

Federal Court



Cour fédérale

Date: 20241030

Docket: IMM-11084-23

Citation: 2024 FC 1725

Ottawa, Ontario, October 30, 2024

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

ATEEQ AZMAT

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION AND THE MINISTER OF
PUBLIC SAFETY AND EMERGENCY
PREPAREDNESS**

Respondents

JUDGMENT AND REASONS

[1] Based on his claim that he feared persecution by the Taliban if he returned to Pakistan, the Applicant, Ateeq Azmat, was determined to be a Convention refugee by the Refugee Protection Division [RPD] on November 3, 2014. The Applicant became a Permanent Resident of Canada on November 9, 2016.

[2] In January 2017, the Applicant applied for and was issued a new Pakistani passport. He traveled to Pakistan on March 15, 2017 and stayed there for 26 days, until April 11, 2017.

[3] The Minister brought a cessation application, pursuant to s 108(2) of the *Immigration and Refugee Protection Act, SC 2001, c 27 [IRPA]*, asserting that the Applicant voluntarily re-availed himself of the protection of his country of nationality, Pakistan.

[4] This is the judicial review of the decision of the RPD allowing the Minister's application for cessation of the Applicant's refugee status.

Decision Under Review

[5] In assessing whether the Applicant had, pursuant to s 108(1)(a) of the *IRPA*, re-availed himself of Pakistan's protection, the RPD considered the United Nations' High Commission on Refugees *Handbook on Procedures and Criteria for Determining Refugee Status* (UNHCR handbook) with respect to voluntariness, intention and re-availment.

[6] The RPD determined that the Applicant acted voluntarily as his presence in Pakistan, to provide his sister with a blessing for her wedding, did not constitute an exceptional circumstance and was not compelled by coercion or force. The RPD relied on *Tung v Canada (Citizenship and Immigration)*, 2018 FC 1224 at paras 41-46 and *Jing v Canada (Citizenship and Immigration)* 2019 FC 104 at paras 24-28 as establishing the principle that returning to one's country of nationality to address the needs of a relative (such as caring for a sick sibling) does not constitute "exceptional circumstances" if that person's presence is not necessary. The RPD found that it

was not necessary for the Applicant to return to Pakistan for his sister's wedding as she had two other brothers, who were not targeted by the Taliban, and who could have provided the blessing (citing *Kovacz v Canada (Citizenship and Immigration)*, 2022 FC 1532 at para 23). The RPD found that customary practices do not qualify as exceptional circumstances or compelling reasons to return to a country of alleged persecution. Further, the RPD found that the Applicant acknowledged there was no evidence of coercion that forced or compelled his return to Pakistan. He stated that when he spoke to his mother on the phone she cried, leaving him feeling helpless.

[7] As to intent to re-avail, the RPD found that the Applicant's voluntary decision and planned trip to his country of persecution for 26 days to attend his sister's wedding indicates a lack of subjective fear and establishes an intent to re-avail himself of the protection of Pakistan. The RPD found that the Applicant failed to rebut the presumption of re-availment with credible and trustworthy evidence.

[8] The RPD acknowledged that the subjective intent of the Applicant should be assessed, citing *Canada (Citizenship and Immigration) v Galindo Camayo*, 2022 FCA 50 [*Camayo*]. However, the RPD found that the Applicant was not credible. The RPD noted that the Applicant provided three different reasons for why he returned to Pakistan, being "to attend his sister's wedding"; a family emergency; and, at the hearing, to place his hand upon his sister's head and provide blessing before she left the family home. The RPD characterized the Applicant's evidence as "evolving" and found that he failed to provide credible and trustworthy evidence regarding his subjective intent, which was a central aspect of the cessation application. The RPD found that it was not reasonable that the Applicant would return to Pakistan, risk his life at the

hands of the Taliban who allegedly detained and persecuted him merely days after another sister's wedding in 2013, and remain indoors for almost a month, just to provide a brief blessing and not attend the wedding on March 18, 2017.

[9] The RPD also considered subjective fear, and found that the fact that the Taliban did not inquire about the Applicant from family members, or attend at his family home in search of him, demonstrated that his alleged agent of persecution is not interested in him. The RPD further found that the Applicant's voluntary willingness to risk his life, despite the alleged fear of the Taliban, was not reasonable if he is willing to curtail travel just to maintain Canadian Permanent Resident status. The RPD found that the Applicant failed to provide credible and trustworthy evidence regarding his alleged ongoing fear of the Taliban throughout Pakistan and consequently attached no probative value to the affidavit of the Applicant's father.

[10] Additionally, the RPD held that given that the Applicant did not face any obstacles entering, exiting, or during his stay in Pakistan, and the RPD's findings that the Applicant lacked credibility regarding his subjective intent, his evidence regarding his alleged precautionary measures taken, specifically, remaining indoors for a month, was impugned.

[11] The RPD relied on *Dari v Canada (Citizenship and Immigration)*, 2023 FC 887 to support its finding that the Applicant's assertion that he did not know the consequences of obtaining and using a Pakistani passport was insufficient to rebut the presumption of intention of reavilment.

[12] The RPD considered Federal Court jurisprudence and the UNHCR Guide to determine that, by using his Pakistani passport and voluntarily remaining in his country of alleged persecution for almost a month, the Applicant actually re-availed himself of Pakistani's protection.

Issues and Standard of Review

[13] The sole issue in the matter is whether the RPD's decision was reasonable. The parties submit and I agree that the applicable standard of review is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov]).

The Parties' Positions

Applicant

[14] The Applicant lists 13 grounds to support his argument that the decision was unreasonable, many of which were not further addressed in his submissions. With respect to the RPD's treatment of the evidence and credibility findings, the Applicant asserts that the RPD appears to have considered his use of his Pakistani passport to travel to Pakistan as satisfying all three elements of the test for re-availment. Further, that the RPD failed to assess his evidence that he lacked subjective knowledge regarding the consequences of travelling to Pakistan, that is, his intent to re-avail. He also asserts that the RPD's reasoning is speculative and that the outcome was the result of misapprehending and misconstruing of the evidence and the drawing of unfounded inferences. Specifically, the Applicant argues that the RPD did not find in clear

and unmistakable terms that his evidence lacked credibility and did not give good reasons to disregard it. He also asserts that the RPD erred in discounting the affidavit evidence of his father.

[15] The Applicant argues that the RPD failed to consider the issue of actual re-availment with respect to non-state actors, including the religious extremists Taliban.

[16] As to *Camayo*, the Applicant submits that the RPD failed to consider the principles outlined by the Federal Court of Appeal, specifically: the Applicant's actual knowledge of the cessation provisions; the severity of consequences for the applicant; and, the precautionary measures taken by the Applicant while in Pakistan.

[17] In his 21-page Reply, the Applicant restates his arguments and submits *Camayo* held that, instead of focusing narrowly on whether there were exceptional circumstances pertaining to the trip(s) at issue, the evidence related to the factors it set out must be considered when determining whether the presumption of re-availment has been rebutted, which the RPD failed to do. The Applicant also argues that the RPD's credibility findings are flawed and unreasonable as they "never actually address the applicant's intention to re-avail himself of Pakistan protection, instead it conflates this issue with whether the applicant knew he should not return to Pakistan because he would be at risk there at the hands of Taliban." The Applicant challenges other credibility findings on the basis that they are without any justifiable basis and with "utter disregard and misapprehension of the evidence on record." Further, the Applicant asserts that the RPD failed to indicate any indicia or inconsistencies in the evidence that are sufficiently serious and sufficiently relevant to the issues being adjudicated to warrant an adverse credibility finding.

Respondent's position

[18] The Respondent emphasises that the presumption of re-availment is particularly strong when a refugee uses his national passport to return to the country from which refuge had been taken, as the Applicant did in this case. The onus is on the Applicant to re-but this presumption. The Respondent submits that the RPD reasonably found that the Applicant failed to provide credible and trustworthy evidence to rebut the presumption. His testimony regarding his return to Pakistan was evolving and lacked credibility, this impugned his evidence as to precautionary measures taken with in Pakistan. Findings of fact and determinations of credibility fall within the heartland of the RPD's expertise (citing *Liu v MCI*, 2017 FC 736 at para 18).

[19] On the *Camayo* factors, the Respondent acknowledges that an individual's lack of knowledge of the immigration consequences is a key factor in assessing intention to re-avail. However, it argues that the RPD reasonably weighed the Applicant's alleged lack of knowledge about the consequences of his re-availment against his actions (for example, the duration and alleged purpose of his trip), and his lack of credibility, in finding that the presumptions of re-availment had not been rebutted. The Respondent submits that the RPD's decision reflects the multi-factored analysis required by *Camayo*.

Analysis

[20] The onus is on the Minister to show, on a balance of probabilities, that the person subject to the cessation application has voluntarily re-availed themselves of the protection of the country from which they fled 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. It is then presumed that the refugee intended to re-avail themselves of the protection of the country in question, and the onus is on the refugee to adduce sufficient evidence to rebut the presumption. 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 (*Canada (Citizenship and Immigration) v Safi*, 2022 FC 1125 at paras 33, 35, citing *Abadi v Canada (Citizenship and Immigration)*, 2016 FC 29 at para 17 [*Abadi*]; *Canada (Citizenship and Immigration) v Nilam*, 2015 FC 1154 at para 26; *Li v Canada (Citizenship and Immigration)*, 2015 FC 459 at para 42; *Camayo* at para 65). The presumption of re-availment is particularly strong when the refugee travels to the country of nationality using a passport issued by that country (*Abadi* at para 16; *Camayo* at para 63).

[21] This Court has held that contradictions, omissions or inconsistencies in the testimony of a claimant or witness can justify a finding of lack of credibility (*Bushati v (Citizenship and Immigration)*, 2018 FC 803 at para 33). However, such inconsistencies in the evidence must be sufficiently serious and must concern matters sufficiently relevant to the issues being adjudicated to warrant an adverse credibility finding (*Sohel v (Citizenship and Immigration)*, 2023 FC 1217 at para 54). It is also well established that findings of fact and determinations of credibility fall within the expertise of the RPD (*Liu v (Citizenship and Immigration)*, 2017 FC 736, para 18 citing *Giron v Canada (Minister of Employment and Immigration)*, [1992] FCJ No 481, 143 NR 238 (FCA)). And, as I held in *Nanyanzi v MCI*, 2019 FC 1535:

[27] As noted above, credibility is a factual determination within the heartland of the RPD's jurisdiction and must be reviewed with deference (*Omar* at para 11; *Singh* at para 3). The RPD is also owed deference in the determination of the plausibility

of testimony. As stated by the Federal Court of Appeal in *Aguebor*, as long as the inferences drawn by the tribunal are not so unreasonable as to warrant intervention of the Court, its findings are not open to judicial review. Further, the burden of establishing that the RPD's inferences are unreasonable lies with the applicant (*Aguebor* at para 4).

[22] In this case, and contrary to the Applicant's submissions, the RPD did give reasons for its credibility findings.

[23] The RPD pointed out that, in his Application for Canadian Citizenship, in listing his absences from Canada for purposes of calculating his physical presence and eligibility, he indicated that he was in Pakistan from March 15, 2017 to April 11, 2017 and that the reason for this travel was "to attend my sister's wedding." However, in his Application for a Permanent Resident Card (renewal) he indicated he was in Pakistan from March 16 to April 12, 2017 due to a "family emergency"; and, at the hearing, he testified that he returned to Pakistan to place his hand on his sister's head to provide a blessing as she left the family home and that he did not attend the wedding but remained indoors for 26 days.

[24] The RPD found, given these differing responses, that the Applicant failed to provide credible and trustworthy evidence regarding his subjective intent in returning to Pakistan. By returning, he was putting his life at risk at the hands of the Taliban – who the Applicant alleged had detained and persecuted him days after another sister's wedding in 2013. The RPD noted the Minister's submission that the Applicant voluntarily placed himself in this position given that the Taliban would be aware of the current wedding in their small community, and had they been interested in persecuting him, this would have been an ideal opportunity to do so. The RPD

found that the fact that the Taliban did not inquire about the Applicant by way of family members demonstrated, on a balance of probabilities, that his agent of persecution was not interested in him.

[25] The RPD stated that, having considered the totality of the evidence, it found that the Applicant returned to Pakistan to attend his sister's wedding as he had stated in his citizenship application. Further, on a balance of probabilities, that it was not reasonable that the Applicant would fly from Toronto to Lahore, Pakistan (on March 15, 2017), drive for two hours to his hometown, put his life at risk at the hands of the Taliban and remain indoors for nearly a month, just to provide a brief blessing by touching the head of his sister – but not attend the March 18, 2017 wedding. Accordingly, that the Applicant had failed to provide credible and trustworthy evidence regarding a central aspect of the cessation application, his subjective intent, and that his testimony was evolving.

[26] The RPD acknowledged that the Applicant had testified that he was safe while he was in Pakistan because he remained indoors. The RPD held that given its finding that the Applicant lacked credibility regarding his subjective intent, his evidence about his alleged precautionary measures was impugned. Further, that during his testimony, the Applicant added that even the groom and his family were not aware of his presence in the family home. The RPD found his evidence in this regard to be evolving.

[27] Given the RPD's above reasons, I do not agree with the Applicant that the RPD failed to indicate any inconsistencies in the evidence that were sufficiently serious and sufficiently relevant to the issues being adjudicated to warrant an adverse credibility finding.

[28] In my view, it was open to the RPD to find that the Applicant was not credible with respect to why he returned to Pakistan with respect to attendance at his sister's wedding. The RPD did not believe that he would again subject himself to risk at the hands of the Taliban simply to bless his sister prior to her wedding but not attend her wedding. Nor is this circumstance similar to *Hamid*, upon which the Applicant relies, as in that case the applicant stayed in guarded hotels, far away from where his family lived and where he experienced persecution (*Hamid* at paras 28-30). Here, the Applicant returned to his family home, which was known to the Taliban, for the same type of event, another sister's wedding, for which he had been detained and persecuted merely days after in 2013.

[29] The Applicant also takes issue with the RPD attaching no probative value to the affidavit of his father. That affidavit described the Applicant's prior abduction; the Applicant's mother's anxiety and emotional distress at being separated from the Applicant and her crying during calls with him; and, the precautionary steps taken while the Applicant was in Pakistan.

[30] Because the RPD had found that the Applicant had failed to provide credible and trustworthy evidence regarding his alleged ongoing fear of the Taliban throughout Pakistan, it afforded no probative value to his father's affidavit. However, the RPD then stated that the affidavit failed to provide details of how, where and to whom the ransom was paid and that this

“lack of clarity impinged the probative value of the affidavit”. It is not clear from the RPD’s reasons why details pertaining to the prior abduction are relevant to the re-availment assessment and, in my view, the RPD’s analysis on this point is unintelligible. However, little turns on this point, given the RPD’s prior findings as to a lack of subjective intent.

[31] With respect to voluntariness, the Applicant argues that the RPD erred by failing to consider how compelling his reasons for return were, from his own perspective, citing *Shah* at para 14. I note that *Shah* did not involve a negative credibility finding. Further, in that case the applicant’s evidence was that he returned because his 5-year-old son was seriously ill and the applicant believed his son might die. He also did not return to his home village where he was most at risk. Justice Norris found that the RPD erred with respect to subjective intent by focusing on whether the applicant’s return to their country of nationality was absolutely necessary rather than how compelling the applicant’s reasons were from his own perspective (citing *Ahmed* at para 44).

[32] In this matter, the RPD found that the actual reason for the Applicant’s return was to attend his sister’s wedding and it assessed voluntariness primarily on that basis.

[33] However, the RPD noted that the Minister had submitted that there was no evidence or coercion that forced or compelled the Applicant to return to his country of alleged persecution and that the Applicant acknowledged this. The RPD acknowledged the Applicant’s submission that when he spoke with his mother by telephone she cried and he felt helpless. It concluded,

stating that it had considered the totality of the evidence, that the Applicant's return was not necessary or compelled.

[34] However, the audio files of the hearing indicate that the Applicant stated that he was "compelled" to book a seat on the plane to Pakistan as a result of his mother's helplessness and crying and his resultant restlessness. The Applicant was also asked to explain what the "family emergency" was in his application to renew his permanent resident card. He stated that this was the helplessness of his mother and himself and later went on to say if he returned to attend his sister's wedding or to his console my mother, "that was an emergency for me."

[35] *Camayo* held that 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. Thus, it was open to the RPD to find that the Applicant's travel to Pakistan to attend a family wedding was different than travel due to serious illness in the family. But, the RPD did not make a specific finding that that Applicant's mother's health was not a compelling reason for return. This, in turn raises the question of whether the RPD reasonably concluded that the reason for the Applicant's return to Pakistan was to attend his sister's wedding.

[36] That said, I am not persuaded that the RPD must determine "how compelling" an applicant's reasons are based solely on their own perspective, especially when that perspective is offered in hindsight, through the lens of a cessation hearing and without objective medical evidence. However, in the absence of a specific negative credibility finding on the point, the

RPD was required to assess the Applicant's evidence as to the Applicant's mother's health as a reason for his return. Based on the limited reasons provided by the RPD, I am unable to conclude that it did so in this case.

[37] Given this finding, and although the Applicant raises other concerns, I need not address them as the RPD's treatment of the evidence pertaining to the health of the Applicant's mother is sufficient to allow the application for judicial review and remit that matter for re-consideration.

[38] I note here in passing that the Applicant filed an affidavit in support of his application for judicial review in which he described his version of his testimony given before the RPD. In my view, if an applicant wishes to rely on their testimony before the RPD, then the appropriate course of action is to file a transcript of the proceeding and refer the Court to the actual testimony which is relied upon. The Court cannot be expected to listen to hours, or days, of audio recordings of testimony before the RPD in an effort to determine what testimony supports an applicant's submissions on judicial review.

JUDGMENT IN IMM-11084-23

THIS COURT'S JUDGMENT is that

1. The application for judicial review is granted;
2. The decision is set aside and the matter shall be remitted to a different decision maker for redetermination;
3. There shall be no order as to costs; and
4. No question of general importance for certification was proposed or arises.

"Cecily Y. Strickland"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-11084-23

STYLE OF CAUSE: ATEEQ AZMAT v THE MINISTER OF CITIZENSHIP
AND IMMIGRATION AND THE MINISTER OF
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PREPAREDNESS

PLACE OF HEARING: BY VIDEOCONFERENCE USING ZOOM

DATE OF HEARING: SEPTEMBER 11, 2024

JUDGMENT AND REASONS: STRICKLAND J.

DATED: OCTOBER 30, 2024

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