Federal Court  Cour fédérale

Date: 20200312

Docket: IMM-5322-19

Citation: 2020 FC 370

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, March 12, 2020

PRESENT: The Honourable Mr. Justice Pentney

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

EDRON ANTOINE

Respondent

JUDGMENT AND REASONS

[1] The Minister of Citizenship and Immigration (the applicant) seeks judicial review of a decision of the Refugee Protection Division (RPD) dated August 7, 2019, wherein it dismissed the application for cessation of refugee protection for the respondent, Edron Antoine. The application for cessation was made pursuant to paragraph 108(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA).

[2] The applicant argues that the respondent voluntarily reavailed himself of Haiti's protection, given that he obtained a Haitian passport and used it on several occasions to return to his country of origin. The RPD rejected the application for cessation of refugee protection, finding that the respondent's actions did not reflect an intention to voluntarily reavail himself of the protection of his country of nationality. The applicant seeks judicial review of that decision.

[3] For the reasons that follow, this judicial review is dismissed on the basis that the RPD's decision is reasonable.

I. Background

[4] The respondent is a citizen of Haiti. As a result of his having helped his uncle to be elected as a member of parliament in the 2006 elections in Haiti, and his role as a representative of the Democratic Alliance Party in his district of Pignon, he was threatened by the Chimères. In October 2008, he left Haiti for the United States, and in December 2008, he entered Canada. On July 13, 2011, the respondent was recognized as a refugee by the RPD and was granted permanent residence on November 16, 2012.

[5] Before becoming a permanent resident, the respondent had been issued a Canadian travel document. He understood that this travel document was valid for travel to all countries except Haiti. According to the respondent, when he signed his permanent resident card, the officer suggested that he no longer needed the travel document. The officer further indicated that the travel document ceased to be valid on the day the respondent became a permanent resident.

[6] The respondent applied to the Haitian authorities and obtained a Haitian passport on December 13, 2012. The passport was valid to December 12, 2017. The respondent made trips to Haiti between 2013 and 2016. As described below, the number of trips is in dispute, but there is no question that the respondent visited Haiti at least three times: from March 20 to April 3, 2013; from July 27 to August 9, 2013; and from April 6 to 13, 2016.

[7] In May 2016, the respondent was informed that a process had been undertaken with a view to the cessation of refugee status. In response, he submitted a letter from his counsel, and prior to the hearing before the RPD, he submitted a second letter providing further details. The application was heard by the RPD on July 4, 2019. On August 7, 2019, the RPD rejected the application for cessation of refugee protection.

II. Issue and standard of review

[8] The only issue is whether the RPD's decision to reject the application for cessation of refugee protection pursuant to paragraph 108(1)(a) of the IRPA is unreasonable.

[9] The standard of review that applies in this case is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]; *Lu v Canada (Citizenship and Immigration)*, 2019 FC 1060 at para 19 [*Lu*]).

[10] In applying the reasonableness standard of review, as per the framework established in *Vavilov*, a decision must be based on internally coherent reasoning and must be justified in light of the relevant legal and factual constraints (*Vavilov* at para 101; *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at paras 29–33 [*Canada Post Corporation*]). The burden

is on the party challenging the decision to satisfy the court that "any shortcomings or flaws relied on . . . are sufficiently central or significant to render the decision unreasonable" (*Canada Post Corporation* at para 33, citing *Vavilov* at para 100).

III. Analysis

[11] The analysis of the decision in this case begins with a review of the RPD's reasons "in light of the relevant factual and legal constraints" (*Vavilov* at para 101).

A. *Legal framework*

[12] This case involves the application of paragraph 108(1)(a) of the IRPA:

Application for visa	**Demande de visa**
108 (1) Subject to subsection (5), if a foreign national makes an application as a member of the Quebec investor class, the Quebec entrepreneur class, the start-up business class, the self-employed persons class or the Quebec self-employed persons class for a permanent resident visa, an officer may only issue the visa to the foreign national and their accompanying family members if they meet the requirements of subsection 70(1) and, if applicable,	**108 (1)** Sous réserve du paragraphe (5), si l'étranger présente, au titre de la catégorie des investisseurs (Québec), de la catégorie des entrepreneurs (Québec), de la catégorie « démarrage d'entreprise », de la catégorie des travailleurs autonomes ou de la catégorie des travailleurs autonomes (Québec), une demande de visa de résident permanent, l'agent ne peut lui en délivrer un ni à quelque membre de sa famille qui l'accompagne à moins qu'ils satisfassent aux exigences prévues au paragraphe 70(1) et, s'il y a lieu, aux exigences suivantes :
(a) in the case of a foreign national who has made an application under the self-employed persons class and their accompanying family members, who intend to reside in a place in Canada other than a province	**a)** dans le cas de l'étranger qui présente une demande au titre de la catégorie des travailleurs autonomes et des membres de sa famille qui cherchent à s'établir au Canada, ailleurs que dans une province ayant conclu avec le

whose government has, under subsection 8(1) of the Act, entered into an agreement referred to in subsection 9(1) of the Act with the Minister under which the province has sole responsibility for selection, the foreign national is awarded the minimum number of points referred to in subsection (4); and	ministre, en vertu du paragraphe 8(1) de la Loi, un accord visé au paragraphe 9(1) de la Loi selon lequel cette province assume la responsabilité exclusive de la sélection, l'étranger obtient le nombre minimum de points visé au paragraphe (4);

[13] Section 108 of IRPA reiterates the principle set out in Article 1C of the *Convention Relating to the Status of Refugees* to the effect that a person may lose their refugee status when their actions indicate that they no longer have reason to fear persecution in their country of nationality, or that alternative protection from another country is not necessary. Justice Fothergill's summary in *Abadi v Canada (Citizenship and Immigration)*, 2016 FC 29 [*Abadi*], provides context for the RPD's analysis:

> [16] In my view, the RPD properly applied the test for re-availment and reasonably found that Mr. Shamsi had failed to rebut the presumption that he intended to re-avail himself of Iran's protection by acquiring an Iranian passport and travelling to that country. When a refugee applies for and obtains a passport from his country of nationality, it is presumed that he intended to re-avail himself of the diplomatic protection of that country (*Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* at para 121 [Refugee Handbook]; *Nsende v Canada (Minister of Citizenship and Immigration)*, 2008 FC 531 at para 14). The presumption of re-availment is particularly strong where a refugee uses his national passport to travel to his country of nationality. It has even been suggested that this is conclusive (Guy Goodwinn-Gill and Jane McAdam, *The Refugee in International Law*, 3rd ed., at page 136).
>
> [17] However, the prevailing view is that the presumption of re-availment may be rebutted with evidence to the contrary (Refugee Handbook at para 122). The onus is on the refugee to adduce sufficient evidence to rebut the presumption (*Canada (Minister of Citizenship and Immigration) v Nilam*, 2015 FC 1154

> at para 26 [*Nilam*], citing *Li v Canada (Minister of Citizenship and Immigration)*, 2015 FC 459 at para 42).
>
> [18] It is only in "exceptional circumstances" that a refugee's travel to his country of nationality on a passport issued by that country will not result in the termination of refugee status (Refugee Handbook at para 124). Mr. Shamsi relies on paragraph 125 of the Refugee Handbook to argue that visiting an old or sick parent qualifies as an "exceptional circumstance" sufficient to rebut the presumption of re-availment. However, paragraph 125 of the Refugee Handbook concerns an individual who travels to his country of nationality on a travel document issued by his country of refuge, and not on a passport issued by his country of nationality (*Nilam* at para 28).

B. *Parties' submissions*

[14] The applicant argues that the RPD erred in concluding that the respondent did not intend to reavail himself of Haiti's protection, given that there is neither credible nor sufficient evidence to demonstrate exceptional circumstances that would rebut the presumption that he had reavailed himself of Haiti's protection.

[15] According to the applicant, the RPD ignored the contradictions regarding the number of trips the respondent made to Haiti. The RPD indicated that there were three trips, but there is evidence on the record, including stamps in the respondent's passport, demonstrating that he made four trips.

[16] Further, the applicant contends that the respondent did not credibly establish the purpose of his travels. The respondent initially indicated that he wanted to introduce his wife to his family on his first trip in 2013. There were also inconsistencies in his testimony before the RPD regarding the date of the trip he took to Haiti with his wife.

[17] In addition, the applicant asserts that the respondent did not provide [TRANSLATION] "official" evidence of his father's illness or death. Furthermore, there were other members of the respondent's family in Haiti who could have cared for the respondent's father, so his return did not constitute an exceptional circumstance.

[18] The applicant argues that the RPD also erred in citing *Cerna v Canada (Citizenship and Immigration)*, 2015 FC 1074 [*Cerna*], to support its finding. *Cerna* does not apply in the absence of evidence relating to a subjective understanding of the benefits of permanent resident status (*Lu* at paras 54–55). The respondent never invoked a subjective belief that he enjoyed the security benefits of permanent resident status, nor an intention to maintain a connection to Canada.

[19] Finally, the applicant submits that the RPD erred in failing to take into account the fact that the respondent returned several times to Pignon, where his persecutors, the Chimères, were located. There, he stayed in the family home, where he could easily have been found. This indicates an absence of subjective fear (*Jing v Canada (Citizenship and Immigration)*, 2019 FC 104 at paras 25–27 [*Jing*], *Abechkhrishvili v Canada (Citizenship and Immigration)*, 2019 FC 313 at para 26).

[20] The respondent submits that the decision is reasonable given that the RPD considered the evidence and the submissions of the parties, and that in view of the measure of deference owed, intervention of this court is not warranted.

[21] The respondent points out that the RPD found him to be credible, and that he established that the reason for his trips was to visit his ailing father. The RPD did consider the applicant's argument that the purpose was actually to introduce his wife to his family, but accepted the

clarification that the respondent offered at the hearing. Moreover, the fact that the respondent's wife accompanied him does not alter the purpose of the trip. The RPD also accepted the respondent's explanation with regard to the inconsistency surrounding the number of trips he had taken.

[22] The respondent states that none of the evidence referred to by the applicant contradicts the fact that his father was ill during the relevant period, and that the applicant did not pose any questions on this point at the hearing.

[23] Finally, the respondent submits that the RPD reasonably concluded that he did not intend to reavail himself of Haiti's protection, and that he had validly rebutted the presumption of intention. The respondent testified that he believed he could not renew his Canadian travel document, and that no one advised him that he could not return to Haiti. Subjective intentions must be considered. In this case, the respondent states that his trips were temporary and of short duration, and the intention was to see his ailing father. Given the purpose of these trips, the presence of other members of his family in Haiti is irrelevant. During these trips, the respondent was careful to stay in his family home and to only move about in an armoured vehicle with the assistance of a police officer, demonstrating his subjective fear (*Peiqrishvili v Canada (Immigration, Refugees and Citizenship)*, 2019 FC 1205 at para 17 [*Peiqrishvili*]).

C. *Discussion*

[24] The applicant submits that the RPD erred in failing to consider the relevant facts and the contradictions in the evidence; in accepting visiting a sick relative as an exceptional circumstance; in relying on *Cerna* to justify its finding when it is in fact not applicable because

there is no evidence as to the respondent's understanding of the benefits of permanent resident status; and in ignoring evidence pointing to the absence of subjective fear on the part of the respondent. The crux of the applicant's argument is that the RPD did not properly apply the correct legal test, as described in *Abadi* at paragraph 16: "The presumption of re-availment is particularly strong where a refugee uses his national passport to travel to his country of nationality".

[25] I am not convinced. While the RPD's decision is not perfect, I submit that it is reasonable from the perspective of the *Vavilov* framework.

[26] In its decision, the RPD analyzed the applicable legislation and case law and noted that the determinative issue was the intention of the respondent, given that the respondent did not dispute the fact that he had obtained a passport from his country of origin and used it to return there.

[27] With respect to the issues surrounding the purpose of the visits and the number of trips to Haiti, the RPD took into account the comments of the Minister's representative at the hearing, as well as the clarifications provided by the respondent. In light of the respondent's explanations, which the RPD found plausible, the RPD contended that "[the respondent] made these trips for the sole purpose of visiting his elderly father, whose health condition was precarious".

[28] The RPD also found that the respondent had made three trips to Haiti, but did not discuss the evidence indicating that he had made four trips. Despite the lack of discussion on this point, it is clear that the relevant evidence was before the RPD, and during the hearing the question of the exact number of visits was not an essential point. In the final analysis, it is unclear how the

exact number of visits is an issue "sufficiently central or significant to render the decision unreasonable" (*Vavilov* at para 100).

[29] I disagree with the applicant with respect to its assertion that visiting a sick relative is not an exceptional circumstance. Each case must be considered on its own merits, and the RPD dealt with the relevant facts in applying the exception in this instance.

[30] I do agree with the applicant that certain decisions of this court have found the RPD to be reasonable in determining that travel to the country of origin to visit an elderly or ill relative is not an exceptional circumstance (see, for example, *Abadi* at para 18). In *Jing*, the court noted that the applicant's trips to care for his parents were not necessary, given that he had several siblings who might have done so (at para 24). The court also noted that each visit lasted approximately two months, and that the applicant did not take steps to avoid the Chinese authorities (see also *Yuan v Canada (Citizenship and Immigration)*, 2015 FC 923 at paras 35–36).

[31] In *Canada (Citizenship and Immigration) v Nilam*, 2015 FC 1154 [*Nilam*], the court overturned the RPD's decision to reject the Minister's application for cessation of refugee protection. In that case, the respondent had fled Sri Lanka and was granted refugee protection status in 2009. He became a permanent resident in January 2011. In July 2011, the respondent renewed his Sri Lankan passport and used it to return to Sri Lanka on two occasions: (i) from August 5 to December 2, 2011, to see his mother, who was dying, and to get married, which he did in the presence of approximately 300 people; and (ii) from December 5, 2012 to May 1, 2013, for the wedding reception, in the presence of approximately 200 people, and for treatment at several medical centres. He also used his Sri Lankan passport to travel to Australia and Malaysia in 2014.

[32] In that case, the RPD found the respondent to be a credible witness, noting that the documentary evidence supported his testimony. The RPD found that the respondent had rebutted the presumption that he had reavailed himself of Sri Lanka's protection. The court allowed the Minister's application for judicial review because the RPD had ignored contradictions in the testimony about the purpose of the trips, and did not consider the evidence regarding the respondent's subjective fear of persecution in his country of nationality. With respect to the respondent's explanation that he had to travel to see his ailing mother, the court found that:

> [29] Even if Mr. Nilam subjectively felt it necessary to return to Sri Lanka on the first occasion because of his mother's illness, and on the second to complete the formalities of his marriage, the Board's finding that Mr. Nilam did not intend by his actions to re-avail himself of Sri Lanka's protection was not reasonable.

[33] Given that the respondent's visits were neither brief nor clandestine, that he did not take steps to avoid the authorities, that he was in Sri Lanka for a total of nine months, that he attended wedding ceremonies along with hundreds of other people, and that he used his passport multiple times, the Court found the RPD's decision to be unreasonable.

[34] However, I contend that these decisions must be viewed from the perspective of their specific facts, and that there are dissimilarities in *Nilam*, including the number of trips, the use of a passport from the country of origin to travel to other countries, the reasons for returning to the country of origin, and the measures taken by the respondent to protect himself from his persecutors.

[35] In the present case, the RPD reviewed the evidence, referred to the applicant's representations, determined that the respondent had established that the purpose of his trips was to visit his elderly and ailing father, that the trips were of short duration and that the protective

measures he took indicated a subjective fear on his part. The RPD accepted that this was an exceptional circumstance.

[36] I submit that the facts of this case are dissimilar to those in the case law cited by the applicant. The RPD's finding is therefore justified on the basis of factual and legal constraints not found in the decisions cited, such as *Nilam*. The situation is rather more consistent with that described by Lorne Waldman in *Immigration Law and Practice*, 2nd ed (looseleaf), at paragraph 8.499.8:

> Thus, the mere fact that a refugee returns to his or her country is not determinative. Rather, the refugee must return with the intent of obtaining the protection of his or her state and must actually receive it. When assessing these issues the tribunal must consider the conduct of the refugee and must determine whether the refugee actually sought the protection, whether his actions were voluntary and whether protection was obtained. Consideration must be given to the reason why the refugee returned. If he/she returned due to a family emergency and remained in hiding then the tribunal must take this evidence into account when assessing both the voluntariness of the conduct and whether protection was actually obtained. However, if there is no justification for the return and the refugee does not take steps to avoid the agents of persecution then the tribunal can reasonably conclude that the refugee voluntarily reavailed him/herself of the protection of his/her country of nationality.

[37] Applying the *Vavilov* framework, and in light of the deference owed the RPD, I do not believe that intervention on this point is warranted.

[38] With respect to the relevance of *Cerna*, and the question of the respondent's subjective intentions, I agree with the applicant that there was no evidence the respondent believed that he received any benefit from his permanent resident status. However, *Cerna* also discusses the fact that subjective intention must be taken into account before determining that a person has

reavailed himself of the protection of their country of origin (*Cerna* at paras 18–20; see also *Camayo v Canada (Citizenship and Immigration)*, 2020 FC 213 at para 43 [*Camayo*]). In the present case, the RPD analyzed other elements, as noted above, including the short duration of the stay in Haiti, the applicant's conduct and his understanding of his right to travel using a travel document.

[39] On the basis of the record that was before the RPD, including the respondent's testimony, there does not appear to be any evidence that the respondent believed he enjoyed the security of his permanent resident status. However, in its analysis of intention, the RPD looked at other elements, including the short duration of his visits to Haiti.

[40] With respect to the absence of subjective fear, the RPD noted that the respondent took precautions when he was in his country of nationality. The respondent testified that while in Haiti, he travelled with a police friend in an armoured car, and only when necessary. He did not move about while he was in the country, limiting himself to visiting and taking care of his father, and staying in his family home. These considerations are relevant to the determination that the RPD must make (see *Peiqrishvili* at paras 19–24), and it is clear that decisions of this nature are largely fact dependent (*Camayo* at para 46).

[41] In this case, therefore, the RPD relied on the evidence on the record to determine that the trips were due to an exceptional circumstance and that there was no intention on the part of the respondent to reavail himself of Haiti's protection. I find that the RPD's decision was not unreasonable, although the opposite conclusion could have been reached (see *Okojie v Canada (Citizenship and Immigration)*, 2019 FC 1287 at paras 28–32; *Peiqrishvili*).

IV. Conclusion

[42] For these reasons, I find that the RPD's decision was not unreasonable, and that intervention is not warranted.

[43] As per the framework established in *Vavilov*, I examined the decision against the relevant factual and legal constraints, and looked at the rationality internal to the reasoning process in the decision. I agree that the decision is based on inherently coherent reasoning and that the RPD's conclusion is justified in light of the relevant legal and factual constraints that bear on the decision.

[44] Although the RPD could have reached a different conclusion in this case, given the evidence and the case law on the issue, that does not in itself constitute a reason to overturn the decision.

[45] The application for judicial review is dismissed. There is no question of general importance to certify.

JUDGMENT in IMM-5322-19

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed.

2. There is no question of general importance to certify.

"William F. Pentney"
Judge

Certified true translation
This 16th day of April 2020.

Johanna Kratz, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5322-19
STYLE OF CAUSE:	THE MINISTER OF CITIZENSHIP AND IMMIGRATION v EDRON ANTOINE
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	February 27, 2020
JUDGMENT AND REASONS:	PENTNEY J.
DATED:	March 12, 2020

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