Federal Court  Cour fédérale

Date: 20181121

Docket: IMM-2555-18

Citation: 2018 FC 1167

[UNREVISED CERTIFIED ENGLISH TRANSLTION]

Ottawa, Ontario, November 21, 2018

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

FARADJ MABROUK SEID

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The applicant is a national of Chad, who was granted refugee status in Canada on August 9, 2000, and the status of permanent resident a year later. In this proceeding, he is disputing a decision by the Refugee Protection Division [PRD] dated May 4, 2018, removing his

refugee protection status from him on grounds based on paragraph 108(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act], namely, that he had voluntarily reavailed himself of the protection of Chad.

II. Background

[2] The facts relevant to this case may be summarized as follows:

a. The applicant arrived in Canada in 1999;

b. In 2005, he left Canada for Chad, according to him, to settle his father's affairs following his death, which likely occurred in February 2003. He stated that, among other things, he wanted to repay his father's debts to prevent his mother and young siblings from losing the home they lived in;

c. He also said that he wanted to return to Canada in 2006, but encountered administrative difficulties that kept him from returning;

d. He ended up staying in Chard for four years; in 2006 and 2007, he worked in human resources there;

e. In 2009, he tried to obtain a travel document from Libya, but his application was denied for non-compliance with the residency requirement of permanent residents under the Act. However, that decision was overturned on appeal on humanitarian and compassionate grounds, and a travel document valid for 6 months was issued to him. That document would not be used.

f. In June 2013, he again applied for a travel document for Canada. For the same reason as in 2009, that application was denied. However, he failed in his attempt to get that decision overturned and, consequently, lost his permanent resident status;

g. In March 2016, the respondent Minister [Minister] instituted proceedings with the RPD to have it recognized that the applicant's refugee protection has ceased. The Minister alleged, on the basis of paragraphs 108(1)(a) and (d) of the Act, that that determination was appropriate given that the applicant had voluntarily reavailed himself of the protection of his country of nationality and that he had voluntarily gone back to re-establish himself there, although this is a country that he had previously left and because of which he had claimed refugee protection in Canada.

III. The RPD decision

[3] As I have explained at the outset, the RPD allowed the Minister's application since it was satisfied that the applicant had voluntarily reavailed himself of the protection of Chad as provided by paragraph 108(1)(a) of the Act. In doing so, it first decided that the fact that the applicant had applied for and obtained the renewal of his Chadian passport triggered the application of the presumption resulting from the principles stated in the *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* of the United Nations High Commissioner for Refugees [Handbook], as enshrined by the Court, that the applicant had thus reavailed himself of the protection of his country of nationality.

[4] The PRD then said it was of the opinion that the applicant's explanations of his reasons for renewing his Chadian passport and returning to Chad did not enable him to rebut that presumption. In particular, the RPD decided that the applicant had not explained to its satisfaction how his physical presence in Chad was not only necessary and urgent but also the only possible option to help his family.

[5] The applicant had explained to the RPD that, since he was the second child of the family, it was tradition that he be the one to take over for his older brother, who came to Chad after his father's death to settle the family's affairs and, after a two-year stay in that country, wanted to return to Canada to finish his studies. The RPD did not find it very plausible that his brothers, who are all Canadian citizens, wanted the applicant to take over when Canada had granted him refugee status a few years earlier because he feared for his life in Chad. For the RPD, those explanations did not constitute exceptional circumstances or circumstances beyond the applicant's control as provided in article 120 of the Handbook and were therefore not sufficient to rebut the presumption that the applicant had voluntarily reavailed himself of the protection of his country of nationality.

[6] The RPD also stated that it was not bound by the decision of the Immigration Appeal Division, which, in allowing the applicant's appeal following the Canadian authorities' refusal to issue him a travel document in 2009, had concluded that the applicant had had compelling reasons to leave Canada for Chad. It specified to that end that the concept of [TRANSLATION] "compelling reasons" applicable in the context of analyzing the residency requirement was

[TRANSLATION] “completely different” from the concept of [TRANSLATION] “exceptional circumstances” applicable in matters of cessation of refugee protection.

[7] Since the PRD was satisfied that the applicant’s refugee protection had ceased under paragraph 108(1)(a) of the Act, it determined that it was not necessary for it in the circumstances to decide on the second ground for the cessation of refugee protection put forward by the Minister, namely, that the applicant voluntarily became re-established in Chad, based on paragraph 108(1)(d) of the Act.

[8] Finally, the RPD rejected the applicant’s argument that the Minister had engaged in abuse of process by waiting until 2016 to file his application to cease refugee protection when he had known since 2009 that the applicant had left Canada for Chad in 2005 and stayed there until 2009. More specifically, the RPD deemed that this delay was explained in part by the fact that the applicant had used the recourse available to him to dispute the two decisions denying him a travel document. It concluded in the circumstances that no significant prejudice had been caused to the applicant and that the delays incurred would not have brought [TRANSLATION] “the human rights system” into disrepute.

IV. Issues and standard of review

[9] The applicant argues that the RPD erred in failing to assess all of the evidence on the record based on the criteria stated in the Handbook. Alternatively, he alleges that he was a victim of abuse of process given the time it took the Minister to file an application to cease refugee

protection. However, at the judicial review hearing, counsel for the applicant did not insist on that point, specifying that the argument was rather moot in the circumstances of this case.

[10] The issue in this case is therefore whether, in deciding as it did, the RPD committed a reviewable error. It is well established on that score that allowing or dismissing an application to cease refugee protection raises questions of mixed fact and law, which attract the reasonableness standard of review, which, in turn, requires the Court to show a certain degree of deference regarding the RPD's findings (*Siddiqui v Canada (Citizenship and Immigration)*, 2016 FCA 134 at para 11 [*Siddiqui FCA*]). That is why the Court will intervene only if the findings lack justification, transparency or intelligibility and fall outside a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190).

V. Analysis

[11] Subsection 108(1) of the Act reads as follows:

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 themself 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;
(b) the person has voluntarily reacquired their nationality;	**b)** il recouvre volontairement sa nationalité;

(c) the person has acquired a new nationality and enjoys the protection of the country of that new nationality;	**c)** il acquiert une nouvelle nationalité et jouit de la protection du pays de sa nouvelle nationalité;
(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	**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) the reasons for which the person sought refugee protection have ceased to exist.	**e)** les raisons qui lui ont fait demander l'asile n'existent plus.

[12] As stated recently by the Federal Court of Appeal, the cessation of refugee protection "is a concept that has formed part of Canada's immigration law since it first ratified the *Convention Relating to the Status of Refugees*, July 28, 1951, Can TS 1969 No. 6" [Convention]. It is "based on the premise that refugee protection is a temporary remedy against persecution" (*Canada (Citizenship and Immigration) v Bermudez*, 2016 FCA 131 at para 22 [*Bermudez*]).

[13] Indeed, section 108 incorporates by reference Article 1C of the Convention, which lists cases that result in the cessation of refugee protection (*Maqbool v Canada (Citizenship and Immigration)*, 2016 FC 1146 at para 25; *Siddiqui v Canada (Citizenship and Immigration)*, 2015 FC 329 at para 28, aff'd 2016 FCA 134 [*Siddiqui FC*]). Among those cases is the one provided for in paragraph 108(1)(a) of the refugee who has voluntarily reavailed him- or herself of the protection of his or her country of nationality. For refugee protection to cease in this context, three conditions must be met: (i) the refugee must act voluntarily; (ii) the refugee must intend by his or her action to reavail him- or herself of the protection of the country of his or her

nationality; and (iii) the refugee must actually obtain such a protection (*Maqbool* at para 33; *Siddiqui FC* at para 28).

[14] It falls to the Minister to prove, on the balance of probabilities, that the person subject to the cessation application has voluntarily reavailed him- or herself of the protection of the country he or she fled from to avoid persecution. However, based on this Court's case law, which is based on article 121 of the Handbook, the burden of proof is reversed when the Minister is able to demonstrate that the person has obtained or renewed a passport from that country. It is therefore presumed that the refugee intended to reavail him- or herself of the protection of the country in question. It is further presumed that the refugee has obtained the actual protection of that country when the Minister establishes that the refugee has used that passport to travel (*Mayell v Canada (Citizenship and Immigration)*, 2018 FC 139 at para 12 [*Mayell*]. This Court has even characterized that presumption as "particularly strong" when the refugee has used his or her passport to travel to the country of nationality (*Abadi v Canada (Citizenship and Immigration)*, 2016 FC 29 at para 16 [*Abadi*]).

[15] In all of these cases, the refugee has the burden of proving that he or she did not actually seek reavailment of the country's protection (*Li v Canada (Citizenship and Immigration)*, 2015 FC 459 at para 42). Among other things, if a refugee returns to his or her country of origin on a passport issued by that country, he or she will have to prove that the trip was necessary due to exceptional circumstances to rebut that presumption (*Abadi* at para 18).

[16] The applicant raises as preliminary argument that paragraph 108(1)(a) is inapplicable to his situation because the application to cease refugee protection was served on him in Chad, while, in accordance with article 118 of the Handbook, that ground for the cessation of refugee protection applies only to refugees who live outside of their country of nationality.

[17] That argument is problematic for at least two reasons. First, it is late because it was not raised before the RPD. In such cases, the Court will not normally hear this issue because it was not part of a dispute with supporting evidence before the forum whose work the Court must review as part of the judicial review before it (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654 ; *Siddiqui FCA* at para 26). Second, the evidence on the record shows that the applicant lived in Libya since 2014. It also shows that, during his stay in Chard, he had established his residence in the city of Kousséri, in Cameroun, which was located at least five kilometres from the city of N'Djaména in Chad, where he conducted his daily activities and where his mother and young siblings lived. Thus, when the Minister undertook this process to cease refugee protection, the applicant lived outside his country of nationality. Thus, although he conducted daily activities there, he seems to have never established his physical residence in Chad.

[18] That preliminary argument, which was raised late, is therefore not supported by the evidence and must be rejected.

[19] Regarding the merits of the RPD decision, the applicant alleges that it did not consider the three conditions required by the Handbook to decide whether a refugee has reavailed him- or

herself of the protection of his or her country of nationality. In particular, even though he acknowledges that he voluntarily returned to Chard, he argues that the RPD could not, in light of the evidence on the record, conclude that he intended to reavail himself of the protection of that country or conclude that he actually obtained that protection.

[20] However, both under the Handbook and the Court's case law, it is presumed, strongly in some cases, that a refugee who returns to his or her country of origin on a passport issued by that country has intentionally reavailed him- or herself of said country's protection and that he or she has actually obtained that country's protection. Under the Handbook and the Court's case law, that presumption can be rebutted only when the refugee proves that there were exceptional circumstances explaining that he or she has thus reavailed him- or herself of the protection of his or her country of nationality (Handbook at paras 123-124; *Abadi* at para 18; *Maqbool* at para 34).

[21] However, in this case, the RPD deemed the explanation given by the applicant to rebut that presumption was insufficient. Among other things, as I have already mentioned, it did not find it very plausible that his brothers, who are all Canadian citizens, let him leave for Chad to continue or finish the work begun by the eldest brother, while they all knew that he was under Canada's protection because he feared for his life should he return to Chad. That explanation seemed even less plausible, according to the RPD, because it was to allow the eldest brother to return to Canada to finish his studies that the applicant had agreed to take the risk of returning to Chad. The RPD saw nothing in the applicant's return to Chad and the reasons given to justify it that could be the result of exceptional circumstances or that could be beyond the applicant's control.

[22] As this Court has noted, absent compelling reasons to do so, people do not normally abandon safe havens to return to places where their personal safety is in jeopardy (*Ortiz Garcia v Canada (Citizenship and Immigration)*, 2011 FC 1346 at para 8).

[23] In my view, the RPD did not commit a reviewable error in finding that the applicant did not successfully rebut the presumption that was against him because he had obtained a Chadian passport in 2005 and 2009, and used it to travel to that country, and there was therefore reason to conclude that he had actually voluntarily and intentionally reavailed himself of the protection of his country of nationality. I am also of the view that the RPD did not err in stating that it was not bound by the fact that the Immigration Appeal Division [IAD] found in 2011 as part of the first appeal filed by the applicant that his return to Chad was justified by compelling reasons because it had not considered the same issues as the IAD, and the framework of analysis it had to apply was different from the one that the IAD had to use. In any case, that was clearly no longer the IAD's opinion when the appeal was filed regarding the second refusal to issue a travel document to the applicant for non-compliance with the residency requirement.

[24] In my view, the RPD's findings fall within a range of possible, acceptable outcomes which are defensible in respect of the facts on the record and law. In other words, they are reasonable.

[25] Furthermore, I note from the transcript of the RPD hearing that the applicant was contrite and stated that he had not thought his actions of returning to Chad through and that he regretted them, specifying that something was telling him that he could not have returned to that country

(Certified Tribunal Record, at p 153). I believe he is far from a refugee who had compelling reasons or reasons beyond his control for returning to a place where his personal safety was in jeopardy.

[26] Ultimately, the applicant submits that the issuing of a passport by the refugee's country of nationality as the triggering factor for the presumption set out in the Handbook and the case law of this Court is now outdated and can no longer serve as the basis for the cessation of refugee protection since there is no direct link between the use of a passport as a travel document and a guarantee that protection of the issuing country would be granted. However, as we have seen, the obtaining of a passport from the refugee's country of nationality at his or her request, and its subsequent use to travel to the country creates a presumption, which —let us not forget—is rebuttable, that the refugee has actually voluntarily and intentionally reavailed him- or herself of the protection of said country. Those principles still reflect the state of the law as well as the application standards for Article 1C of the Convention, as stated in the Handbook, and I was not satisfied that we should now distance ourselves from either. In this case, the applicant was given the opportunity to rebut that presumption. His explanations regarding it did not satisfy the RPD. As I have just stated, I see no reason to intervene here.

[27] I reiterate that, when the RPD has an application to cease refugee protection before it, it has no jurisdiction to consider humanitarian and compassionate grounds (*Abadi* at para 24; *Bermudez* at para 41), unlike the IAD when it hears an appeal from a decision refusing to issue a travel document to a permanent resident for non-compliance with the residency requirement. It also lacks jurisdiction, at least in the current state of the law, to assess the risk of persecution that the person whose refugee protection ceases will be exposed to should he or she return to his or her country of

nationality (*Abadi* at para 20; *Norouzi v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 368 at para 43, question certified but appeal – docket A-159-17 of the Federal Court of Appeal files – discontinued on July 6, 2017).

[28] Finally, even though he did not insist on this point at the judicial review hearing, the applicant alternatively argues that the Minister engaged in abuse of process regarding him by filing his application to cease refugee protection with the RPD only in March 2016 even though he had known since 2009 that the applicant had returned to Chad four years earlier.

[29] That argument must also fail. The issue of whether a delay causes abuse of process justifying, as in this case, the setting aside of the impugned decision depends on the circumstances of each case, but the criterion for concluding that abuse took place is high because the delay at issue "must be clearly unacceptable and have directly caused a significant prejudice . . . of such magnitude that the public's sense of decency and fairness is affected" (*Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at paras 115, 133 [*Blencoe*]).

[30] For the delay to qualify as an abuse of process, it must have been part of an administrative or legal proceeding that was already under way (*Torre v Canada (Citizenship and Immigration)*, 2015 FC 591 at para 30 [*Torre*]). Here, it is the proceeding undertaken by the Minister in March 2016 with the RPD. It was settled on May 4, 2018, that is, in a reasonable amount of time, all things considered. As we have seen, the delay that the applicant complained about is not that one, but rather the one that elapsed between the filing of the application to cease

refugee protection and the time when the Minister knew about the fact that the applicant had stayed in Chad.

[31] However, that delay cannot be used to calculate an unreasonable delay resulting in abuse of process (*Torre* at para 32). Even if it could, I would not be inclined to find that there was abuse of process in the circumstances of this case. As stated by the RPD, this delay is explained in part by the appeal filed by the applicant with the IAD and by the findings of non-compliance with his residency requirement that are at the basis of these recourses. In addition, as noted by the Minister, the delay is also explained in part by the applicant's own actions as, after winning his case before the IAD in October 2011, he waited a year before applying for a travel document, which was issued to him for a period ending in May 2012, but which he did not end up using for reasons that remain unknown.

[32] For there to be abuse of process "the proceedings must . . . be "unfair to the point that they are contrary to the interests of justice", which will be "extremely rare" (*Blencoe* at para 120). This is not a case of that nature, even if we take into account the delay between the time when the Minister knew that the applicant had stayed in Chad from 2005 to 2009 and the time when he filed his application to cease refugee protection with the RPD.

[33] This application for judicial review will therefore be dismissed.

[34] Neither of the parties proposed a question for certification for appeal. I am also of the opinion that no question for certification arises in this case.

JUDGMENT in IMM-2555-18

THIS COURT ORDERS AND ADJUDGES that

1. The application for judicial review is dismissed;

2. There is no question for certification.

"René LeBlanc"
Judge

Translation certified true
On this 10th day of December 2018

Margarita Gorbounova, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2555-18
STYLE OF CAUSE:	FARADJ MABROUK SEID v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	NOVEMBER 14, 2018
JUDGMENT AND REASONS:	LEBLANC J.
DATED:	NOVEMBER 21, 2018

APPEARANCES:

Stéphanie Valois	FOR THE APPLICANT
Thi My Dung Tran	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Stéphanie Valois Counsel Montréal, Quebec	FOR THE APPLICANT
Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT