

Federal Court



Cour fédérale

Date: 20150915

Docket: IMM-7267-14

Citation: 2015 FC 1074

Toronto, Ontario, September 15, 2015

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

DAVIS WILLIAM LEZAMA CERNA

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] In 2008, Mr Davis William Lezama Cerna acquired refugee protection in Canada based on his fear of persecution in Peru due to his sexual orientation. He became a permanent resident of Canada the following year.

[2] When Mr Cerna applied for Canadian citizenship in 2012, officials asked him about his several trips back to Peru and his use of a Peruvian passport, which he had renewed twice. Subsequently, the Minister filed an application to cease Mr Cerna's refugee protection on the basis that he had reavailed himself of Peru's protection (relying on s 108(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27, [IRPA] – see Annex for provisions cited. A panel of the Immigration and Refugee Board granted the Minister's application.

[3] Mr Cerna argues that the Board applied the wrong test for reavailment, and rendered an unreasonable decision on the evidence. Further, he maintains that the Board failed to consider the impact of its approach on his rights under s 7 of the *Canadian Charter of Rights and Freedoms*. He asks me to quash the Board's decision and order another panel to reconsider the Minister's application.

[4] In my view, the Board applied the correct test but arrived at an unreasonable conclusion based on the evidence before it. I must, therefore, allow this application for judicial review. It is unnecessary to consider Mr Cerna's *Charter* arguments.

[5] There are two issues:

1. Did the Board apply the wrong test?
2. Was the Board's conclusion unreasonable?

II. The Board's Decision

[6] The Board found that Mr Cerna had reavailed himself of the protection of Peru. The fact that Mr Cerna had renewed his Peruvian passport created a presumption of reavilment that Mr Cerna failed to rebut.

[7] Mr Cerna explained to the Board that he renewed his Peruvian passport in order to be able to continue to use his United States visa. However, he only used that passport to travel to Peru. The reasons for his trips varied – to visit his parents, to obtain educational documents, and to undergo cosmetic surgery. The trips varied in length from two to seven weeks.

[8] The Board observed that Mr Cerna's parents were not dependent on him for their care and that he could have tried to obtain the educational documents he sought from within Canada. The Board also noted that Mr Cerna obtained refugee protection on the basis of his fear of street gangs operating near his parents' home, yet that is the place to which he returned on his various visits to Peru.

[9] Based on this evidence, the Board found that Mr Cerna had reavailed himself of Peru's protection and, accordingly, that his refugee protection had ceased.

III. Issue One – Did the Board apply the wrong test?

[10] Mr Cerna argues that the Board wrongly imposed on him a burden to rebut a presumption of reavilment based on his having renewed his Peruvian passport. He suggests that the presumption applies only to one element of the test for reavilment.

[11] I can see no error in the Board's approach.

[12] Reavilment comprises three elements: (1) the refugee must have acted voluntarily; (2) the refugee must have intended to reavail himself or herself of the protection of the country of nationality; and (3) the refugee must actually have obtained protection (*Nsende v Canada (Minister of Citizenship and Immigration)*, 2008 FC 531 at paras 12-15; *Cabrera Cadena v Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 67 at para 22).

[13] The fact that a refugee has obtained or renewed a passport issued by the country of nationality creates a rebuttable presumption that the refugee intended to reavail himself or herself of that country's protection (*Li v Canada (Minister of Citizenship and Immigration)*, 2015 FC 459 at para 39). If the refugee acquires the passport in order to return to his or her country of origin, as Mr Cerna did, then the refugee has also obtained actual protection from that state. In these circumstances, unless the refugee has rebutted the presumption of intention, the only remaining question is whether he or she voluntarily acquired his or her passport.

[14] The Board found that Mr Cerna had not rebutted the presumption of intention. He made several trips to Peru that were not strictly necessary and, while there, actually availed himself of Peru's protection. Further, Mr Cerna had clearly acquired his Peruvian passport voluntarily. The main issue was whether Mr Cerna had intended to reavail himself of Peru's protection and the Board concluded that he did.

[15] In my view, the Board applied the presumption of intention correctly and also addressed the other branches of the test for reavailment. I cannot conclude that the Board applied the wrong test.

IV. Issue Two – Was the Board's conclusion unreasonable?

[16] The Minister contends that the Board's decision was reasonable on the evidence.

[17] I disagree.

[18] The Board failed to take account of Mr Cerna's testimony that he travelled to Peru only on the strength of his belief that he enjoyed the security of having permanent residence in Canada, and the corresponding protection that his status carried with it. Further, he had no idea that he put his status at risk by travelling back to Peru. As the law stood at the time of his travels, cessation of refugee status did not affect permanent residence (for a discussion of the current consequences of cessation of refugee status, see *Yuan v Canada (Minister of Citizenship and Immigration)*, 2015 FC 923, at paras 6-11).

[19] Many Canadian permanent residents will assume that their status would allow them to turn to Canada for protection even when travelling to their countries of origin. Permanent resident status “attracts much greater stability, longevity and associated rights’ than that of a foreign national” (*Bermudez v Canada (Minister of Citizenship and Immigration)*, 2015 FC 639 at para 30 citing *Hernandez v Canada (Minister of Citizenship and Immigration)*, 2005 FC 429). In these circumstances, the Board must take account of the refugees’ subjective intentions before concluding that they have availed themselves of the protection of their countries of origin.

[20] In my view, the Board should have considered whether the evidence relating to Mr Cerna’s subjective understanding of the benefits of his permanent resident status rebutted the presumption that he had intended to obtain Peru’s protection by acquiring a Peruvian passport. Without that analysis, the Board’s conclusion on reavilment does not represent a defensible outcome based on the facts and the law.

V. Conclusion and Disposition

[21] The Board failed to take account of important evidence relating to the test for reavilment. Absent an analysis of that evidence, the Board’s conclusion that Mr Cerna had reavailed himself of the protection of the state of Peru was unreasonable. I must, therefore, allow this application for judicial review and order another panel of the Board to reconsider the Minister’s cessation application. No question of general importance arises.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed and the matter is returned to another panel of the Board for reconsideration.
2. No question of general importance is stated.

“James W. O’Reilly”

Judge

Annex

Immigration and Refugee Protection Act,
SC 2001, c 27

Loi sur l'immigration et la protection des
réfugiés, LC 2001, ch 27

Rejection

Rejet

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:

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 reavailed themselves of the protection of their country of nationality;

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

Canadian Charter of Rights and
Freedoms

Charte Canadienne des droits et libertés

Life, liberty and security of person

Vie, liberté et sécurité

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-7267-14

STYLE OF CAUSE: DAVIS WILLIAM LEZAMA CERNA v THE MINISTER
OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

DATE OF HEARING: MAY 21, 2015

JUDGMENT AND REASONS: O'REILLY J.

DATED: SEPTEMBER 15, 2015

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