Federal Court  Cour fédérale

Date: 20230901

Docket: IMM-7557-22

Citation: 2023 FC 1194

Toronto, Ontario, September 1, 2023

PRESENT: Madam Justice Go

BETWEEN:

FAZL MINALLOH MUHAMMAD ANVAR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mr. Fazl Minalloh Muhammad Anvar [Applicant], a citizen of Afghanistan, brings an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] of a decision rendered on July 4, 2022 [Decision] by the Refugee Protection Division [RPD]. The RPD allowed the application by the Minister of Public

Safety and Emergency Preparedness [the Minister] for the cessation of refugee protection to the Applicant, pursuant to subsection 108(2) of the *IRPA*.

[2] The Applicant was determined to be a Convention refugee in November 2005 and resettled in Canada in 2006. The RPD found that the Applicant voluntarily reavailed himself of the protection of Afghanistan, his country of nationality, pursuant to para 108(1)(a) of the *IRPA*, as the Applicant applied for and received three Afghan passports and travelled to Afghanistan five times between 2007 and 2015.

[3] For the reasons set out below, I grant this application for judicial review.

II. Preliminary Issues

[4] Prior to the hearing, I issued a direction to the parties seeking additional submissions with respect to the Affidavit of the Applicant in support of his application for judicial review [Affidavit]. Briefly, the Affidavit contains certain information that does not appear to have been presented to the RPD; it also contains information that appears to be inconsistent with the Applicant's prior statements.

[5] Through counsel, the Applicant submits that most of the information contained in the Affidavit is "in consonance to" the evidence before the RPD. The Applicant's response fails to address the issues identified by the Court.

[6] The Respondent submits, and I agree, that while some of the statements in the Affidavit are not necessarily inconsistent with the actual testimony, many of them appear to expand on the Applicant's case, which is not proper.

[7] For instance, at para 12 of the Affidavit, the Applicant states:

> I believed that I was able to retain and travel on my Afghanistan passport, as nobody had asked me to deposit my passport nor was, I advised against travelling on my Afghani passport.

[8] The Applicant points to the following exchange in the Transcript of the RPD hearing [Transcript] as the basis of para 12 of the Affidavit:

> **Q:** …and five visits. Why did you apply for passport instead of travel document?
>
> **A:** Yeah. I didn't know about travel document. I thought that okay, when you are spending three or, three or - up to five years, then you can obtain a Canadian passport. And all the other Afghans and friends, they told me you can get an Afghan passport.

[9] Stating that all the other Afghans and friends advised him he could get an Afghan passport is not the same as asserting that the Applicant has never been told to "deposit" his passport or has never been advised against travelling on his Afghan passport.

[10] A related discrepancy appears in para 23 of the Affidavit, where the Applicant specifically claims that he did not know about the possibility of obtaining a refugee travel document, and only learned about it during the cessation hearing. The above noted excerpt from the Transcript does not confirm this statement, as the Applicant testified his lack of knowledge about travel documents in the past tense.

[11] As a further example of inconsistencies, at para 13 of the Affidavit, the Applicant states that his brother "had expressed his hopelessness and had pleaded" with the Applicant to return to Afghanistan and "save [their] aged father as he was extremely sick." At the RDP hearing, the Applicant testified simply that:

> "The brother who's, who's, who's suffered that horrible injury was not able to assist; he had his own medical concerns."

[12] I need not review all of the inconsistences arising between the Affidavit and the Applicant's prior statements. I will simply note that these issues appear in at least nine out of twenty-nine paragraphs in the Affidavit.

[13] I am not suggesting that the Applicant seeks to mislead the Court by including statements in the Affidavit that are not based on the evidence in the record. However, in my view, counsel for the Applicant ought to have exercised more care to ensure there are no inaccuracies or misleading statements in the Affidavit. Being accurate with one's factual assertion is an important part of effective advocacy, and is an integral part of counsel's responsibility as an officer of the Court.

[14] As the Respondent rightly points out, it is trite law that an applicant's affidavit is "at the core of an Application for Leave": *Dhillon v Canada (Citizenship and Immigration)* 2009 FC 614 at para 9. Further, as a general rule, the evidentiary record on judicial review is restricted to the evidentiary record that was before the decision-maker. To the extent that the Affidavit contains information not before the decision-maker, those portions of the Affidavit should be given no weight.

[15] As such, I will give no weight to the information contained in the following paras: 12, 13, 14, 15, 16, 17, 19, 20, and 22, where the information is inconsistent with, or not based on the evidentiary record.

[16] Also as a preliminary matter, the style of cause will be amended to correct the spelling of the Applicant's last name. I brought this issue to the attention of the parties as I noticed almost all of the documents that pre-date the filing of the application for leave for judicial review [ALJR] - including the Applicant's passport - state the Applicant's last name as "Anvar" instead of "Anwar" as stated in the ALJR. Through counsel, the Applicant confirms that he "prefers" Anvar as his last name, but provides no explanation as to why the ALJR uses a different name. The Respondent has no objection to amending the style of cause.

III. Issues and Standard of Review

[17] The overarching issue before this Court is whether the Decision is reasonable. Specifically, the Applicant argues that the RPD erred in assessing a) his intention to reavail based on the evidence of compelling circumstances, and b) his lack of knowledge about the legal consequences of acquiring an Afghan passport, in light of the factors set out by the Federal Court of Appeal's [FCA] decision in *Canada (Citizenship and Immigration) v Galindo Camayo*, 2022 FCA 50 [*Camayo*].

[18] 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*].

[19] 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). The onus is on the Applicant to demonstrate that the decision is unreasonable (*Vavilov* at para 100). To set aside a decision on this basis, "the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100).

IV. Analysis

[20] The RPD based its Decision on the following relevant provisions of the *IRPA*:

Rejection	**Rejet**
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:	**108(1)** Est rejetée la demande d'asile et le demandeur n'a pas qualité de réfugié ou de personne à protéger dans tel des cas suivants :
(a) The person has voluntarily reavailed themself of the protection of their country of nationality; […]	**a)** il se réclame de nouveau et volontairement de la protection du pays dont il a la nationalité; […]
Cessation of refugee protection	**Perte de l'asile**
(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).	**(2)** L'asile visé au paragraphe 95(1) est perdu, à la demande du ministre, sur constat par la Section de protection des réfugiés, de tels des faits mentionnés au paragraphe (1).
Effect of decision	**Effet de la décision**

(3) If the application is allowed, the claim of the person is deemed to be rejected.	**3)** Le constat est assimilé au rejet de la demande d'asile.

[21] There are three requirements for the cessation of refugee protection as a result of reavailment, as provided for by the United Nations High Commissioner for Refugees Handbook on Procedures and Criteria for Determining Refugee Status [UNHCR Handbook] and affirmed in *Camayo* at para 18:

A. voluntariness – whether the refugee acted voluntarily;

B. intention – whether the refugee intended by their actions to reavail themselves of the protection of their country of nationality; and

C. actual reavailment – whether the refugee actually obtained such protection.

[22] The burden is on the Minister to show that the three elements of reavailment are met to establish a *prima facie* case for reavailment. It then becomes the refugee's burden to rebut the presumption on a balance of probabilities: *Canada (Citizenship and Immigration) v Safi*, 2022 FC 1125 at para 33.

a) *RPD did not fail to consider evidence of family emergencies*

[23] The Applicant testified at the RPD that he travelled to Afghanistan in 2007 to take care of his father's deteriorating health. After his father passed away in January 2010, the Applicant traveled to Afghanistan in February 2010 to carry out the last rites. The Applicant visited Tajikistan for a week to see his in-laws before returning to Canada in April 2010. In May 2014, the Applicant returned to Afghanistan to arrange for his mother's surgery in India, and travelled back and forth between Afghanistan and India before returning to Canada in July 2014. Finally,

in September 2015, the Applicant travelled to Afghanistan to visit his ailing mother, who passed away during his visit. He attended to her funeral and returned to Canada in November 2015.

[24] The Applicant argues that the RPD erred in considering his intention to reavail in light of the family emergencies that formed the purpose of his trips. The Applicant points to the UNHCR Handbook, which notes that circumstances such as "visiting an old or sick parent will have a different bearing on the refugee's relation to his former home country than regular visits to that country spent on holidays": at para 125. The Applicant also points to the purpose of travel factor set out at para 84 of *Camayo,* which similarly notes:

> 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;

[25] Emphasizing the FCA's guidance in *Camayo* that the factors set out in para 84 are to be considered "at a minimum," the Applicant argues that the RPD failed to heed to the jurisprudence by failing to account for his purposes of taking his trips.

[26] Specifically, the Applicant takes issue with the RPD's observation that the reasons for his trips "were not exceptional and/or compelling" when finding that he traveled voluntarily, despite his brother's financial and physical incapacity and in light of his parent's state of health. The Applicant submits that this finding suggests a "failure to meaningfully grapple with key issues" and calls "into question whether the decision maker was actually alert and sensitive to the matter before it": *Canada (Citizenship and Immigration) v Obaid*, 2022 FC 1236 at para 31.

[27] I am not persuaded by the Applicant's arguments.

[28] The RPD noted the purposes of the Applicant's trips and acknowledged that he returned to Afghanistan to look after his ailing parents. The RPD also noted the brother's conditions. At para 20 of the Decision, the RPD summarized its findings:

> I empathize with the [Applicant] that his brother, who lived with his parents in Afghanistan, was not in a position to take care of them financially and had mobility issues due to losing his legs in a bomb blast in 1996. However, the [Applicant's] family (his wife and children), pleaded with him not to put himself in danger by visiting Afghanistan. However, in spite of this, the [Applicant] voluntarily undertook the travel to Afghanistan, Tajikistan, and India. This evidence shows that the [Applicant's] family certainly was fearful for his life and safety during his visits to Afghanistan. He did not heed their advice and decided to undertake those travels, saying that he has to care for his aging parents. The [Applicant] did not provide any credible evidence that he was forced to go to his country and then to Tajikistan and India under circumstances that were compelling so much so that he had to risk his life upon travel to Afghanistan when the conditions of lawlessness in that country were still prevalent which had prompted him to seek refugee protection. When asked why he felt safe enough to return to Afghanistan on all these occasions, the [Applicant] testified that he did not have any trouble with anyone in his country and that he stayed at his brother's house with his parents.

[29] The RPD then concluded, based on the "totality of the circumstances," that the Applicant's return to Afghanistan was voluntary, "notwithstanding the need for caring for his aging parents."

[30] The Decision, read as a whole, revealed that the RPD did take into account the purposes of the Applicant's trips, contrary to the Applicant's assertion.

[31] As Justice Fuhrer explained in *Wu v Canada (Minister of Citizenship and Immigration)*, 2023 FC 1071, at para 23: “The existence of a reason to return to one’s country of origin, however, does not alter necessarily the voluntariness of the act” citing *Cabrera Cadena v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 67 at para 22.

[32] Further, as the Respondent notes, this Court has affirmed that it is the RPD’s role to assess whether the facts of a particular case constitute reavailment when an individual travels for extenuating family circumstances: *Norouzi v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 368 at paras 11 and 21.

[33] In this case, I find that the RPD reasonably assessed the Applicant’s stated purposes of return. While the Applicant may disagree with the RDP’s conclusion that these circumstances are not exceptional or compelling, the Applicant has not pointed to any reviewable error arising from the RPD’s findings.

b) *The RPD erred by failing to consider the lack of subjective knowledge*

[34] In his written submission, the Applicant submits that the RPD failed to consider his testimony that he only obtained and used his Afghan passports as a matter of administrative routine and “did not know or appreciate the legal ramifications of such actions.” The Applicant further states that he testified that he was not aware that he could travel by applying for a Canadian travel document. With respect to actual reavailment, the Applicant asserts that “[h]e did not believe, for a moment, that the act of issuing a passport meant that the Afghanistan

Government or the Taliban has decided to stop persecuting him on the account of his ethnicity or that they are offering to protect him."

[35] The Applicant submits that the presumption of reavailment must be open to rebuttal and that the distinction between actual state protection and diplomatic protection "is a point of legal technicality that is seldom appreciated by the lay refugee." Pointing to *Camayo*, the Applicant argues that the "actual knowledge of the immigration consequences of [a refugee's] actions" while not determinative, 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": at para 70. As such, the Applicant argues that the RPD's failure to consider this evidence critical to the analysis of his intent and actual reavailment renders the Decision unreasonable.

[36] I should pause to note that not all of the Applicant's arguments are based on the evidence as contained in the record before me. For instance, contrary to his written argument, the Applicant never gave evidence that he was unaware of the legal ramifications of his actions, or that he did not believe that the act of issuing a passport meant that the Afghan government or the Taliban were offering to protect him. I point this out, once again, to emphasize the importance for counsel to ensure accuracy in their factual assertion in a judicial review application. Such inaccuracy reflects poorly both on the Applicant and their counsel and could lead the Court down a wrong path of analysis.

[37] At the hearing before me, counsel for the Applicant revised his submission by arguing that the question of subjective knowledge was never raised at the cessation hearing. Specifically, the Applicant was never asked by anyone, including his then-counsel, if he was aware he could lose his status by travelling on an Afghan passport. Given the lack of evidence with respect to subjective knowledge, which *Camayo* affirms is a factor to consider, the Decision was therefore unreasonable, argued the Applicant.

[38] The FCA in *Camayo* at para 84 highlights the following as one of the factors to be considered in a cessation hearing:

- 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;

[39] As the RPD issued its decision prior to the release of *Camayo*, it cannot be faulted for not heeding the FCA's guidance. However, as the FCA made clear, ***all*** of the evidence relating to the factors it set out "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": *Camayo*, at para 84. By failing to consider whether or not the Applicant was aware of the potential consequences of his actions, the RPD erred.

[40] I have considered the Respondent's argument that given the limited evidence to rebut that presumption, the RPD's failure not to consider the Applicant's subjective knowledge did not rise to a reviewable error. However, in view of the potential significance of the evidence concerning

the Applicant’s awareness - or lack thereof - of the consequences of his actions, the appropriate remedy is to send the matter back for redetermination.

V. Conclusion

[41] The application for judicial review is granted.

[42] There is no question for certification.

JUDGMENT in IMM-7557-22

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 is no question for certification.

4. They style of cause shall be amended to state the Applicant's last name as "Anvar" instead of "Anwar."

"Avvy Yao-Yao Go"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-7557-22
STYLE OF CAUSE:	FAZL MINALLOH MUHAMMAD ANVAR v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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