

Federal Court



Cour fédérale

Date: 20150818

Docket: IMM-7600-14

Citation: 2015 FC 979

Montréal, Quebec, August 18, 2015

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

BUN CHOU KUOCH

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The legal mechanism relating to cessation of refugee protection on the basis of reavailment is intricately linked with the underlying requirements of subjective fear and absence of state protection for granting refugee protection in *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 [*Ward*]. This logic was expressed by Justice R. L. Barnes in *Garcia v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1346 at para 8 [*Garcia*]:

[8] Reavailment typically suggests an absence of risk or a lack of subjective fear of persecution. Absent compelling reasons, people do not abandon safe havens to return to places where their personal safety is in jeopardy.

II. Introduction

[2] The Applicant challenges a decision dated September 23, 2014, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], wherein the Refugee Protection Division [RPD] found that the Applicant was no longer a Convention refugee or person in need of protection on the basis that she had voluntarily reavailed herself of the state protection of Cambodia.

III. Background

[3] The Applicant is a citizen of Cambodia who successfully claimed refugee protection in Canada on November 14, 2005.

[4] The Applicant became a permanent resident of Canada on March 23, 2007.

[5] The Applicant has six children, one of whom is in Cambodia, one is in the United States and four are in Canada.

[6] On December 10, 2013, the Respondent alleged before the RPD that the Applicant had reavailed herself of Cambodia's state protection, under paragraph 108(1)(a) of the IRPA, on the

basis that she had traveled there on five occasions and that her passport was reissued and extended on three separate occasions since her refugee claim.

[7] A hearing was held before the RPD on September 23, 2014, resulting in the cessation of the Applicant's refugee protection.

[8] In its reasons for decision dated September 23, 2014, the RPD concludes that:

[30] Although the panel can understand the reasons related to her mother's funeral, it is of the opinion that the respondent's actions and explanations as to the other trips do not rebut the presumption that she intended to reavail herself of Cambodia's protection. Returning as many times to her country and staying for as long as she did each time put her *de facto* under the protection of her country.

(RPD's Decision, Certified Tribunal Record, at para 30)

IV. Legislative Provisions

[9] The provisions of the IRPA relating to cessation of refugee protection, which are founded in the principle embodied in Article 1C of the *1951 United Nations Convention relating to the Status of Refugees* [Convention], are the following:

Cessation of Refugee Protection

Rejection

108. (1) A claim for refugee protection shall be rejected, and a person is not a Convention refugee or a person in need of protection, in any of the following circumstances:

Perte de l'asile

Rejet

108. (1) Est rejetée la demande d'asile et le demandeur n'a pas qualité de réfugié ou de personne à protéger dans tel des cas suivants :

(a) the person has voluntarily reacquired themselves of the protection of their country of nationality;

(b) the person has voluntarily reacquired their nationality;

(c) the person has acquired a new nationality and enjoys the protection of the country of that new nationality;

(d) the person has voluntarily become re-established in the country that the person left or remained outside of and in respect of which the person claimed refugee protection in Canada; or

(e) the reasons for which the person sought refugee protection have ceased to exist.

Cessation of refugee protection

(2) On application by the Minister, the Refugee Protection Division may determine that refugee protection referred to in subsection 95(1) has ceased for any of the reasons described in subsection (1).

Effect of decision

(3) If the application is allowed, the claim of the person is deemed to be rejected.

Exception

(4) Paragraph (1)(e) does not apply to a person who establishes that there are compelling reasons arising out of previous persecution, torture, treatment or

a) il se réclame de nouveau et volontairement de la protection du pays dont il a la nationalité;

b) il recouvre volontairement sa nationalité;

c) il acquiert une nouvelle nationalité et jouit de la protection du pays de sa nouvelle nationalité;

d) il retourne volontairement s'établir dans le pays qu'il a quitté ou hors duquel il est demeuré et en raison duquel il a demandé l'asile au Canada;

e) les raisons qui lui ont fait demander l'asile n'existent plus.

Perte de l'asile

(2) L'asile visé au paragraphe 95(1) est perdu, à la demande du ministre, sur constat par la Section de protection des réfugiés, de tels des faits mentionnés au paragraphe (1).

Effet de la décision

(3) Le constat est assimilé au rejet de la demande d'asile.

Exception

(4) L'alinéa (1)e) ne s'applique pas si le demandeur prouve qu'il y a des raisons impérieuses, tenant à des persécutions, à la torture ou à des traitements ou peines

punishment for refusing to avail themselves of the protection of the country which they left, or outside of which they remained, due to such previous persecution, torture, treatment or punishment.

antérieurs, de refuser de se réclamer de la protection du pays qu'il a quitté ou hors duquel il est demeuré.

V. Issues

[10] The Applicant submits the following issues to be determined by the Court:

- a) Did the RPD err in ignoring relevant evidence and facts?
- b) Did the RPD err in imposing a higher burden of proof on the Applicant?
- c) Did the RPD err in its interpretation of paragraph 108(1)(a) of the IRPA?

VI. Arguments

A. *Applicant's Position*

[11] First, relying on *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ 1425, the Applicant submits that the RPD committed a reviewable error in dismissing significant evidence and arguments put forth at the hearing without explanation.

[12] Among others, the RPD failed to consider that the Applicant had not addressed herself to the Cambodian authorities during her stay and that she relied on her son to renew and extend her passport. The RPD also ignored oral and written evidence demonstrating that the Applicant was fearful upon return to Cambodia and that rigorous measures were adopted to ensure her security during her stay, such as staying with her son's parents-in-law.

[13] The Applicant also submits that the RPD erred in ignoring two letters from her sisters living in Cambodia, which confirm that the Applicant's mother was suffering from a serious illness, thus contradicting the RPD's findings in this respect.

[14] Moreover, relying on *Cho v Canada (Minister of Citizenship and Immigration)*, [2010] FC 1299, the Applicant submits that in the absence of any credibility findings by the RPD, her testimony is presumed to be true.

[15] Second, in her Supplementary Memorandum, the Applicant argues that the undertaking of passport formalities, in and of themselves, do not amount to reavailing oneself of the protection of one's country of nationality (*Nsende v Canada (Minister of Citizenship and Immigration)*, 2008 FC 531 at para 18 [*Nsende*]; *Canada (Minister of Public Safety and Emergency Preparedness) v Bashir*, 2015 FC 51).

[16] The Applicant also argues that the RPD erred in raising the Applicant's burden of proof in rebutting the presumption of reavailment by suggesting that the Applicant was required to demonstrate an element of "urgency" for traveling to Cambodia. Also, considering that the Applicant returned to Cambodia for family reasons, paragraph 125 of the United Nations High Commissioner for Refugees *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* [UNHCR Handbook] is relevant, in that it provides that "visiting an old or sick parent will have a different bearing on the refugee's relation to his former home country than regular visits to that

country spent on holidays or for the purpose of establishing business relations”. As such, the RPD erred in assessing the Applicant’s intent.

[17] Finally, the Applicant contends that the RPD erred in its interpretation of the meaning of “protection” in the context of paragraph 108(1)(a) of the IRPA and that the “cessation clause” found in subsection 108(1) should be interpreted restrictively, as stipulated in the UNHCR Guidelines.

B. *Respondent’s Position*

[18] The Respondent contends that the RPD’s findings that the three conditions cessation (voluntariness, intent and effective protection) are reasonable.

[19] The Respondent submits that the presumption of reavilment is particularly strong when a refugee uses their national passport to return to the country from which refugee status had been taken.

[20] The Respondent submits that it was not unreasonable for the RPD to conclude that the reasons given by the Applicant for her return to Cambodia – her mother’s illness and her two sons’ engagements – do not justify the number of trips or the length of each stay in her country. Such explanations are insufficient to rebut the presumption that the Applicant intended to reavail herself of Cambodia’s protection.

[21] The Respondent underlines the fact that the Applicant acted on her own volition in asking her son to renew her passport for the purposes of travel. Also, in requesting the renewal of her passport in April 2007, the Applicant failed to demonstrate that there were, at the time, exceptional circumstances compelling her to renew her passport. Furthermore, the Respondent points out the six-month delay between the Applicant's renewal of her passport and her travel in November 2007, which is indicative that she did not travel on the basis of urgency or criticality of her mother's illness.

[22] Finally, the Respondent further submits that decision-makers are not bound to make explicit findings on each constituent element, leading to its final conclusion and are presumed to have considered all the evidence (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16; *Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ 598).

VII. Standard of Review

[23] The standard of review applicable to the RPD's interpretation of paragraph 108(1)(a) of the IRPA is that of reasonableness (*Dunsmuir v New Brunswick*, [2008] SCC 9; *Nsende*, above at paras 6-9).

VIII. Analysis

[24] The legal mechanism relating to cessation of refugee protection on the basis of reavilment is intricately linked with the underlying requirements of subjective fear and absence

of state protection for granting refugee protection in *Ward*, above. This logic was expressed by Justice R. L. Barnes in *Garcia*, above at para 8:

[8] Reavailment typically suggests an absence of risk or a lack of subjective fear of persecution. Absent compelling reasons, people do not abandon safe havens to return to places where their personal safety is in jeopardy.

[25] The UNHCR Handbook, although not formally binding on signatory states, provides authoritative interpretative guidance as to the meaning of “reavailment” in the context of cessation (*Nsende*, above at para 12; *Cadena v Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 67).

[26] More precisely, section 119 of the UNHCR Handbook, found in “Chapter 3: Cessation Clauses”, provides a tripartite test to determine voluntary reavailment under the Convention:

- (a) voluntariness: the refugee must act voluntarily;
- (b) intention: the refugee must intend by his action to reavail himself of the protection of the country of his nationality;
- (c) reavailment: the refugee must actually obtain such protection.

(see: *Nsende*, above at para 13).

[27] In assessing voluntariness of reavailment for the purposes of cessation, the UNHCR Handbook indicates the following:

120. If the refugee does not act voluntarily, he will not cease to be a refugee. If he is instructed by an authority, e.g. of his country of residence, to perform against his will an act that could be interpreted as a reavailment of the protection of the country of his nationality, such as applying to his Consulate for a national passport, he will not cease to be a refugee merely because he obeys

such an instruction. He may also be constrained, by circumstances beyond his control, to have recourse to a measure of protection from his country of nationality. He may, for instance, need to apply for a divorce in his home country because no other divorce may have the necessary international recognition. Such an act cannot be considered to be a “voluntary reavilment of protection” and will not deprive a person of refugee status.

[28] Moreover, sections 121-124 of the UNHCR Handbook provide further guidance on the interpretation of reavilment for the purposes of cessation, in particular, in situations where refugees have obtained a national passport, which raises a rebuttable presumption of reavilment.

Proof to the contrary may refute that presumption:

121. In determining whether refugee status is lost in these circumstances, a distinction should be drawn between actual reavilment of protection and occasional and incidental contacts with the national authorities. If a refugee applies for and obtains a national passport or its renewal, it 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. On the other hand, the acquisition of documents from the national authorities, for which non-nationals would likewise have to apply – such as a birth or marriage certificate – or similar services, cannot be regarded as a reavilment of protection.

122. A refugee requesting protection from the authorities of the country of his nationality has only “reavailed” himself of that protection when his request has actually been granted. The most frequent case of “reavilment of protection” will be where the refugee wishes to return to his country of nationality. He will not cease to be a refugee merely by applying for repatriation. On the other hand, obtaining an entry permit or a national passport for the purposes of returning will, in the absence of proof to the contrary, be considered as terminating refugee status. This does not, however, preclude assistance being given to the repatriant – also by UNHCR – in order to facilitate his return.

123. A refugee may have voluntarily obtained a national passport, intending either to avail himself of the protection of his country of origin while staying outside that country, or to return to that country. As stated above, with the receipt of such a document he normally ceases to be a refugee. If he subsequently renounces

either intention, his refugee status will need to be determined afresh. He will need to explain why he changed his mind, and to show that there has been no basic change in the conditions that originally made him a refugee.

124. Obtaining a national passport or an extension of its validity may, under certain exceptional conditions, not involve termination of refugee status (see paragraph 120 above). This could for example be the case where the holder of a national passport is not permitted to return to the country of his nationality without specific permission.

[Emphasis added.]

(See: *Nsende*, above at paras 14 and 15).

[29] In a similar perspective, Justice Cecily Y. Strickland indicates in *Romero v Canada (Minister of Citizenship and Immigration)*, 2014 FC 671 at para 41:

[41] In determining whether refugee status is lost in these circumstances, the UNHCR Handbook states that a distinction should be drawn between actual reavilment of protection and occasional or incidental contacts with the national authorities. If a refugee applies for and obtains a national passport or its renewal, it 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: "... obtaining an entry permit or a national passport for the purposes of returning will, in the absence of proof to the contrary, be considered as terminating refugee status."

[Emphasis added.]

IX. Conclusion

[30] For all of the above reasons, the decision of the Refugee Protection Division is reasonable; as a result, the Court is in agreement with it. Therefore, the Court rejects the challenge to the decision and rejects the application for judicial review.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

There is no serious question of general importance to be certified.

"Michel M.J. Shore"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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