Federal Court  Cour fédérale

Date: 20250219

Docket: IMM-8668-23

Citation: 2025 FC 326

Ottawa, Ontario, February 19, 2025

PRESENT: Mr. Justice Pentney

BETWEEN:

KRYSTYNA PARCZEWSKA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Krystyna Parczewska seeks judicial review of the decision of the Refugee Protection Division (RPD) to cease her refugee protection. The RPD found that the Applicant had reavailed herself of the protection of Poland, the country from which she had obtained refugee protection.

[2] The Applicant submits that the RPD failed to give due consideration to the unfairness caused by the lengthy delay in this matter, and also that its decision is unreasonable because the RPD erred in its application of the test for reavailment.

[3] For the reasons that follow, this application for judicial review will be dismissed. The RPD's assessment of the Applicant's abuse of process claim was reasonable, and there is no basis to overturn its application of the test for cessation.

I. Background

[4] The Applicant is a citizen of Poland. At the relevant time she was 70 years of age, and in declining health. She was granted refugee status in Canada in December 2005, on the basis of a well-founded fear of persecution due to her Roma ethnicity.

[5] In 2019, the Minister of Public Safety and Emergency Preparedness (the "Minister") filed an application to cease her refugee protection. The Minister alleges the Applicant renewed her Polish passport in August 2008 and used it in April 2014 to travel outside of Canada. In 2016, she told immigration officials that she had visited Poland for six or seven months to visit her sick daughter; immigration officials cautioned her about the possibility of reavailment if she travels to Poland. However, in September 2018, she was issued a Canadian travel document, which she used to travel to Poland again for almost four months to visit her sick son-in-law.

[6] In her cessation submission, the Applicant did not dispute that she made these trips to Poland. She submitted that the trips were not voluntary because they were for exceptional

reasons and that in each case, she went to care for a sick family member, which is a strong expectation in Roma culture. She argued that once she learned about the immigration consequences in 2019, she declined to attend a family funeral, which resulted in her being ostracized and shunned by her family and community in Poland.

[7] The Applicant argued that the RPD should dismiss the application because the delay in bringing the cessation application to a hearing constituted an abuse of process. She also submitted that her trips back to Poland were not entirely voluntary, because of the cultural pressure she faced to return to look after her sick family members.

[8] The RPD granted the Minister's application to cease the Applicant's refugee protection. It found that there was no abuse of process, and that the Applicant had reavailed herself of the protection of Poland.

[9] On the abuse of process claim, the RPD discussed the delay that had occurred, finding that the time started to run when an immigration officer warned the Applicant about the consequences of returning to Poland in 2016. However, the Minister did not file the cessation application until 2019. There followed a series of delays, some associated with RPD scheduling and workload, some relating to the need to arrange for appropriate translation for the Applicant, and some because the Applicant's counsel asked for a six-month adjournment relating to the Applicant her medical condition. The RPD found that the Minister's delay in filing the application amounted to 3.5 years, while subsequent delays added 28 months before the hearing was eventually held.

[10] The Applicant argued that she was prejudiced by the delay because of her age and illness, pointing to evidence that her memory and capacities had declined during the intervening period. The RPD applied the test for assessing whether delay amounted to an abuse of process from the leading cases: *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 [*Blencoe*] and *Law Society of Saskatchewan v Abrametz*, 2022 SCC 29 [*Abrametz*]. The RPD found that the Minister's delay was 3.5 years, administrative delays added a further 28 months, and some of the delay was attributed to the Applicant and the need to arrange for appropriate translation. The RPD concluded that the delay of approximately 70 months was not inordinate and would not offend the community's sense of fairness. Moreover, refusing to hear the cessation application due to delay might offend the community's sense of fairness and undermine confidence in the integrity of the immigration system.

[11] On the issue of whether the delay prejudiced the Applicant, the RPD indicated that she had argued that the stress associated with the delay had contributed to her declining health. The RPD accepted that the Applicant's health had deteriorated during the period of delay, to the point that it appointed a Designated Representative to testify for her. The Applicant had stipulated to certain facts relating to her case, and she adduced evidence regarding her travels, the reasons for her return to Poland, her knowledge of immigration consequences of her travels and certain other matters. Because of that, the Applicant did not establish that the delay resulted in an unfair proceeding.

[12] Based on its findings on the first two grounds, the RPD did not analyze the third branch of the test. The RPD concluded that there was no abuse of process.

