Federal Court  Cour fédérale

Date: 20230614

Docket: IMM-7777-22

Citation: 2023 FC 846

Ottawa, Ontario, June 14, 2022

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

JUAN MARIANO PADRON CASTRO

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application, brought by the Minister of Public Safety and Emergency Preparedness [Minister], seeking judicial review of a decision of the Refugee Protection Division [RPD] dated July 25, 2022 [Decision]. In the Decision, the RPD denied the application of the Minister to cease the refugee protection of the Respondent, a Cuban national, pursuant to paragraph 108(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] As explained in greater detail below, this application is dismissed, because the Decision demonstrates that the RPD understood and discharged its obligation to consider and balance the evidence before it on the factors relevant to its determination of whether the Respondent had rebutted the presumption of re-availment to the protection of the Cuban government.

II. Background

[3] The Respondent is a 64-year-old Cuban national. His claim for refugee protection in Canada was accepted on December 12, 2001, and on June 16, 2003, he obtained permanent resident status in Canada.

[4] Since 2005, the Respondent has been issued three Cuban passports, all of which were issued in Cuba. Since obtaining refugee status in 2001, the Respondent has traveled outside Canada 39 times, including multiple trips to Cuba, some for extended periods of time. The reasons for the travel given by the Respondent were vacations and visiting family back in Cuba.

[5] Based on the Respondent's travel history back to Cuba, the Minister applied to the RPD pursuant to section 108 of the IRPA for the cessation of the Respondent's refugee protection.

[6] By way of additional background, I note that it is uncontested that the Respondent suffers from congestive heart failure, on the basis of which he was assessed by a Canadian medical professional in 2019 as a critically ill person with a life expectancy of less than two years. He is also in receipt of the Ontario Disability Benefit and other supports including specialized housing due to his medical condition, and he requires ongoing medication and therapy.

III. Decision under Review

[7] Before the RPD, the Minister argued that the Respondent voluntarily re-availed himself of the protection of his country of nationality within the meaning of paragraph 108(1)(a) of the IRPA. Paragraph 108(1)(a) mandates that a claim for refugee protection be rejected, and prescribes that a person is not a Convention refugee or a person in need of protection, if that person has voluntarily re-availed themselves of the protection of their country of nationality.

[8] In considering whether the Respondent had voluntarily re-availed himself of Cuba's protection, the RPD was guided by the United Nations' Handbook on Procedures and Criteria for Determining Refugee Status [Handbook], which the RPD noted has been accepted by this Court as valid and authoritative guidance for the interpretation of re-availment (see *Kuoch v Canada (Citizenship and Immigration)*, 2015 FC 979 at para 25).

[9] Paragraph 119 of the Handbook outlines the following cumulative three-part analytical framework for cessation:

A. Voluntariness: the refugee must act voluntarily;

B. Intention: the refugee must intend by their action to re-avail themselves of the protection of the country of their nationality; and

C. Re-availment: meaning that the refugee must actually obtain such protection.

[10] As a preliminary matter, the Minister argued before the RPD that paragraph 108(1)(a) of the IRPA contains only two elements – an objective one (has re-availed) and a subjective one (voluntariness) – and argued that, because the Handbook is not binding, it was open to the RPD to reject the Respondent's evidence on intent, because intent is not mentioned in paragraph 108(1)(a) of the IRPA.

[11] In rejecting this submission, the RPD noted that the three-part test identified above, in which intent is a required element, has been endorsed in all the available jurisprudence from this Court (see, *e.g.*, *Canada (Public Safety and Emergency Preparedness) v Bashir*, 2015 FC 51; *Nsende v Canada (Minister of Citizenship and Immigration)*, 2008 FC 531; *Ahmed v Canada (Citizenship and Immigration)*, 2022 FC 884). The RPD further noted the Federal Court of Appeal's recent caution about applying the test for cessation "in a mechanistic or rote manner", underlining the importance of including the question of intent in the analysis, namely "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" (see *Canada (Citizenship and Immigration) v Galindo Camayo*, 2022 FCA 50 [*Camayo*] at para 83).

[12] Turning to the resulting analysis, the RPD found that the Minister had not met the onus for allowing the cessation application and therefore denied the Minister's application. The RPD concluded the determinative issue was intent and found that the required element of intent had not been established, due to the Respondent's lack of actual subjective knowledge of the immigration consequences of his travel to Cuba, and elsewhere, on a Cuban passport.

[13] In reaching this determination, the Member accepted the application of the presumption that a refugee intends to re-avail themselves of diplomatic protection when they apply for and obtain a passport from their country of origin. The RPD also noted that the presumption is particularly strong where, as is in the present case, the refugee uses their national passport to travel to their country of nationality. In concluding that the presumption applied, the RPD took into account the fact that the Respondent had obtained three Cuban passports in the twenty-year period since coming to Canada and had travelled on those passports to Cuba on multiple occasions, sometimes staying there for extended periods of time.

[14] However, the RPD also noted that the presumption of re-availment is a rebuttable one, with the onus of rebutting the presumption falling on the refugee (in this case the Respondent). Relying on *Camayo*, the RPD noted that an individual assessment of all the evidence is required when determining whether the presumption of re-availment has been rebutted, including evidence concerning the refugee's subjective intent to re-avail.

[15] The RPD then noted that, in *Camayo,* the Federal Court of Appeal answered the following certified question in the affirmative:

> 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?

[16] The RPD stated that *Camayo* explained that the focus of subjective intent is not on what the refugee should have known about the consequences for their immigration status in Canada

from traveling to their country of nationality on a passport from that country, but rather on what the refugee actually knew and did subjectively intend by their actions (see *Camayo* at paras 67-68).

[17] The RPD also referred to the Federal Court of Appeal's comment that, while 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 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. Based on the wording of *Camayo*, the RPD interpreted the Federal Court of Appeal's decision as instruction that, to be reasonable, a decision must consider this factor and, depending on the facts of the case, this factor may or may not be determinative. The RPD then stated its conclusion that, having considered the totality of the evidence, this factor was determinative, and it proceeded to provide reasons for that conclusion.

[18] The RPD referred to the Respondent's testimony at the cessation hearing as to the particular fear of persecution underlying his departure from Cuba in 1999, the events surrounding his arrival in Canada, and his subsequent receipt of refugee protection and permanent resident status. The RPD then referenced the Respondent's testimony that, while he learned he should not exceed a certain number of days outside Canada in order to maintain permanent resident status, he was never told that travelling to Cuba could be a problem for maintaining his status. He also testified that, because he had travelled with his Cuban passport and permanent resident card, presenting them each time to the Canadian authorities and having

never been informed of any consequences to his immigration status, he assumed there was no issue.

[19] The RPD found the Respondent's testimony to be credible both overall and specifically on the issue of lack of subjective knowledge of the immigration consequences of travelling to Cuba on a Cuban passport. The RPD also noted that the Minister was not contesting the credibility of the Respondent's claim that he was ignorant of the law. Rather, the Minister asserted that this lack of knowledge could not explain away travelling back to the country of alleged persecution. However, in the RPD's view, the Minister's submission amounted to an argument that ignorance is not an excuse, which represents a mechanistic legislative interpretation of the sort the Federal Court of Appeal warns against in *Camayo*. The RPD concluded that this submission could not undermine the significance of its finding that the Respondent credibly established that he was not aware of the consequences of his travels.

[20] Finally, the RPD referred to the severity of the consequences of allowing the cessation application, noting this to be one of the factors that *Camayo* (at para 84) identified that the RPD must consider when assessing an application for cessation. The RPD also noted the Federal Court of Appeal's comment that a decision that entails particularly harsh consequences for the concerned individual must be supported by reasons explaining why the decision best reflects legislative intent (see *Camayo* at para 50). The RPD observed that the Respondent's particular circumstances were such that, had the cessation application been allowed, the consequences would have been harsh, exposing him to immediate deportation and depriving him of the disability supports he needs and receives in Canada in what could be the final years of his life.

However, because the absence of the required element of intent resulted in the Minister's application being dismissed, the RPD did not consider it necessary to conduct a more thorough analysis of the severity of the consequences in this case.

[21] For the reasons set out above, the RPD found that the Respondent had rebutted the presumption of re-availment by establishing on a balance of probabilities that he did not have subjective knowledge of the immigration consequences of his travels to Cuba and elsewhere on a Cuban passport. The Minister's application for cessation was therefore denied.

IV. Issues and Standard of Review

[22] The sole issue that arises in this application for judicial review is whether the Decision is reasonable. The applicable standard of review is reasonableness (see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]).

V. Analysis

[23] In support of this application for judicial review of the Decision, the Minister argues that the RPD unreasonably focused mainly on the Respondent's knowledge of the cessation provisions in the IRPA and failed to consider and balance this factor against all the other factors prescribed by *Camayo*.

[24] In particular, the Minister submits that the RPD failed to balance the facts that the Respondent feared the Cuban state authorities; the Respondent travelled frequently to Cuba; he

did so to visit family or when he was not working; the Respondent renewed his passports in Cuba; the Cuban authorities specifically gave him permission to exit and enter Cuba freely; and there was no evidence that while in Cuba the Respondent took any precautionary measures to conceal his presence from the authorities.

[25] There appears to be no dispute between the parties as to the legal principles relevant to this application. The Respondent does not argue that the RPD was entitled to consider and rely upon only the subjective knowledge factor, to the exclusion of the other factors identified in *Camayo*. Rather, he submits that, when the Decision is read in accordance with the standard of review prescribed by the Supreme Court of Canada, which does not involve assessment against a standard of perfection (see *Vavilov* at para 91), it is apparent that the RPD applied the legal principles prescribed in *Camayo*, including the requirement to consider and balance all the evidence before it on the factors relevant to its determination.

[26] I accept that, as the Minister submits, the RPD's analysis focuses significantly upon the Respondent's subjective knowledge of the cessation provisions, which is only one of the *Camayo* factors. As the Decision expressly states, the RPD found this factor to be determinative in the case at hand. However, this is not problematic, as *Camayo* explains at paragraph 70 that this key factor may not be determinative of the question of intent, which necessarily implies that it is possible that this factor can be determinative in certain cases.

[27] It would be problematic, however, if (as the Minister submits) the RPD arrived at this conclusion, that the subjective knowledge factor was determinative, without considering and

weighing the evidence relevant to the other *Camayo* factors. As *Camayo* explains at paragraph 84, all of the evidence relating to the factors prescribed therein should be considered and balanced in order to determine whether the actions of the individual are such that they have rebutted the presumption of re-availment. However, I agree with the Respondent's submission that the Decision demonstrates that the RPD did not overlook this requirement.

[28] Certainly, the Decision expressly notes that *Camayo* (at para 66) calls for an individualized assessment of all the evidence before the RPD when determining whether the presumption of re-availment has been rebutted. The Decision also expressly refers to the possibility that lack of actual subjective knowledge of the immigration consequences of travelling on a national passport to the country of nationality may be found by the RPD to be determinative, after conducting an individualized analysis of all of the evidence (my emphasis). It is therefore clear that the RPD understood that it was required to assess all the evidence before potentially identifying subjective knowledge as the determinative factor.

[29] The RPD then states that, for the reasons that it is about to provide and considering all the evidence, the subjective knowledge factor is determinative in the Respondent's case (my emphasis). This language indicates that the RPD not only understood the nature of the analysis that it was required to conduct but intended to conduct an analysis consistent with that understanding.

[30] That said, the Decision is less express in actually setting out that analysis. However, as noted above, the RPD's reasons for the Decision need not withstand scrutiny against a standard

of perfection. In the portion of the Decision that assessed whether the Respondent had rebutted the presumption of re-availment, the RPD referenced and took into account the Minister's additional post-hearing submissions, explaining that the Minister asserted that the Respondent's ignorance of the law could not explain away travelling back to the country of alleged persecution. The Certified Tribunal Record demonstrates that the Minister's submissions reference the following:

A. The Respondent had obtained three Cuban Passport in Cuba;

B. The Respondent used these passports to travel to Cuba on a total of 18 documented occasions, with another 21 trips recorded, along with travelling to other countries;

C. The Respondent failed to establish having taken credible measures to avoid contact with his agent of persecution, the Government of Cuba, while in Cuba.

[31] As I read those submissions, the Minister was arguing that the facts cited therein supported a finding that, notwithstanding his ignorance of the law, the Applicant had not rebutted the presumption of re-availment. However, the RPD concluded that this argument could not undermine the significance of its finding that the Respondent was not aware of the consequences of his travels. In my view, this conclusion represents the required consideration and weighing of the evidence relevant to the *Camayo* factors, including not only the Respondent's subjective knowledge but also the other factors referenced in the Minister's submissions.

[32] I therefore find that the Decision is reasonable and that this application for judicial review must be dismissed. Neither party proposed any question for certification for appeal, and none is stated.

JUDGMENT IN IMM-7777-22

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

No question is certified for appeal.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-7777-22
STYLE OF CAUSE:	MPSEP v. JUAN MARIANO PADRON CASTRO
PLACE OF HEARING:	TORONTO,ON
DATE OF HEARING:	JUNE 13, 2023
JUDGMENT AND REASONS:	SOUTHCOTT J.
DATED:	JUNE 14, 2023

APPEARANCES:

John Loncar	FOR THE APPLICANT
Tatiana Emanuel	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada Toronto, ON	FOR THE APPLICANT
Legally Canadian Immigration Law Firm Toronto, ON	FOR THE RESPONDENT