

Federal Court



Cour fédérale

Date: 20230606

Docket: IMM-8099-21

Citation: 2023 FC 794

Ottawa, Ontario, June 6, 2023

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

**MEMET SALIK
FADIME SALIK**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants seek judicial review of a decision of the Refugee Protection Division (“RPD”) dated October 8, 2021, finding that the Applicants’ refugee status is ceased pursuant to subsection 108(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (“IRPA”).

[2] The RPD granted the Minister's application for cessation of the Applicants' refugee status and found that the Applicants had reavailed themselves of Turkey's protection by returning there on several occasions.

[3] The Applicants submit that the RPD breached their rights to procedural fairness by conducting the cessation hearing without providing its reasons in the 2010 decision to grant the Applicants' refugee claims. The Applicants further submit that the RPD engaged in an unreasonable analysis of the legal test for cessation as it applies to their circumstances, rendering the decision unreasonable as a whole.

[4] For the reasons that follow, I find that the RPD's decision is reasonable. This application for judicial review is therefore dismissed.

II. Facts

A. *The Applicant*

[5] Memet Salik (Mr. "Salik") and his wife, Fadime Salik (Ms. "Salik") are citizens of Turkey. They have a son and a daughter.

[6] The Applicants arrived in Canada on June 7, 2007. On August 7, 2007, the Applicants made claims for refugee protection on the basis of their fear of persecution at the hands of Turkish authorities and private Turkish citizens due to their Alevi and Kurdish identities.

[7] On March 23, 2010, the RPD granted the Applicants' refugee claims. The Applicants obtained permanent resident status on March 13, 2012.

[8] On May 16, 2012, Mr. Salik received a new Turkish passport, after which he returned to Turkey five times. Mr. Salik claims that he returned to Turkey for the following reasons: to visit his terminally ill brother, Gultekin Salik ("Gultekin") in July 2013; to say goodbye to Gultekin and attend his funeral in November 2013; to support his other brother, Ibrahim Salik ("Ibrahim"), following the death of his son in July 2014; to visit Ibrahim, who had become terminally ill, in February and March 2015; and to attend his daughter's wedding in August 2017.

[9] Ms. Salik also received a new Turkish passport, and travelled to Turkey six times thereafter. Ms. Salik claims that she returned to Turkey for the following reasons: to visit her terminally ill mother in July 2012; to say goodbye to her terminally ill brother-in-law, Gultekin, in November 2013; to visit her ill mother again in February 2014; to attend her father's funeral in early 2015; to visit her terminally ill mother-in-law, attend her funeral, and attend to her final requests in June and July 2016; and to attend her daughter's wedding in August 2017.

[10] In February 2019, the Applicants applied for Canadian citizenship. In their applications, the Applicants disclosed their trips to Turkey and one trip to the United Kingdom.

[11] On October 13, 2020, the Minister of Immigration, Refugees and Citizenship (the "Minister") made an application for cessation of the Applicants' refugee status, pursuant to subsection 108(1)(a) of *IRPA*. The Minister alleged that upon obtaining permanent resident

status in 2012, the Applicants obtained new Turkish passports, repeatedly returned to Turkey using these passports, and thereby reavailed themselves of Turkey's protection.

B. *Decision Under Review*

[12] In a decision dated October 8, 2021, the RPD allowed the Minister's cessation application and rejected the Applicants' refugee claims.

[13] Section 108 of *IRPA* sets out the grounds upon which an application for cessation of refugee protection can be granted. In the Applicants' case, the RPD considered that a claim for refugee protection shall be rejected if the person has "voluntarily reavailed themselves of the protection of their country of nationality" as per subsection 108(1)(a).

[14] In considering voluntary reavailment under subsection 108(1)(a), the RPD noted paragraphs 118 to 125 of the United Nations High Commission on Refugees' *Handbook on Procedures and Criteria for Determining Refugee Status* (the "UNHCR Handbook"), which states that cessation of refugee protection implies three requirements: 1) the refugee must act voluntarily; 2) the refugee must intend to reavail himself of the protection of the country of his nationality, and; 3) the refugee must actually obtain such protection. This test was recently affirmed and applied by the Federal Court of Appeal ("FCA") in *Canada (Citizenship and Immigration) v Galindo Camayo*, 2022 FCA 50 at paragraph 18 ("*Camayo*").

[15] The consequences of cessation of refugee status involve the inability to appeal the cessation finding to the Immigration Appeal Division or the Refugee Appeal Division, the

inability to seek a Pre-Removal Risk Assessment or an application for permanent residence on humanitarian and compassionate grounds for at least one year, and inadmissibility to Canada for an indeterminate period, with removal enforced “as soon as possible” as per subsection 48(2) of *IRPA*. Following changes to the *IRPA* brought about by *Protecting Canada’s Immigration System Act*, SC 2012, c 17, a successful cessation application also results in the loss of an individual’s permanent resident status.

[16] At the cessation hearing before the RPD, the Applicants submitted that they returned to Turkey due to urgent family matters, remained in hiding during each of their visits, and were unaware of the extent of the consequences of reavilment. While they conceded that their ignorance of these consequences is not an excuse, they submitted that key considerations include the reasons for their return, their conduct in Turkey, and the attitude of Turkish authorities towards the Alevi and Kurdish people.

[17] On the first prong of the test for cessation, concerned with the voluntariness of the Applicants’ actions, the RPD assessed the alleged reasons for both Applicants’ travel to Turkey, particularly their claims that they were compelled to return due to ailing family members. In doing so, the RPD found insufficient evidence that the Applicants’ presence in Turkey was necessary and that no one else could care for their ill relatives. The RPD concluded that the Applicants’ repeated choice to be with their relatives when they were sick, to attend funerals, or to attend a wedding demonstrated that their trips to Turkey were voluntary.

[18] On the second issue, whether the Applicants intended to reavail themselves of the protection of Turkey, the RPD noted that a refugee claimant obtaining a passport from the country of nationality creates a rebuttable presumption of intention to reavail (*Li v Canada (Citizenship and Immigration)*, 2015 FC 459). The RPD found that not only did the Applicants renew their Turkish passports, but they used them to travel several times and for extended periods of time. The RPD also dismissed the Applicants' submissions that they made efforts to stay safe during their trips to Turkey, finding that they voluntarily presented themselves to Turkish officials by repeatedly entering and exiting Turkey using their Turkish passports, despite their claimed fear of the Turkish authorities. The RPD therefore concluded that the Applicants failed to rebut the presumption of an intention to reavail themselves of Turkey's protection.

[19] On the final consideration, whether the Applicants actually obtained the protection of Turkey, the RPD acknowledged the Applicants' reliance on *Din v Canada (Citizenship and Immigration)*, 2019 FC 425 ("*Din*"). In *Din*, this Court found that the applicants did not obtain protection from their country of nationality where evidence demonstrated that the state did not provide protection to those belonging to the applicants' religion (at paras 40-43). The RPD found that the Applicants' case is distinguishable from the facts in *Din* because the Applicants' refugee claim was based, in part, on the fear of persecution at the hands of Turkish state authorities, and yet the Applicants repeatedly presented themselves to Turkish officials by travelling several times on their Turkish passports.

[20] Ultimately finding that all three prongs of the tripartite test for cessation was made out in the Applicants' case, the RPD granted the Minister's cessation application and therefore rejected the Applicants' claims.

III. Issues and Standard of Review

[21] This application for judicial review raises the following issues:

- A. *Whether the decision is reasonable.*
- B. *Whether there was a breach of procedural fairness.*

[22] The applicable standard of review of the RPD's decision is reasonableness, as per the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("*Vavilov*") at paragraphs 16-17. The issue of procedural fairness is to be reviewed on the correctness standard (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 ("*Canadian Pacific Railway Company*") at paras 37-56; *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35)).

[23] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13; 75; 85). The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified (*Vavilov* at para 15). A decision that is reasonable as a whole 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). Whether a decision is reasonable depends on the relevant administrative setting, the record before the decision-maker, and the impact of the decision on those affected by its consequences (*Vavilov* at paras 88-90, 94, 133-135).

[24] For a decision to be unreasonable, the applicant must establish the decision contains flaws that are sufficiently central or significant (*Vavilov* at para 100). Not all errors or concerns about a decision will warrant intervention. A reviewing court must refrain from reweighing evidence before the decision-maker, and it should not interfere with factual findings absent exceptional circumstances (*Vavilov* at para 125). Flaws or shortcomings must be more than superficial or peripheral to the merits of the decision, or a “minor misstep” (*Vavilov* at para 100; *Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156 at para 36).

[25] Correctness, in contrast, is a non-deferential standard of review. The central question for issues of procedural fairness is whether the procedure was fair having regard to all of the circumstances, including the factors enumerated in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paragraphs 21-28 (*Canadian Pacific Railway Company* at para 54).

IV. Analysis

[26] The Applicants submit that the RPD breached their rights to procedural fairness in conducting the cessation hearing without providing the Applicants with written reasons from the RPD’s 2010 decision granting their refugee claims.

[27] The Applicants also submit that the RPD unreasonably applied the legal test for cessation to their circumstances by failing to properly consider whether the Turkish state actually afforded the Applicants diplomatic protection, and by erroneously finding that the Applicants' situation did not amount to exceptional circumstances sufficient to rebut the presumption of their intention to reavail. The following analysis will assess the latter consideration first, as it appears in the tripartite test for cessation outlined in *Camayo*.

[28] In my view, the Applicants' submission that they were denied procedural fairness is meritless. I also find that the Applicants have failed to raise a reviewable error in the RPD's assessment of the cessation application.

A. *Procedural Fairness*

[29] The Applicants submit that the RPD breached procedural fairness by proceeding with the cessation hearing without providing the Applicants with the written reasons from the RPD's 2010 decision on their refugee claims. The Applicants submit that these reasons are central to a fair adjudication of the cessation proceedings because the RPD's assessment of their refugee claims inform its ability to determine whether the tripartite test for cessation is made out. The Applicants submit that without these reasons, the RPD assessed the cessation application in a factual vacuum, rendering its ultimate decision unreasonable.

[30] The Respondent submits that the Applicants' allegations of procedural unfairness lack merit. The Respondent contends that the RPD Case Management Officer informed the Applicants that no reasons exist for the RPD's 2010 decision on their refugee claims because it

was a positive decision and at the time the decision was heard, protocol did not mandate written reasons for a positive decision. The Respondent further submits that the Applicants failed to raise this alleged breach of procedural fairness at “the earliest practical opportunity” (*Benitez v Canada (Minister of Citizenship and Immigration)*, 2006 FC 461 at paras 220-221).

[31] I agree with the Respondent and find that there is no merit to the Applicants’ allegation that the RPD breached procedural fairness. The RPD Case Management Officer clearly informed the Applicants that no written reasons for the 2010 decision exist and why they do not exist. The Applicants have failed to demonstrate how the fact that these reasons do not exist denies them procedural fairness in the course of the RPD’s cessation proceedings, particularly given that the RPD’s role on the cessation application was to apply the tripartite legal test to the evidence before it, and not to reassess or revisit the 2010 refugee claim.

[32] I also agree with the Respondent that the Applicants only raise this allegation of procedural unfairness before this Court on review, having never placed it before the RPD or raised it as an objection. This Court is not in a position to impugn the procedural fairness of the RPD’s proceedings on the cessation application for an alleged omission that occurred several months prior to the hearing and where it was not given a chance to respond to or cure any alleged error. For these reasons, I find that the Applicants’ procedural unfairness allegation is meritless.

B. *Reasonableness*

(1) Whether the Applicants Intended to Reavail

[33] The Applicants challenge the reasonableness of the RPD's findings that they failed to rebut the presumption of reavailment because they presented themselves to Turkish authorities on several occasions and because they remained in Turkey for extended periods of time. The Applicants rely on this Court's decision in *Cerna v Canada (Citizenship and Immigration)*, 2015 FC 1074, to support the proposition that Mr. Salik believed that his permanent resident status protected him while in Turkey, as he testified before the RPD. The Applicants note that Mr. Salik consulted with a lawyer prior to each trip to Turkey, who informed him that he would be safe during his stay there.

[34] The Applicants further submit that the RPD unreasonably found that the extenuating family circumstances for which they travelled to Turkey did not constitute exceptional circumstances sufficient to rebut the presumption of intention to reavail. The Applicants rely on *Canada (Citizenship and Immigration) v Antoine*, 2020 FC 370 ("*Antoine*"), where this Court concluded that the RPD reasonably found the claimant's reason for travelling to his country of nationality, visiting a sick relative, to constitute an exceptional circumstance (at paras 24-26, 35).

[35] The Applicants submit that similarly to the situation in *Antoine*, they were compelled to travel to Turkey due to family circumstances, did not return to re-establish themselves, and were still in fear of unwanted attention by civilians or Turkish authorities. The Applicants submit that the RPD further erred in finding that the Applicants' visits to their ailing relatives did not constitute exceptional circumstances on the grounds that others may have cared for them, and that the RPD erroneously viewed the Applicants' behaviour through the lens of Canadian values (*Lubana v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116 at para 12). The

Applicants submit that the RPD failed to consider the precautions they took during their trips to Turkey and, instead, granted undue weight to the length of their stays. The Applicants contend that the UNHCR Handbook should be not interpreted in an overly restrictive manner so as to undermine the protection afforded to refugee claimants.

[36] The Respondent submits that the RPD properly applied the jurisprudence and the legal considerations for assessing the Applicants' intention to reavail and, in doing so; reasonably found that their explanations for their actions did not amount to exceptional circumstances. The Respondent submits that the Applicants' submissions on this issue largely amount to a request that this Court reweigh the evidence and reassess the legal test, which is not this Court's role on reasonableness review (*Vavilov* at para 125). The Respondent contends that the RPD adequately applied the jurisprudence, which establishes that applying for a passport and using it to travel to the country of nationality creates a presumption that protection of that country was sought by the claimant and obtained, and the claimant bears the onus to proffer sufficient evidence to rebut that presumption.

[37] The Respondent submits that contrary to the Applicants' claim that care for an ill family member is a valid justification for their travel, the UNCHR Handbook states that travelling to visit "an old or sick parent" with a travel document, "not with a national passport," this may not always result in a finding of reavailment but must ultimately be judged on the individual merits of the situation. The Respondent notes that in the Applicants' case, the RPD reasonably assessed the Applicants' individual circumstances, finding that they renewed their Turkish passports and their travels were not confined to visits to sick relatives.

[38] The Respondent further submits that the Applicants' submission that the RPD failed to account for their cultural background or differences in cultural values is baseless. The Respondent submits that the RPD acknowledged that the Applicants' travels were "desirable" but not essential, and that it assessed the evidence before it, as required. The Respondent submits that the reasonableness of the RPD's overall assessment cannot be impugned on the basis that it did not accept the RPD's preferred view of the evidence.

[39] In my view, the RPD conducted a thorough assessment of the legal test for cessation, including the issue of the Applicants' intention to reavail and the presumption of intention created by the Applicants' actions, and reasonably applied this test to the Applicants' evidence. The RPD's reasons demonstrate a rational line of analysis that is justified, transparent and intelligible (*Vavilov* at paras 99, 102). On the contested issue of whether the RPD reasonably assessed the Applicants' claim constituted exceptional circumstances, I note this Court's application of the relevant considerations in *Tung v Canada (Citizenship and Immigration)*, 2018 FC 1224 ("*Tung*"). This is particularly instructive in the context of a claimant travelling back to their country of nationality to visit a sick relative, and the standard of proof required by the claimant to establish exceptional circumstances and rebut the presumption of intention to reavail.

Tung states at paragraphs 41 to 43, as follows:

[41] The RPD applied this test when it considered the Applicant's claim that her return to China was necessary to care for her sick mother and support her incarcerated husband. However, the RPD found there was no evidence that her presence in China was necessary as there were other family members in China who could and did carry out these functions in her absence. The RPD concluded that her travel to China was not necessary but was voluntary. Having found her visits to China voluntary, the RPD concluded that this called into question her alleged subjective fear.

[42] In *Li v Canada (Citizenship and Immigration)*, 2015 FC 459, Justice O'Reilly outlines the applicable burden of proof as follows at paragraph 42:

The Minister has the burden of proving re-availment on the balance of probabilities. In doing so, the Minister is entitled to rely on the presumption of re-availment by proving that the refugee obtained or renewed a passport from his or her country of origin. Once that has been proved, the refugee has the burden of showing that he or she did not actually seek re-availment. As stated in the UNHCR Handbook, where there is proof that a refugee has obtained or renewed a passport “[i]t will, in the absence of proof to the contrary, be presumed that he intends to avail himself of the protection of the country of his nationality” (para 121).

[43] Here, the Applicant applied for and obtained two Chinese passports after being declared a refugee in Canada. She travelled back and forth to China extensively using her Chinese passports. The presumption of re-availment is particularly strong in circumstances where a refugee uses his or her national passport to return to the country of nationality (*Kuoch* at paras 28-29).

[Emphasis added]

[40] In light of this jurisprudence, I find that the RPD conducted a reasonable analysis of the relevant considerations and reasonably applied these considerations to the Applicants' evidence and actions. The Applicants initiated the process of renewing their Turkish passports upon becoming permanent residents in Canada, used these passports to travel repeatedly back and forth between Turkey and Canada, and explicitly testified that their reasons for doing so were not confined to visiting ill relatives. The Applicants stated that aside from travelling to visit or tend to sick relatives, they travelled to Turkey to attend funerals, attend their daughter's wedding in 2017, and Mr. Salik visited Turkey to provide “emotional assistance” to his brother in 2014, whose son had recently passed away. Despite their alleged fear of persecution at the hands of Turkish authorities, which was central to their refugee claims, the Applicants repeatedly

presented themselves to Turkish authorities by obtaining national passports and using them for travel into Turkey, for long periods of time. The RPD is entitled to assess all this evidence cumulatively and find that the Applicants' actions undermine their subjective fear of persecution in Turkey, as found reasonable in *Tung* (at para 41), and that the Applicants therefore failed to rebut the presumption of their intention to reavail themselves of Turkey's protection.

[41] I also disagree with the Applicant's contention that the RPD failed to account for the Applicants' cultural background. I do not find that a reading of the RPD's thorough assessment of the Applicants' case supports the allegation that it was unduly restrictive or unsympathetic to the Applicants' individual circumstances, including their cultural values. The Applicants provided minimal, if any, evidence to support this serious assertion.

(2) Whether the Applicants Actually Obtained Protection

[42] The Applicants submit that the RPD unreasonably assessed the final issue in the tripartite test for cessation: whether the Applicants reavailed themselves of Turkey's protection. The Applicants submit that the RPD failed to consider whether they actually acquired "diplomatic protection" from Turkey and, in turn, whether it is even possible for Turkey to provide protection to the Applicants, given their identities as Alevi and Kurdish citizens of Turkey, which are in and of themselves sufficient to rebut the presumption of an intention to reavail. The Applicants submit that the Turkish state remains hostile towards Alevi and Kurdish people, who continue to be subject to discrimination, according to the National Documentation Package for Turkey, and that the consideration of whether the Applicants reavailed themselves of Turkey's protection should be considered in light of this objective evidence.

[43] The Respondent submits that the Applicants' submissions misinterpret the legal test for cessation and the question of whether any protection would have been extended to Alevi or Kurdish people finds no foundation in the law. The Respondent also submits that the Applicants' submission that their identities as Alevi and Kurdish people is sufficient to challenge the finding that they reavailed themselves of Turkey's protection runs contrary to the relevant test, which asks whether the Applicants reavailed themselves of Turkey's protection on the basis of their actions in obtaining new Turkish passports and repeatedly returning to their country of nationality, against which they claimed refugee status.

[44] I agree with the Respondent. I first note that the RPD is not required to conduct a risk analysis in assessing whether reavailment occurred. In other words, the RPD did not err in failing to ask whether the Applicants are at risk of persecution in Turkey due to their Alevi and Kurdish identities. As stated by this Court in *Ahmed v Canada (Citizenship and Immigration)*, 2022 FC 884 ("*Ahmed*"), "whether an applicant would be at risk in their country of nationality is not a relevant consideration in a cessation hearing" (at para 59, citing *Al-Habib v Canada (Citizenship and Immigration)*, 2020 FC 545 at para 14; *Chokheli v Canada (Citizenship and Immigration)*, 2020 FC 800 at para 65).

[45] That being said, I acknowledge the Applicants' proposition that a finding of reavailment in their case is undermined by the evidence that meaningful protection is not available to them as an Alevi and Kurdish couple. In this Court's decision in *Ahmed*, the applicant made a similar submission and relied on *Din*, wherein this Court found the RPD unreasonably failed to consider

evidence “that the applicant could not obtain actual protection in Pakistan as an Ahmadi”

(*Ahmed* at para 54, citing *Din* at para 34). In *Ahmed*, however, this Court found the following:

[55] In my view, *Din* can be distinguished on facts. In *Din*, the Court found that the RPD failed to consider the applicant’s extensive evidence of the precautions he took in Pakistan and if that evidence affected whether he obtained actual protection. In this case, the RPD did consider all of the Applicant’s evidence and arguments. While the Applicant testified that he hid during his visits in Pakistan, as the Respondent notes, the evidence shows that at the very least, he got married, visited his mother at the hospital, and interacted with family and the police. The Respondent submits that the RPD simply found the Applicant’s circumstances insufficient to rebut the presumption that he actually re-availed himself of Pakistan’s protection. I agree.

[56] Citing *Camayo* (FCA), the Applicant submits that measures he took which illuminate his lack of confidence in state protection and his subjective fear should not have been disregarded or treated as negative factors. As the Respondent submits, however, and I agree, the actions of the Applicant support the RPD’s finding that he “was accepting of, and relied on, the protection of Pakistan.”

[Emphasis added]

[46] In my view, the same reasoning as the one in *Ahmed* can be employed to the Applicants’ case. The RPD’s role in assessing the cessation application was to determine whether the Applicants had reavailed themselves of Turkey’s protection on the basis of the evidence available. It was therefore open to the RPD to find that the Applicants’ actions created a presumption of an intention to reavail, which they provided insufficient evidence to rebut, and that their actions undermined their subjective fear of Turkish authorities. As found in *Ahmed*, the RPD “did consider all of the [Applicants’] evidence and arguments” and reasonably found that their circumstances, including their trips to Turkey for reasons outside of visiting sick relatives, such as attending their daughter’s wedding, were insufficient to rebut the presumption

of reasonableness. Therefore, I find that the RPD reasonably assessed the issue of whether the Applicants actually reavailed themselves of Turkey's protection.

V. Conclusion

[47] This application for judicial review is dismissed. The RPD conducted a justified, transparent and intelligible assessment of the legal test for cessation as it applies to the Applicants' circumstances, in line with the evidence and the jurisprudence (*Vavilov* at para 99). No questions for certification were raised, and I agree that none arise.

JUDGMENT in IMM-8099-21

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.
2. There is no question to certify.

“Shirzad A.”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-8099-21

STYLE OF CAUSE: MEMET SALIK AND FADIME SALIK v THE
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PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: MARCH 28, 2023

JUDGMENT AND REASONS: AHMED J.

DATED: JUNE 6, 2023

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