[13] Turning to the cessation application, the RPD applied the three-part test from the case-law. The RPD found that the Applicant had acted voluntarily when she renewed her Polish passport in 2008, visited Poland in December 2015 and returned to Poland in 2018. The RPD acknowledged that the Applicant felt compelled to go to Poland to visit her sick family members because this is expected of her in her Roma culture. However, the RPD did not find that this was so compelling as to be beyond the Applicant's control.

[14] The Applicant's renewal of her Polish passport triggered a rebuttable presumption that she intended to reavail herself of Poland's protection. The RPD found that although the Applicant is elderly, uneducated and illiterate, her actions demonstrated that she was capable of making rational decisions. After being warned about the danger of reavailment, the Applicant returned to Poland, travelling on a Canadian travel document and transiting through the United Kingdom. The Applicant's refugee claim was based on her fear of persecution by the wider Polish community because of their animosity towards persons of Roma ethnicity. Despite this, she travelled to Poland for extended periods on two occasions, and despite her testimony, there is no evidence that she remained in hiding while she was there. She also approached Polish authorities to obtain a new passport. The RPD found that the Applicant's actions demonstrated a lack of subjective fear of persecution.

[15] Finally, the RPD determined that the Applicant had sought and obtained the actual protection of Poland when she applied for, and then travelled, using her Polish passport. She entered and exited Poland using a Polish passport on two occasions, and also used it to travel to

the United States. The Applicant did not rebut the presumption that a person who travels to their country of origin using that country's passport has received actual protection from that state.

[16] The RPD did not consider the humanitarian and compassionate (H&C) factors relied on by the Applicant, because it did not have jurisdiction to consider such matters. Based on its analysis of reavailment, the RPD granted the Minister's application to cease the Applicant's refugee status.

[17] The Applicant seeks judicial review of the RPD's decision.

II. Issues and Standard of Review

[18] The Applicant submits that the RPD's analysis of the abuse of process failed to consider her circumstances and ignored the evidence she presented about how the decline in her health prejudiced her ability to present her case. In addition, she claims that the RPD's assessment of cessation was unreasonable.

[19] Both of these questions are to be assessed under the framework for reasonableness review set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], and confirmed in *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21.

[20] The abuse of process argument in this case attracts reasonableness review because the Applicant is challenging the RPD's assessment of the abuse of process claim she advanced before it. Her argument is not that the RPD's conduct of the hearing amounted to an abuse of

process (which would raise a question of procedural fairness), but rather that its analysis of the delay issue was not reasonable.

[21] In summary, under the *Vavilov* framework, a reviewing court is to review the reasons given by the administrative decision maker and determine whether the decision is based on an internally coherent chain of reasoning and is justified in light of the relevant legal and factual constraints (*Vavilov* at para 85). The onus is on the Applicants to demonstrate that "any shortcomings or flaws … are sufficiently central or significant to render the decision unreasonable" (*Vavilov* at para 100). Absent exceptional circumstances, reviewing courts must not interfere with the decision-maker's factual findings and cannot reweigh and reassess evidence considered by the decision-maker (*Vavilov* at para 125).

III. Analysis

A. *The RPD's abuse of process analysis was reasonable*

[22] The Applicant argues that the RPD's analysis of her abuse of process claim is unreasonable because it failed to consider her personal circumstances, it ignored evidence about how her health and memory had declined while she waited for the hearing of the cessation claim, and also because the RPD erroneously required that she demonstrate a causal connection between the delay and the deterioration of her health.

[23] Despite acknowledging that the Applicant had experienced a rapid deterioration of her health and mental capacity, the Applicant contends that the RPD erred by failing to consider the impact of the delay on her, in light of her particular circumstances. The RPD appointed a

Designated Representative because it found the Applicant was unable to testify or comprehend the nature of the proceedings, but then failed to give that due consideration in assessing whether she had been prejudiced by the delay.

[24] Similarly, the Applicant argues that the RPD failed to consider the evidence of a witness who had known her for many years, and who testified that her health and memory had deteriorated during the period she was waiting for her immigration hearing. This witness indicated, for example, that while the Applicant had previously been able to take the bus to visit her, this was no longer possible because of the Applicant's memory and cognitive decline. The Applicant submits that the RPD downplayed this evidence.

[25] Finally, the Applicant submits that the RPD unreasonably required proof that her health and memory decline was directly caused by the delay. In her view, it was sufficient that her capacity to testify and to recall events had declined during the intervening period; causation was not a requirement.

[26] I am not persuaded that the RPD's analysis of the abuse of process question was marred by any fundamental errors. The RPD applied the test set out in the leading cases on this question: *Blencoe* and *Abrametz*. It appropriately noted that the onus was on the Applicant to demonstrate that the delay was unacceptable to the point of tainting the proceedings, and that the threshold for finding abuse of process due to delay in administrative proceedings is a high one.

[27] The RPD was clearly aware of the Applicant's age, as well as her medical and cognitive challenges. It appointed a Designated Representative for her when it became aware of her limitations. The Applicant does not dispute the RPD's recounting of the delay or the reasons for it; rather, she argues that the member ignored relevant evidence and imposed an unreasonably high standard of causation.

[28] I disagree. Having listened to the recording of the hearing, I can confirm that the RPD accurately summarized the witness' evidence about the Applicant's diminished capacities: "[a] witness testified that the [Applicant's] mental capacities have declined. She can no longer take transit on her own, as she does not know where she is going; she is angry and depressed and rarely leaves her apartment." The Panel accepted that the Applicants' mental and physical condition deteriorated during the period of delay, but it found that the Designated Representative testified capably on her behalf, and her counsel had provided a statement agreeing to certain facts regarding her travel history. The RPD noted that the Applicant was able to adduce evidence about her reasons for returning to Poland, and her knowledge of the consequences of these trips, in addition to other matters. This analysis shows that the RPD was fully aware of the Applicant's decline, and took that into account in assessing the overall fairness of the proceeding.

[29] Next, the RPD determined that the Applicant had failed to establish that the delay had caused her significant prejudice. I reject the Applicant's claim that the RPD imposed too high a standard of causation; the portion of the decision discussing that point is in direct response to the argument the Applicant had advanced. As stated by the RPD:

> The [Applicant] argues that delay also led to a deterioration of her mental and emotional health, as she was anxious and stressed

> awaiting the proceeding. However, she did not provide any medical or psychological evidence to establish that changes in her health were related to the delay. In order to establish prejudice resulting from delay, the [Applicant] must do more than make vague allegations that the delay negatively impacted her health.

[30] This passage demonstrates that the RPD did not impose a strict requirement of causation, but rather it assessed the Applicant's claim that the stress associated with waiting for her hearing had directly caused her health to decline. The RPD reasonably found that the Applicant's evidence did not support her claim. I can find no basis to question this conclusion.

[31] It is important to note that the RPD's analysis of the cessation claim did not turn on any credibility finding against the Applicant. Instead, its decision was based on the Applicant's travel history – which she had acknowledged – as well as her evidence about the reasons for these trips. That evidence was provided both by the Applicant herself, by her Designated Representative as well as another witness who had known the Applicant for many years. The RPD reasonably considered the Applicant's prejudice claim in light of her circumstances and also in the context of the case before it. That is a reasonable approach to the question of whether delay has amounted to an abuse of process. The RPD's reasons for its conclusion are clearly expressed and reflect an analysis rooted in the evidence and the binding jurisprudence. That is all that is required for a reasonable decision, and I can find no basis to disturb the RPD's analysis of this question.

[32] In closing on this point, it is important to underline that the question on judicial review is not whether I would have reached the same conclusion as the RPD member. That is not my role. Instead, I am required to assess the reasons in light of the record, applying the *Vavilov*

framework. I have done that, and concluded that the RPD's analysis of the abuse of process issue was reasonable.

B. *The RPD's cessation analysis was reasonable*

[33] The Applicant does not take issue with the RPD's statement of the test for cessation, but rather she submits that the RPD erred in its application of the three branches of the test: voluntariness, intention, and actual protection.

[34] On voluntariness, the Applicant argues that she presented compelling reasons for obtaining her Polish passport in 2008, and for her subsequent trips. She stated that she needed photo identification in Canada because banks and other service providers were not satisfied with her refugee documents. That is why she applied for a Polish passport in 2008, and the Applicant points out that she did not use that passport for travel for many years. According to the Applicant, the RPD failed to consider that she did not obtain her 2008 passport to travel.

[35] As for her other trips, the Applicant states that in 2014, she used her Polish passport to travel to the United States for one day to meet with her ailing husband who was there without status and thus unable to visit her. She felt compelled to travel to see her husband, and argues that the RPD should not have counted that trip against her.

[36] The Applicant's evidence was that she travelled to Poland in 2016 to help care for her daughter who was dealing with cancer, and also to help look after her grandchildren, some of whom were sick at the same time. The Applicant argues that the Panel failed to mention the

specific reason for that trip – namely that her daughter had cancer – and instead it simply said that she had returned to Poland "to spend time with her family." The RPD diminished the compelling nature of the reason for that trip by failing to take note of the actual evidence reflected in the record, including the Canada Border Services Officer notes which state that the Applicant had explained that she travelled to Poland "because her daughter has cancer and her grand-children are sick too."

[37] In the leading case on the current test for cessation (*Canada (Citizenship and Immigration) v Galindo Camayo*, 2022 FCA 50, [2022] 4 FCR 220 [*Camayo*]) the Federal Court of Appeal specifically recognized that travel to care for a family member who is sick can be a compelling reason for a return to a refugee claimant's country of origin (at para 84). The Applicant contends that the RPD failed to apply this guidance in a reasonable manner.

[38] Moreover, the Applicant's evidence was that she felt very strong pressure from her family and community because Roma culture demanded that she return to take responsibility for caring for her ailing family members. She underlines the fact that when she did not return to Poland for a family funeral, she was shunned by her family and community. This corroborates her evidence about the strength of the cultural expectation that she was facing. The Applicant submits that the RPD downplayed this in finding that her trips were voluntary.

[39] The second branch of the test concerns the Applicant's intention: did she intend to seek the protection of Poland when she obtained her passport and later travelled there? She claims that the RPD failed to heed the guidance set out in *Camayo*, which emphasizes the importance of

considering all of the circumstances in assessing the refugee's intention. Instead, according to the Applicant, the RPD fell into the very trap that *Camayo* warned against, by equating her intention with the sole fact that she obtained a Polish passport and used it to travel there. She says that the RPD failed to consider her explanation for why she needed the passport, or to give due weight to her explanations for why she had to travel to Poland.

[40] Finally, on whether she actually obtained the protection of Polish authorities, the Applicant submits that the RPD failed to consider that she stayed with her family members during the trips. She had to obtain a new passport in 2016 because her old one was stolen, and she needed a passport to return to Canada. According to the Applicant, these are compelling reasons, and the RPD failed to give them adequate consideration.

[41] Furthermore, although the RPD mentions the Minister's evidence that someone had attempted to obtain electronic Travel Authorizations (eTA) using the Applicant's maiden name, the Panel did not make clear findings on this point. The Applicant submits there is no evidence to confirm that she was the one who applied for the eTA, and it is illogical to assume so because she did not need one to return to Canada because she had refugee status. She argues that the RPD erred in weighing this evidence against her, without making a clear finding on the weight that could be attributed to this equivocal evidence.

[42] As a final matter, the Applicant submits that the RPD erred by not conducting a state protection analysis which was required in a cessation case like this.

[43] I am not persuaded that the RPD's application of the cessation test was unreasonable. The RPD weighed the evidence put forward by the Minister and the Applicant against the appropriate legal thresholds. The Panel found that the Applicant had failed to rebut the strong presumption that arises when a refugee claimant obtains a passport from their country of origin and then travels there. Overall, I find that the Applicant's arguments on this point amount to a request that I reweigh the evidence, but that is not my role on judicial review: *Vavilov* at para 125.

[44] In discussing the voluntariness branch of the test, the RPD specifically noted that while in *Camayo* the serious illness of a family member was recognized as a compelling reason for return to a refugee's country of origin, other cases have found the opposite. The Panel then traced the evidence about the reason why the Applicant said she obtained her Polish passport in 2008, and her subsequent travel using it. The RPD noted that despite being warned in 2016 about the implications of further travel to Poland, the Applicant nevertheless obtained a Canadian travel document in 2018 and used it to travel to the United Kingdom and then to Poland where she stayed for approximately four months. The Applicant does not take issue with any of these facts.

[45] Next the Panel acknowledged the evidence about the cultural pressure the Applicant felt, but found that this was not sufficient to make her travel involuntary:

> [41] The panel accepts the [Applicant's] evidence, including that of her witness, that her culture places a strong emphasis on family support for a sick relative. However, in the panel's view, such an obligation is not so compelling that it can be considered a reason beyond the [Applicant's] control. Here the [Applicant's] s presence was not required to physically care for her daughter and son-in-law, and after she learned of this cessation application, she chose to disregard the cultural obligation to attend her son-in-law's

> funeral. According to her witness, the [Applicant] made this decision because she chose to think about what was best for herself.

[46] I am not persuaded that any of the findings made by the RPD are unreasonable, when viewed in light of the record. The Panel did not downplay the seriousness of the illnesses experienced by the Applicant's family members, but rather focused on her stated reasons for travelling to Poland. The RPD assessed this by applying the appropriate legal standard to the facts of this case. There is no basis to disturb the RPD's finding that the Applicant's reasons for travelling to Poland were not so compelling as to make her trips involuntary.

[47] In examining the Applicant's intention, the RPD specifically stated that "[t]he question of intent to reavail is distinct from whether the motive for travel was necessary or justified" (citing *Camayo* at para 72). The RPD correctly found that once the Minister established that the Applicant obtained a Polish passport and used it to travel there, the onus shifted to the Applicant to rebut the strong presumption that she had intended to reavail herself of the protection of the Polish state. The RPD took into account the guidance from *Camayo* that it was required to consider all of the relevant circumstances in assessing the Applicant's intention, including her age, education, level of sophistication, the identity of the agent of persecution, what she did while in Poland and whether she took any specific precautions to avoid harm while there.

[48] Applying these factors to the case, the RPD found that the presumption to reavail was established because the Applicant acknowledged that she had obtained her Polish passport, used it to travel there, and then obtained a new one while in Poland that she subsequently used to return to Canada. In examining the circumstances of the case, the RPD stated:

> [48] The [Applicant] is elderly, uneducated, and illiterate. Despite this, her actions show that she was quite capable of making rational decisions. She used a Canadian refugee travel document to visit Germany in 2007. She met with her daughter in Germany in 2014, rather than in Poland. After Canadian immigration officials cautioned her against traveling to her country, she made the subsequent trip using a Canadian travel document to access Poland via the U.K, taking advantage of the fact that both countries are within the Schengen area. After the Minister filed this application, the Respondent decided not to visit Poland again, despite family pressure.

[49] Noting that the Applicant's refugee claim was based on a broad fear of persecution by Polish people because of her Roma ethnicity, the RPD found that she nevertheless returned to Poland for "lengthy visits totalling at least nine or ten months" during which she "largely stayed inside her family's home …but there is no evidence that she was in hiding or made her visits as short as possible." The RPD reasonably concluded that the Applicant's actions were indicative of a lack of subjective fear of persecution in Poland.

[50] The Applicant takes issue with the weight the RPD assigned to certain elements of her evidence, but I am not persuaded that the Panel failed to consider any essential element or that its decision rests on a skewed assessment of the record as a whole. The following passage of the RPD's analysis is particularly telling in support of its finding on intention:

> [50] Upon return from her first visit to Poland, the [Applicant] was warned by immigration officials about re-availment. Despite this, she subsequently returned to Poland anyway, though on this occasion she avoided using her Polish passport and instead used a Canadian travel document to access Poland via the U.K. While the [Applicant] may not have known of the immigration consequences of re-availment at the time of her first trip to Poland, she knew afterward, and yet chose to return anyway.

[51] For the reasons set out above, I am not persuaded that the RPD's assessment of the Applicant's intention was unreasonable. The findings reflect a consideration of the totality of the record, measured against the appropriate legal tests. That bears the hallmarks of reasonableness, under the *Vavilov* framework.

[52] Finally, the RPD did not err in its consideration of whether the Applicant obtained the actual protection of Polish authorities. She obtained two passports from Polish authorities, which she used to travel under the consular protection of the Polish state. There is no indication or evidence that she sought to avoid contact with Polish authorities, or otherwise disguised her travel or any evidence to corroborate her statement that she hid while she was in Poland. There is no basis to question the RPD's conclusion that by obtaining the passports and travelling with them, the Applicant sought and obtained the protection of Poland.

[53] For all of the reasons set out above, I am not persuaded that the RPD's application of the legal test for cessation based on reavailment was unreasonable. The decision is based on an assessment of the evidence in the record and a consideration of the elements of the legal test. The Applicant believes that some evidence should have been weighed differently, but that is not sufficient to make the decision unreasonable.

[54] As a final point, the RPD did not err in failing to give effect to the H&C factors cited by the Applicant. In considering the Minister's application for cessation of the Applicant's refugee protection, the RPD did not have the legal authority to consider such things.

IV Conclusion

[55] Based on the analysis set out above, the application for judicial review is dismissed.

[56] In closing, I want to acknowledge that the Applicant's case clearly excites some sympathy. The fact that the RPD felt obliged to name a Designated Representative to testify for her at the hearing is a clear indication of the nature and extent of physical and cognitive challenges the Applicant faces. In this regard, nothing in my decision should be interpreted as discounting the importance of the H&C factors that arise in this case. However, such elements must be examined in another process based on other evidence and submissions. The H&C factors cannot, in themselves, justify a different result in this application for judicial review.

[57] There is no question of general importance for certification.

JUDGMENT in IMM-8668-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question of general importance for certification.

"William F. Pentney"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Milan Tomasevic	FOR THE APPLICANT
Leanne Briscoe	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Barrister & Solicitor Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT