

Federal Court



Cour fédérale

Date: 20151021

Docket: IMM-1133-15

Citation: 2015 FC 1190

Montréal, Quebec, October 21, 2015

PRESENT: The Honourable Mr. Justice Locke

BETWEEN:

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Applicant

and

BAHAREH ESFAND

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application by the Minister of Citizenship and Immigration for judicial review of a February 19, 2015 decision of the Refugee Protection Division (RPD) on a threshold jurisdiction issue. An RPD panel concluded that it did not have the jurisdiction to consider the Minister's application to cessate the refugee status of the respondent pursuant to section 108 of

the *Immigration and Refugee Protection Act, SC 2001, c 27 [IRPA]*, because the panel found that the respondent is not a Convention refugee as contemplated in paragraph 95(1)(a) of the *IRPA*.

[2] For the reasons set out below, this application will be dismissed and the RPD's decision will stand.

II. Facts

[3] The respondent is a citizen of Iran who became a permanent resident of Canada upon her arrival in the country on June 13, 2006. She was a dependent of her husband, who was determined to be a Convention refugee by a visa officer overseas. Under a policy of family unity, the respondent, her husband, and their son became members of the Convention Refugees Abroad (CR-1) class.

[4] It is clear from the overseas visa officer's notes that the officer analyzed and considered whether the respondent's husband was a Convention refugee. The officer concluded that the respondent's husband had a well-founded fear of persecution based on political opinion. There was no similar finding for the respondent. It seems that, upon finding that the respondent's husband was a Convention refugee, it was considered unnecessary to assess other family members' risks in Iran. Under the policy of family unity, which I understand is applied routinely, the other family members were accepted without assessment.

[5] The respondent has since returned to Iran on two occasions (the second time after having renewed her Iranian passport). This prompted the Minister to seek the cessation of the

respondent's Convention refugee status on the basis of paragraph 108(1)(a) of the *IRPA* for voluntarily re-availing herself of the protection of Iran. However, section 108 of the *IRPA* applies only to Convention refugees and persons in need of protection: subsection 95(1) of the *IRPA*. The current dispute arose as a result of the respondent's assertion that she does not in fact have this status.

III. The Impugned Decision

[6] The threshold jurisdictional issue determined by the RPD was whether the respondent is a Convention refugee as contemplated in section 95 of the *IRPA*. The panel found that there was only one applicant for refugee protection overseas; the respondent's husband. The respondent's husband had alleged that he had a well-founded fear of persecution in Iran. The respondent formed part of her husband's application not as a refugee claimant, but as a dependent of her husband. The only questions posed to the respondent as part of the visa officer's determination were related to the risk faced by her husband.

[7] The RPD panel found that the Minister's representative was wrong in stating that if a principal claimant is granted refugee protection by a visa officer, all the other claimants are also granted refugee status by virtue of the finding on the principal applicant. All claimants that appear before the Refugee Protection Division must be assessed as Convention refugees in their own right. Reasoning by analogy, the panel accordingly found that the respondent did not become a Convention refugee simply by virtue of her husband's refugee claim being accepted by the overseas visa officer.

[8] The panel considered section 140 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR], which states that:

Class of family members

140. Family members of an applicant who is determined to be a member of a class under this Division are members of the applicant's class.

Catégorie des membres de la famille

140. Les membres de la famille du demandeur considéré comme appartenant à une catégorie établie par la présente section font partie de cette catégorie.

[9] The panel found that this provision applied to the respondent's husband, but not to the respondent. The respondent became a member of the CR-1 class by virtue of being dependent on her husband, not by virtue of being determined to be a Convention refugee.

[10] The panel also considered chapter 10.2 of the Citizenship and Immigration Canada (CIC) processing manual *OP 5: Overseas Selection and Processing of Convention Refugees Abroad Class and Members of the Humanitarian-protected Persons Abroad Class* (OP 5). Chapter 10.2 of this text outlines four factors to be considered when assessing eligibility. The panel noted that the text indicates that only the principal applicant needs to meet the eligibility requirements, while accompanying family members "derive their refugee status" from the principal applicant. The panel found that, though the phrase "derive their refugee status" suggests that the respondent in this case is a Convention refugee like her husband, a plain reading of the text indicates that no assessment of the dependents is made; chapter 10.2 does not suggest that the dependents are determined to be Convention refugees in the sense of paragraph 95(1)(a) of the *IRPA*.

[11] Having found that the respondent was not a Convention refugee as contemplated in paragraph 95(1)(a) of the *IRPA*, the panel concluded that it did not have jurisdiction to consider the Minister's application to cessate the refugee status of the respondent.

IV. Issue

[12] The sole issue in this application is whether the RPD erred in finding that the respondent had not been determined to be a Convention refugee as contemplated in section 95 of the *IRPA*, so that the RPD did not have the jurisdiction under section 108 to cessate the respondent's refugee protection.

V. Standard of Review

[13] The parties agree that the RPD's decision should be reviewed on a standard of reasonableness as the panel's interpretation of section 95 of the *IRPA* is a question of law involving the interpretation of the tribunal's home statute, and is not "both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise": *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 54 and 60 [*Dunsmuir*].

[14] The applicant notes that reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process, but it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law: *Dunsmuir* at para 47. The applicant also notes that the range of possible, acceptable outcomes may be narrow, given that the tribunal is engaged in

statutory interpretation (*B010 v Canada (Citizenship and Immigration)*, 2013 FCA 87 at para 72; *Abraham v Canada (Attorney General)*, 2012 FCA 266 at 45 and 48).

VI. Analysis

[15] This case essentially comes down to a matter of statutory interpretation, and specifically whether the phrase “has been determined to be a Convention refugee” in paragraph 95(1)(a) of the *IRPA* applies to the respondent. Only then does the RPD have jurisdiction to cessate her refugee status under subsection 108(1) of the *IRPA*.

[16] The Supreme Court of Canada stated the following on the subject of statutory interpretation in *Rizzo and Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21 [*Rizzo*]:

Although much has been written about the interpretation of legislation [...], Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[17] Though the respondent was not assessed concerning her risk in Iran, the applicant argues that the respondent’s status as a Convention refugee was deemed to have been so determined by virtue of her acceptance in the Convention Refugee Abroad class. The applicant places emphasis on the statement in chapter 10.2 of OP 5 (mentioned above) that family members accompanying

a principal applicant who has been determined to be a Convention refugee “derive their refugee status” from the principal applicant.

[18] However, OP 5 does not have the force of law. More importantly, the statement upon which the applicant relies merely suggests that the respondent has refugee status. It does not say that she “has been determined to be a Convention refugee” as required by paragraph 95(1)(a) of the *IRPA*.

[19] The applicant also cites the affidavit of Jean-Marc Gionet, Director of the Resettlement Division of the Refugee Affairs Branch of CIC, as evidence that the respondent was deemed to be determined to be a Convention refugee. However, Mr. Gionet’s statement is merely his opinion. The only authorities he cites to support it are section 140 of the *IRPR* (mentioned above), OP 5 and the GCMS notes concerning the respondent’s husband’s refugee claim. These authorities are not persuasive. Despite Mr. Gionet’s familiarity with Canada’s overseas Refugee and Humanitarian Resettlement Program by virtue of his position, I am not inclined to give much weight to his opinion. His view of the deemed determination of refugee status is essentially an opinion on a question of law coming from a representative of one of the parties in the present application.

[20] On the other side of the ledger, certain provisions of the *IRPR* suggest that, though accompanying family members are members of the same class as the person who has been determined to be a Convention refugee, they are not thereby deemed to have been determined to be likewise Convention refugees. For example, the preamble of subsection 139(1) of the *IRPR*

provides that “[a] permanent resident visa shall be issued to a foreign national in need of refugee protection, and their accompanying family members, if following an examination it is established that [...]”. This preamble is followed by a series of requirements concerning almost exclusively the foreign national rather than their accompanying family members. All of them receive a permanent resident visa, but no determination is made of the risks to the family members. Also, section 140 of the *IRPR* (quoted above) provides that family members are members of the same class as a person who is determined to be a refugee, but does not state that such family members are deemed to have been determined to be refugees.

[21] The applicant points to the fact that the only reason that the respondent’s risk was not assessed separately from her husband’s is for the sake of efficiency, since it was unnecessary to do a separate assessment for the respondent once it was determined that her husband was a Convention refugee. The applicant seems to argue that it would be unfair to deny it the ability to cessate the respondent’s refugee status simply because it acted efficiently in the past. This argument strikes me as close to suggesting that the Minister is more concerned with removing refugee status than granting it. In my view, this is not the principal goal of the *IRPA*.

[22] The applicant’s strongest argument, in my view, concerns the definition of “protected persons” and the consequences of the RPD’s decision. Subsection 95(2) of the *IRPA* defines a protected person as “a person on whom refugee protection is conferred under subsection (1), and whose claim or application has not subsequently been deemed to be rejected under subsection 108(3), 109(3) or 114(4).” The applicant notes that if the respondent is not a refugee for the purposes of subsection 95(1) of the *IRPA*, then she cannot be a “protected person” as defined in

subsection 95(2). If the respondent is not a “protected person” then a number of consequences could follow that do not apply to protected persons, including the following:

1. She could be found inadmissible on health grounds under section 38 of the *IRPA*;
2. She could be arrested and detained without a warrant under subsection 55(2) of the *IRPA*;
3. She would not be entitled to protection against refoulement under section 115 of the *IRPA*.

[23] The applicant also argues that the respondent, if she is not a protected person, is not entitled to the health benefits of a protected person and does not have access to a Refugee Travel Document.

[24] As regards the Refugee Travel Document and the protection against refoulement, these seem to be irrelevant to the respondent, who has managed to renew her Iranian passport and travel in and out of Iran more than once.

[25] Though some of the other benefits of being a protected person may be relevant, it seems nonsensical to consider a change to the respondent’s status in Canada simply because she visited a country in which her husband was found to be in danger, but in which she never claimed to be in danger. In my view, this comes close to an absurd consequence of the kind prohibited in *Rizzo* at para 27. Moreover, this is not an academic debate. For example, if the respondent’s refugee status were ceased, she would face the loss of her permanent resident status under paragraph 46(1)(c.1) of the *IRPA*, with all of the consequences that could have on her and her family. In my

view, the applicable statutory and regulatory provisions would have to be clearer in order for the applicant's position to prevail.

[26] The applicant argues that the present proceeding is not about deciding whether the respondent should lose her refugee status, but rather whether the RPD has the jurisdiction even to consider the issue - to look at the facts and decide the matter on its merits. The applicant argues that the result of the RPD's decision is that there are no circumstances under which the respondent's refugee status could be removed under section 108 of the *IRPA*.

[27] In my view, this argument does not outweigh the following important points:

1. It makes no sense for the respondent to face negative consequences for visiting Iran, where she never claimed to be at risk;
2. The applicable statutory and regulatory provisions (read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the *IRPA*, the object of the *IRPA*, and the intention of Parliament) do not support the applicant's position; and
3. The applicant's position would work against the clearly stated policy of family unity.

[28] I conclude that the RPD's decision was reasonable, even applying a narrow range of possible, acceptable outcomes.

VII. Conclusion

[29] The present application will be dismissed and the decision of the RPD maintained.

[30] The applicant requests that I certify a serious question of general importance. The respondent submits that no question should be certified. After having heard the parties, I have agreed to certify the question below.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The present application is dismissed and the RPD's decision is maintained.
2. The following serious question of general importance is certified:

Where a person has become a permanent resident under a visa application in the overseas Refugee and Humanitarian Resettlement Program by virtue of a member of the person's family listed in the visa application having been determined to be a Convention refugee (though the person was not themselves assessed as a Convention refugee), is that person a Convention refugee as contemplated in paragraph 95(1)(a) of the *IRPA* who is subject to cessation of refugee status pursuant to subsection 108(2) of the *IRPA*?

“George R. Locke”

Judge

Annex “A”: Relevant Legislation

Immigration and Refugee Protection Act, SC 2001, c 27

Refugee Protection, Convention Refugees and Persons in Need of Protection

Conferral of refugee protection

95. (1) Refugee protection is conferred on a person when

(a) the person has been determined to be a Convention refugee or a person in similar circumstances under a visa application and becomes a permanent resident under the visa or a temporary resident under a temporary resident permit for protection reasons;

(b) the Board determines the person to be a Convention refugee or a person in need of protection; or

(c) except in the case of a person described in subsection 112(3), the Minister allows an application for protection.

[...]

Convention refugee

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail

Notions d’asile, de réfugié et de personne à protéger

Asile

95. (1) L’asile est la protection conférée à toute personne dès lors que, selon le cas :

a) sur constat qu’elle est, à la suite d’une demande de visa, un réfugié au sens de la Convention ou une personne en situation semblable, elle devient soit un résident permanent au titre du visa, soit un résident temporaire au titre d’un permis de séjour délivré en vue de sa protection;

b) la Commission lui reconnaît la qualité de réfugié au sens de la Convention ou celle de personne à protéger;

c) le ministre accorde la demande de protection, sauf si la personne est visée au paragraphe 112(3).

[...]

Définition de « réfugié »

96. A qualité de réfugié au sens de la Convention – le réfugié – la personne qui, craignant avec raison d’être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de

themselves of the protection of each of those countries; or

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

[...]

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:

(a) the person has voluntarily reavailed 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).

la protection de chacun de ces pays;

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

[...]

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) 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).

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 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.

[...]

Provisions that Apply to All Divisions

Sole and exclusive jurisdiction

162. (1) Each Division of the Board has, in respect of proceedings brought before it under this Act, sole and exclusive jurisdiction to hear and determine all questions of law and fact, including questions of jurisdiction.

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

[...]

Attributions communes

Compétence exclusive

162. (1) Chacune des sections a compétence exclusive pour connaître des questions de droit et de fait – y compris en matière de compétence – dans le cadre des affaires dont elle est saisie.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1133-15

STYLE OF CAUSE: THE MINISTER OF CITIZENSHIP AND
IMMIGRATION v BAHAREH ESFAND

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

DATE OF HEARING: SEPTEMBER 9, 2015

JUDGMENT AND REASONS: LOCKE J.

DATED: OCTOBER 21, 2015

APPEARANCES:

Mark East FOR THE APPLICANT

Douglas Cannon FOR THE RESPONDENT

SOLICITORS OF RECORD:

William F. Pentney FOR THE APPLICANT
Deputy Attorney General of Canada
Vancouver, British Columbia

Elgin Cannon & Associates FOR THE RESPONDENT
Barristers and Solicitors
Vancouver, British Columbia