Federal Court  Cour fédérale

Date: 20230809

Docket: IMM-3587-22

Citation: 2023 FC 1086

Ottawa, Ontario, August 9, 2023

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

JOHN HANI SHAFIK ANDARAWES

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision of a Member of the Refugee Protection Division [RPD], dated March 23, 2022 [the Decision]. In the Decision, the RPD allowed the application of the Minister of Citizenship and Immigration [Minister] to cease the Applicant's refugee protection, pursuant to section 108 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] As explained in greater detail below, this application is allowed, because the RPD failed to conduct the required consideration of the Applicant's evidence as to precautionary measures he took while in Egypt.

II. Background

[3] The Applicant is an Egyptian citizen. His claim for refugee protection, based on persecution by Muslim extremists, was accepted on May 24, 2016, and on December 8, 2017, he obtained permanent resident status in Canada.

[4] On January 9, 2018, the Applicant was issued a new Egyptian passport, which is valid until January 8, 2025. He has also travelled to Egypt six times since being granted permanent resident status. The first trip occurred at the end of December 2017, just after he had been granted permanent resident status in Canada, and the last trip was in February 2021.

[5] The Applicant explains that his trips to Egypt were made for several reasons, including the fact that his paternal grandmother was diagnosed with cancer, that she was undergoing surgery, to visit and get engaged to his girlfriend, and to undergo stomach reduction surgery.

[6] Based on the Applicant's travel history back to Egypt, the Minister applied to the RPD pursuant to section 108 of the IRPA for the cessation of the Applicant's refugee protection.

III. Decision under Review

[7] Before the RPD, the Minister argued that the Applicant voluntarily re-availed himself of the protection of his country of nationality within the meaning of paragraph 108(1)(a) of the IRPA. That provision mandates that a claim for refugee protection be rejected and prescribes that

a person is not a Convention refugee or a person in need of protection, if that person has voluntarily re-availed themselves of the protection of their country of nationality.

[8] In considering whether the Applicant had voluntarily re-availed himself of Egypt's protection, the RPD was guided by the United Nations High Commission on Refugees Handbook on Procedures and Criteria for Determining Refugee Status [Handbook]. Paragraph 119 of the Handbook outlines the following cumulative three-part analytical framework for cessation:

A. Voluntariness: the refugee must act voluntarily;

B. Intention: the refugee must intend by their action to re-avail themselves of the protection of the country of their nationality; and

C. Re-availment: the refugee must actually obtain such protection.

[9] In the resulting analysis, the RPD found that the Minister had met the onus for allowing the cessation application and therefore allowed the Minister's application.

[10] First dealing with voluntariness, the RPD considered two of the reasons identified by the Applicant for his travels to Egypt - his grandmother's surgery and his stomach reduction surgery.

[11] With respect to his grandmother's surgery, the Applicant argued that this trip was not voluntary because there was nobody in Egypt who had the physical ability to provide the attention that his grandmother required. However, the RPD noted that the grandmother's medial report, which indicated that she fell into a sudden and unexpected coma, was dated August 27, 2018, which was after the Applicant's arrival in Egypt on August 3, 2018. The RPD also noted that when the Applicant was questioned by a Canada Borders Services Agency [CBSA] Officer as to the reason for his travel to Egypt when he returned to Canada from this trip on September 7, 2018, he did not mention returning to Egypt to care for his grandmother. Instead, the Applicant

stated that the political situation in Egypt had changed and that he had gotten engaged. The RPD found this contradiction to undermine the Applicant's credibility in terms of involuntarily returning to Egypt to help his grandmother.

[12] With respect to his stomach reduction surgery, the Applicant explained that his surgery was medically necessary and that in Canada the wait time was long and the procedure costly. As such, he submitted that it was necessary to return to Egypt to seek medical intervention and therefore the trip was involuntary. However, the RPD stated that it would have expected documentation from a Canadian medical professional to substantiate the claim that the procedure was medically necessary and that it was necessary to seek treatment outside of Canada. The RPD noted that the Applicant did not provide any such documentation or supporting objective evidence to validate that he involuntary returned to Egypt in order to obtain this surgery.

[13] In light of these findings, the fact that the Applicant had obtained a new Egyptian passport and travelled to Egypt six times, and the lack of evidence that showed the Applicant was forced or pressured to apply for a new passport, the RPD concluded that he acted freely and voluntarily.

[14] Next, in addressing whether the Applicant intended to re-avail, the RPD observed that the Applicant asserted he did not intend to re-avail himself of Egypt's protection, because his original claim for protection was made against Muslim extremists (non-state actors) rather than against the Egyptian state. However, the RPD noted the jurisprudence from this Court holding that the re-availment analysis does not change between state and non-state agents of persecution.

[15] Turning to the third part of the analytical framework for cessation, actual re-availment, the Applicant argued that no evidence had been provided to show that he actually obtained protection from Muslim extremists or that he could have done so.

[16] The RPD was not persuaded by this submission. It noted that the burden was on the Applicant to rebut the presumption of re-availment on a balance of probabilities. The RPD concluded that, as the Applicant acquired and relied on an Egyptian passport to return to Egypt on multiple occasions, there was persuasive evidence that he actually re-availed himself of the protection accorded to persons who acquire the passport of their home country of former nationality to travel there. Further, the RPD found that the Applicant's actions showed a lack of subjective fear.

[17] The RPD found on a balance of probabilities that the Applicant's time in Egypt was not spent in hiding and was neither necessary nor involuntary. The RPD concluded that the Minister had met the burden of proving on a balance of probabilities that the Applicant re-availed himself of Egypt's protection. Therefore, it allowed the Minister's application.

IV. Issues and Standard of Review

[18] Based on the submissions of the parties, the issues in this application for judicial review are:

A. Whether the Decision is reasonable; and

B. Whether the Applicant was deprived of procedural fairness by not being afforded an opportunity to adduce certain evidence at the hearing.

[19] As the articulation of the first issue suggests, the parties agree (and I concur) that the standard of review applicable to that issue is reasonableness (see *Canada (Minister of*

Citizenship and Immigration) v Vavilov, 2019 SCC 65). The procedural fairness issue is reviewable on a standard of correctness (see *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35).

[20] The Respondent also raises an evidentiary issue, taking the position that the Court should disregard the entirety of a supplemental affidavit of the Applicant, sworn on May 29, 2023, because it contains evidence that was not before the RPD. The Respondent relies on the principle that, as a general rule, the evidentiary record before a court on judicial review is restricted to the record that was before the administrative decision-maker (see *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 19).

[21] The Applicant argues that the supplemental affidavit is admissible because it falls within an exception to the above principle, applicable to evidence relevant to issues of procedural fairness. He submits that the affidavit identifies evidence that he would have adduced before the RPD had he been given an opportunity.

V. Analysis

[22] I need not decide whether to disregard the supplemental affidavit, as it relates to the procedural fairness issue, and my decision to allow this application for judicial review turns on one of the Applicant's arguments challenging the reasonableness of the Decision. It is therefore unnecessary for the Court to address the procedural fairness issue.

[23] I find that the Decision is unreasonable, because it discloses no consideration of the Applicant's evidence of precautionary measures he took while in Egypt. In *Canada (Citizenship and Immigration) v Galindo Camayo*, 2022 FCA 50 [*Camayo*], the Federal Court of Appeal explained that all of the evidence related to a number of factors should be considered and balanced when assessing whether the actions of an individual are such that they have rebutted the presumption that the individual intended to re-avail (at para 84). Such factors include precautionary measures taken by the individual, as well as the submissions of the parties.

[24] In the case at hand, the Applicant testified as to precautionary measures he took while in Egypt. His counsel's subsequent written submissions placed considerable emphasis on those measures. However, the Decision does not engage with any of this evidence or the Applicant's related submissions. The RPD's findings include a conclusion that the Applicant's time in Egypt was not spent in hiding. However, the Decision discloses no analysis leading to that conclusion. Moreover, the Applicant's evidence and submissions do not assert that he was in hiding. I do not read *Camayo* as indicating that precautionary measures must amount to being in hiding in order to be relevant to the assessment of intention to re-avail and to require consideration by the RPD.

[25] I therefore find that the Decision is unreasonable and that this application for judicial review must be dismissed.

[26] As a final procedural point, the parties agree that the correct Respondent in this matter is the Minister of Citizenship and Immigration. The Applicant had named both the Minister of

Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness as Respondents. My Judgment will correct the style of cause.

[27] Neither party proposed any question for certification for appeal, and none is stated.

JUDGMENT IN IMM-3587-22

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed, the Decision is set aside, and the matter is returned to a different Member of the RPD for re-determination.
2. No question is certified for appeal.
3. The Respondent is changed to "The Minister of Citizenship and Immigration", and the style of cause is amended accordingly.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3587-22
STYLE OF CAUSE:	JOHN HANI SHAFIK ANDARAWES v. MPSEP
PLACE OF HEARING:	TORONTO,ON
DATE OF HEARING:	JULY 18, 2023
JUDGMENT AND REASONS:	SOUTHCOTT J.
DATED:	AUGUST 9, 2023

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