Federal Court  Cour fédérale

Date: 20160108

Docket: IMM-2680-15

Citation: 2016 FC 29

Ottawa, Ontario, January 8, 2016

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

SAJJAD SHAMSI KAZEM ABADI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Sajjad Shamsi Kazem Abadi has brought an application for judicial review of a decision of the Refugee Protection Division [RPD] of the Immigration and Refugee Board. The RPD granted the application of the Minister of Citizenship and Immigration [the Minister] to cease his status as a refugee pursuant to s 108(1)(*a*) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. Mr. Shamsi brings this application under s 72(1) of the IRPA.

[2] For the reasons that follow, I have concluded that the RPD reasonably found that Mr. Shamsi had re-availed himself of Iran's diplomatic protection by acquiring an Iranian passport and travelling to Iran on two occasions. The unavailability of Mr. Shamsi's original refugee determination file did not result in an abuse of process. The application for judicial review is therefore dismissed.

II. Background

[3] Mr. Shamsi is a citizen of the Islamic Republic of Iran. He arrived in Canada in 1996, when he was 12 years old.

[4] Mr. Shamsi, his mother and his two siblings were granted refugee status on September 10, 1999. According to the Minister, Mr. Shamsi's refugee protection file was disposed of in accordance with the Retention and Disposition Authority [RAD] 96/037. The precise basis upon which he received refugee status in Canada is therefore unclear. However, the parties agree that Mr. Shamsi was granted refugee status on the basis of his mother's well-founded fear of gender-based persecution in Iran.

[5] Mr. Shamsi's mother and two siblings eventually obtained Canadian citizenship. Mr. Shamsi became a permanent resident of Canada in 2001, but he never applied for citizenship due to a prior criminal conviction for breaking and entering when he was 19 years old. Mr. Shamsi has a young daughter with his former common law spouse.

[6] In 2006, Mr. Shamsi applied for and was issued an Iranian passport. He used the passport to travel to Iran to attend his sister's wedding. Following a two-month stay in Iran, he was detained by the Iranian authorities at Tehran Airport because he had failed to acquire an exit stamp. Mr. Shamsi says that he was released only once he established that he was a permanent resident of Canada.

[7] Mr. Shamsi renewed his Iranian passport in 2011 in anticipation of a vacation to Mexico. He used it to return to Iran in 2014, to visit his aging father, and stayed there for three weeks.

[8] Upon returning to Canada in 2014, Mr. Shamsi was questioned by an agent with the Canada Border Services Agency [CBSA]. The agent recommended to the Minister that Mr. Shamsi's refugee status be "cessated" pursuant to s 108(1)(*e*) of the IRPA due to a change in country conditions in Iran.

[9] In September 2014, the Minister of Public Safety and Emergency Preparedness [Minister of PSEP] applied to the RPD for a determination of whether Mr. Shamsi's status has ceased pursuant to s 108(1)(*a*) of the IRPA. The Minister argued that Mr. Shamsi had re-availed himself of Iran's diplomatic protection by applying for and obtaining an Iranian passport, and by travelling to Iran on two occasions.

III. The RPD's Decision

[10] The RPD applied the test for re-availment found in *Nsende v Canada (Minister of Citizenship and Immigration)*, 2008 FC 531, and concluded that all three requirements for re-

availment had been met. The RPD determined that Mr. Shamsi: (i) voluntarily applied for an Iranian passport, and in doing so; (ii) intended to re-avail himself of the diplomatic protection of Iran; and (iii) actually obtained Iran's diplomatic protection when he used his passport to enter Iran and transit through Germany. The RPD therefore allowed the Minister of PSEP's application and Mr. Shamsi ceased to be a Convention refugee pursuant to ss 108(2) and 108(3) of the IRPA.

IV. Issues

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

A. What is the applicable standard of review?

B. Was the RPD's finding that Mr. Shamsi had re-availed himself of Iran's diplomatic protection reasonable?

C. Given the unavailability of Mr. Shamsi's original refugee determination file, was the Minister's cessation application an abuse of process?

V. Analysis

A. *What is the applicable standard of review?*

[12] The parties disagree about the standard of review that applies to the RPD's decision. The Minister says that the correctness standard applies because any interpretation of the cessation provisions of the IRPA amounts to an interpretation of provisions found in the United Nations

Convention Relating to the Status of Refugees, Can TS 1969 No 6 [Convention]. Mr. Shamsi says that the reasonableness standard should apply, but that the range of possible, acceptable outcomes may be narrow.

[13] As the Supreme Court of Canada observed recently, the Federal Court of Appeal has adopted different views on whether questions of statutory interpretation involving consideration of international instruments should be reviewed against the standard of reasonableness or correctness (*B010 v Canada (Minister of Citizenship and Immigration)*, 2015 SCC 58 at para 24, citing *Hernandez Febles v Canada (Citizenship and Immigration)*, 2012 FCA 324 and *B010 v Canada (Minister of Citizenship and Immigration)*, 2013 FCA 87 [*B010*]).

[14] Where the tribunal is interpreting its home statute, there is a presumption that the standard of review is reasonableness (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 34). The provision at issue in this case lies at the core of the RPD's expertise. There is nothing to rebut the presumption that the reasonableness standard applies. However, because the RPD was engaged in statutory interpretation, the range of reasonable outcomes may be narrow (*Canada (Attorney General) v Canadian Human Rights Commission*, 2013 FCA 75; *B010* at para 72).

B. *Was the RPD's finding that Mr. Shamsi had re-availed himself of Iran's diplomatic protection reasonable?*

[15] Pursuant to Article 1C of the Convention, an individual may lose refugee protection where that individual's actions indicate that he no longer has a well-founded fear of persecution

in his country of nationality, or that the surrogate protection of another country is no longer required. This principle is reflected in s 108 of the IRPA, which provides that a claim for refugee protection shall be rejected, and a person is not "a Convention refugee or a person in need of protection," if the person has voluntarily re-availed himself of the protection of his country of nationality. Subsection 108(2) of the IRPA further provides that, on application by the Minister, the RPD may determine that refugee protection has ceased due to the individual's re-availment of the protection of his country of nationality. In such cases, the claim of the person is "deemed to be rejected" pursuant to s 108(3) of the IRPA.

[16] In my view, the RPD properly applied the test for re-availment and reasonably found that Mr. Shamsi had failed to rebut the presumption that he intended to re-avail himself of Iran's protection by acquiring an Iranian passport and travelling to that country. When a refugee applies for and obtains a passport from his country of nationality, it is presumed that he intended to re-avail himself of the diplomatic protection of that country (*Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* at para 121 [Refugee Handbook]; *Nsende v Canada (Minister of Citizenship and Immigration)*, 2008 FC 531 at para 14). The presumption of re-availment is particularly strong where a refugee uses his national passport to travel to his country of nationality. It has even been suggested that this is conclusive (Guy Goodwinn-Gill and Jane McAdam, *The Refugee in International Law*, 3rd ed., at page 136).

[17] However, the prevailing view is that the presumption of re-availment may be rebutted with evidence to the contrary (Refugee Handbook at para 122). The onus is on the refugee to

adduce sufficient evidence to rebut the presumption (*Canada (Minister of Citizenship and Immigration) v Nilam*, 2015 FC 1154 at para 26 [*Nilam*], citing *Li v Canada (Minister of Citizenship and Immigration)*, 2015 FC 459 at para 42).

[18] It is only in "exceptional circumstances" that a refugee's travel to his country of nationality on a passport issued by that country will not result in the termination of refugee status (Refugee Handbook at para 124). Mr. Shamsi relies on paragraph 125 of the Refugee Handbook to argue that visiting an old or sick parent qualifies as an "exceptional circumstance" sufficient to rebut the presumption of re-availment. However, paragraph 125 of the Refugee Handbook concerns an individual who travels to his country of nationality on a travel document issued by his country of refuge, and not on a passport issued by his country of nationality (*Nilam* at para 28).

[19] Mr. Shamsi says that the RPD failed to take into account his testimony that he travelled to Iran believing that he benefited from the security of being a permanent resident of Canada. The Minister argues that Mr. Shamsi is confusing an intention to re-establish oneself in one's country of nationality with the intention to re-avail oneself of that country's diplomatic protection. I agree with the Minister that the distinction is an important one. Mr. Shamsi's testimony was that he considered himself a permanent resident of Canada, and that he had no intention of re-establishing himself in Iran. However, this does not detract from Mr. Shamsi's voluntary acquisition of an Iranian passport and his re-availment of Iran's diplomatic protection by using it to travel to Iran, via other countries, on two occasions.

[20] Mr. Shamsi also says that the RPD committed a reviewable error by failing to assess whether he would be at risk of persecution upon return to Iran. However, in *Balouch v Canada (Minister of Public Safety and Emergency Preparedness)*, 2015 FC 765 at para 19, Justice Heneghan ruled that the risk of persecution is not relevant in a cessation hearing. She certified the following question for appeal: "When deciding whether to allow an application by the Minister for cessation of refugee status pursuant to s 108(1)(a) of the *Immigration and Refugee Protection Act* based on past actions, can the Board allow the Minister's application without addressing whether the person is at risk of persecution upon return to their country of nationality at the time of the cessation hearing?" Pending clarification by the Federal Court of Appeal, the RPD cannot be faulted for not assessing Mr. Shamsi's risk of persecution in Iran.

[21] In any event, the evidence demonstrates that Mr. Shamsi does not have a subjective fear of persecution in Iran. In an application for cessation, a central issue is whether a refugee has an ongoing subjective fear of persecution in his country of nationality (*Nilam* at para 30). Mr. Shamsi's evidence was that he returned to Iran in 2006 to attend a wedding. He returned again in 2014 to visit his aging father. In his interview with the CBSA, Mr. Shamsi said that he did not fear for his safety when he returned to Iran. In light of this evidence, it was reasonable for the RPD to find that Mr. Shamsi intended to re-avail himself of Iran's diplomatic protection, and that he received such protection when he travelled to Iran via Germany using his Iranian passport.

[22] Finally, Mr. Shamsi relies on Justice Phelan's decision in *Kandasamy v Canada (MCI)*, 2015 FC 855 [*Kandasamy*] to argue that the RPD was required to consider the humanitarian and compassionate [H&C] factors that arise in his case, particularly his degree of establishment in

Canada and the best interests of his Canadian-born child. *Kandasamy* concerned an application for judicial review of a CBSA officer's decision to refer the applicant's case to the Immigration and Refugee Board [IRB] for a cessation hearing. Justice Phelan observed *in obiter* at para 15 that an applicant's procedural rights before a CBSA officer are minimal, in part because the same H&C matters may be raised at the IRB.

[23] However, in *Olvera Romero v Canada (Citizenship and Immigration)*, 2014 FC 671 at para 69 [*Olvera Romero*], Justice Strickland held that the function of the RPD in a cessation hearing is to consider whether re-availment was voluntary, intentional and actual. She acknowledged that in circumstances where the decision may adversely affect the best interests of a child and where this factor must be accounted for, H&C considerations may ultimately prevail. Justice Mosley clarified in *Bermudez v Canada (Minister of Citizenship and Immigration)*, 2015 FC 639 at para 34 [*Bermudez*] that this must be understood as a reference to a separate application for an exemption under s 25 of the IRPA, since the RPD does not have the authority to consider H&C factors.

[24] In light of the clear authority of *Olvera Romero* and *Bermudez*, and considering that Justice Phelan's remark in *Kandasamy* about the IRB's jurisdiction to consider H&C matters was made *in obiter*, I cannot fault the RPD for declining to consider H&C factors in this case. In my view, these factors are properly the subject of a separate application under s 25 of the IRPA.

C. *Given the unavailability of Mr. Shamsi's original refugee determination file, was the Minister's cessation application an abuse of process?*

[25] I am unable to conclude that the Minister's cessation application was an abuse of process. Abuse of process is a common law principle that permits a court to halt a proceeding that has become unfair or oppressive (*Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44). This Court may grant such a remedy only in the clearest of cases (*Fabbiano v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1219 at para 9), and only where there is no adequate alternative remedy available (*R v Piccirilli*, 2014 SCC 16 at para 32). I note that Mr. Shamsi's objection to the RPD's consideration of the Minister's cessation application on the ground that it was abusive was raised for the first time on judicial review.

[26] It is unclear how the original refugee determination file would have assisted Mr. Shamsi in this case. Mr. Shamsi argues that the uncertainty surrounding the precise reasons why he acquired refugee status in Canada makes it impossible to assess whether country conditions have changed in Iran, or whether he took reasonable precautions in Iran not to expose himself to the risks that caused him to flee that country almost 20 years ago.

[27] However, the parties agree that Mr. Shamsi was granted refugee status in Canada on the basis of his mother's well-founded fear of gender-based persecution in Iran. It is doubtful that Mr. Shamsi himself ever required refugee protection in Canada. He is a male, now an adult, and there is nothing about his profile to suggest that he has a well-founded fear of persecution in Iran. He acquired refugee protection in Canada only because he was the dependent child of a woman who was eligible for refugee protection.

[28] Mr. Shamsi has not demonstrated that the disposal of the original refugee determination file compromised his ability to respond to the Minister's application to cease his refugee status, or that this is one of the clearest of cases that justifies a stay of proceedings. Despite the absence of the original file, there was never any serious doubt about the basis upon which Mr. Shamsi acquired refugee status in Canada.

VI. Conclusion

[29] For the foregoing reasons, the application for judicial review is dismissed. The outcome of this case is a function of its particular facts, and accordingly no question is certified for appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;

2. No question is certified for appeal.

"Simon Fothergill"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Erica Olmstead Aris Daghighian	FOR THE APPLICANT
Brett Nash	FOR THE RESPONDENT

SOLICITORS OF RECORD:

EDELMANN & CO. Barristers and Solicitors Vancouver, British Columbia	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT