowledge as it relates to subjective intent to reavail, reads as follows:

[67] Ms. Galindo Camayo testified that she was not aware that using her Colombian passport to travel to Colombia and elsewhere could have consequences for her immigration status in Canada. The RPD rejected this claim, not because Ms. Galindo Camayo was not credible, but because it found that ignorance of the law was not a valid argument. The RPD noted that Ms. Galindo Camayo was an educated and sophisticated individual who could have sought information as to the requirements that she had to uphold in order to maintain her status in Canada. With respect, this misses the point.

[68] If it were acting reasonably, at this point in its analysis, the RPD should have considered not what Ms. Galindo Camayo *should have* known, but rather whether she *did* subjectively intend by her actions to depend on the protection of Colombia. Having failed to find that Ms. Galindo Camayo's testimony on this point lacked credibility, the RPD is deemed to have accepted her claim that she did not know that using her Colombian passport to return to Colombia and to travel elsewhere could result in her being deemed to have reavailed herself of Colombia's protection, and that this was not her intent.

[69] The Minister contends that the cessation provisions of *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 put their status in Canada in jeopardy. Not only did the Federal Court explicitly reject this argument, it also overstates the issue.

[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.

[71] In order for it to make a reasonable decision, the RPD was required to take account of the state of Ms. Galindo Camayo's actual knowledge and intent before concluding that she had intended to reavail herself of Colombia's protection. I agree with the Federal Court that without this analysis, the RPD's conclusion on reavailment was not a defensible outcome based on the constraining facts and law, and that it was thus unreasonable: *Cerna v. Canada (Minister of Citizenship and Immigration)*, 2015 FC 1074 at paras. 18-19; *Mayell v. Canada (Minister of Citizenship and Immigration)*, 2018 FC 139 at paras. 17-19.

[Emphasis added]

[33] I find that the RPD failed to properly assess the issue of the Applicant's actual knowledge as required by the jurisprudence, despite both parties' submissions on this issue. This Court has applied this finding by the FCA in *Ahmed*, finding that the RPD must consider the question of whether the applicant lacked actual knowledge of the immigration consequences of his actions (at para 42). Although the Respondent correctly notes that the issue need not be determinative of the question of intent, this does not immunize the RPD from considering the issue at all. The FCA emphasized that the issue of an applicant's actual knowledge is a "key factual consideration that the RPD must either weigh in the mix with all the other evidence, or properly explain why the status excludes its consideration" (*Camayo* at para 70). The RPD fails to do either and, in turn, fails to conduct a reasonable and proper analysis of the test for cessation.

[34] I also disagree with the Respondent's submission that the RPD is entitled to presume that the Applicant was aware of the consequences of returning to China, on the basis of evidence that he initiated his own refugee claim at 45 years old and was able to obtain a Chinese passport. The FCA in *Camayo* rejected an analogous argument that the applicant in that case was educated, sophisticated, and *could* have sought information as to her obligations as a permanent resident, and found that this "misses the point" (at para 67). The same reasoning applies in the case at hand. Had the RPD conducted an analysis of the Applicant's actual knowledge of the immigration consequences at all, the question is not whether the Applicant *should* have known that he would lose his permanent resident status, but whether he *did* subjectively intend to depend on China's protection, which involves considering whether he had actual knowledge of the consequences of reavailment. The question is not whether a reasonable person, viewing the

situation objectively, would view the Applicant as having actual knowledge of the consequences. This standard for assessing reavailment does not exist in the jurisprudence regarding cessation.

[35] I further note that similarly to the testimony before the RPD by the applicant in *Camayo*, the Applicant in the present case testified that he only learned that he would lose his permanent resident status when he received the letter from IRCC regarding the cessation application. Not only did the RPD err in omitting any consideration of the Applicant's testimony on this issue at all, I disagree with the Respondent that the RPD was entitled to presume that the Applicant knew the consequences of his actions when the evidence suggests a contrary conclusion. As the FCA found in *Camayo*, the RPD did not find that the Applicant's testimony on his actual knowledge lacked credibility and therefore, "the RPD is deemed to have accepted" the Applicant's testimony that he did not have this knowledge when he chose to use his passport to travel to China (*Camayo* at para 68), particularly if he did so on the acceptable assumption that permanent resident status would allow him protection beyond his refugee status (*Cerna* at para 19).

[36] For these reasons, I find that the RPD's failure to meaningfully consider the key issue of the Applicant's actual knowledge of the consequences of his actions fails to accord with the evidence and jurisprudence, and is therefore sufficient to render the decision unreasonable.

V. Conclusion

[37] This application for judicial review is granted. The RPD erred by omitting any proper analysis of a central issue in the cessation application, rendering the decision unreasonable. No questions for certification arose, and I agree that none arise.

JUDGMENT in IMM-6169-22

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted. The decision under review is set aside and the matter is referred back for redetermination by a different decision-maker.

2. There is no question to certify.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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