Federal Court  Cour fédérale

Date: 20200226

Docket: IMM-2000-19

Citation: 2020 FC 304

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, February 26, 2020

PRESENT: The Honourable Associate Chief Justice Gagné

BETWEEN:

JOWHANE WESH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Jowhane Wesh is applying for judicial review of a decision made by the Refugee Protection Division [RPD] to withdraw her refugee status in Canada for having again voluntarily availed herself of the protection of her country of citizenship.

[2] The applicant was granted refugee status in September 2006 and has been a permanent resident of Canada since November 2007.

[3] In August 2007, she applied for and obtained a Haitian passport valid until August 2012, which was subsequently renewed until August 2017.

[4] Since coming to Canada, the applicant travelled to Haiti at least 11 times for a total of 255 days between 2009 and 2014.

[5] During the hearing before the RPD, she explained that she had to return to Haiti to care for her mother, who was diagnosed with cancer in 2011 and died of it in January 2012. Following the death of her mother, she had to go back there settle her estate and to take the necessary steps to apply for and obtain permanent residence for her sons, who had remained in the care of her mother.

[6] In May 2016, the Minister of Citizenship and Immigration filed an application to cease refugee protection against the applicant, pursuant to subsection 108(3) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act].

II. Impugned decision

[7] The RPD considered the applicant's explanations but expressed the opinion that they did not justify the number of visits and the durations of the visits, which were all between two weeks and one month.

[8] The RPD focused on the fact that the applicant continued to travel to Haiti well after her mother had died and after she had obtained Canadian permanent residence for her sons. The sons obtained permanent resident status in 2011, while the applicant stayed in Haiti for 15 days in winter 2012, 42 days in summer 2012, 22 days in summer 2013 and 18 days in winter 2014.

[9] The RPD also rejected the applicant's justification to the effect that she was misled by the lawyer who represented her in her refugee protection claim, who confirmed to her that obtaining a Haitian passport would not affect her refugee status. The RPD criticized the applicant for not supporting her testimony with any corroborating evidence in this regard. It concluded that the applicant had failed to rebut, with clear and convincing evidence, the presumption that obtaining a passport confirms a refugee's desire to re-avail him- or herself of the protection of the country of his or her nationality (*Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to Status of Refugees*, HCR/IP/4/Eng/REV.1 Reedited, Geneva, January 1992, UNHCR 1979, Chapter III – Cessation clauses [Refugee Handbook]).

III. Issues and standard of review

[10] The following issues arise in this application for judicial review:

A. *Did the RPD err in rejecting the applicant's explanations?*

B. *Was the RPD required to assess the applicant's risk of return to Haiti before concluding that she had lost her refugee status?*

[11] The parties did not really comment on the subject, but it is settled law that the standard of review applicable to the analysis of the questions raised before the Court is that of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65).

IV. Analysis

A. *Did the RPD err in rejecting the applicant's explanations?*

[12] The applicant submits that the RPD erred in concluding that she had voluntarily availed herself of Haiti's diplomatic protection.

[13] The Refugee Handbook contains guidelines for interpreting the phrase "to re-avail himself of the protection of the country".

[14] The applicant first refers the Court to paragraph 119 of the Refugee Handbook, which lists three conditions to be met in order to conclude that a person has availed him- or herself of the protection of the country of his or her citizenship:

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

[15] She also refers the Court to paragraph 125 of the Refugee Handbook, which lays out why it is important for the courts to consider the reasons why a claimant would be forced to return to their country of origin. The applicant notes that without being exhaustive, the list of reasons

submitted as an example explicitly includes the case of an old or sick parent. In addition, she submits that returning there to help her minor children could also be considered to be an involuntary return.

[16] In this case, not only has the applicant twice requested the issuance of a Haitian passport, but she has actually traveled to Haiti several times since arriving in Canada. There is therefore more than a mere presumption that the applicant wanted to avail herself of the protection of her country; there is the fact that she did avail herself of the protection of her country.

[17] Even if it were concluded that she was misled by her lawyer when applying for her first passport in 2007, it would have no bearing on the fact that she returned to Haiti as much before her mother's cancer diagnosis (at least five times), as after her sons obtained Canadian permanent residence (at least four times).

[18] The applicant has in no way challenged the RPD's finding of fact that the school report cards of her two minor sons show that they have been enrolled in a Canadian school since at least the 2011–2012 school year. She therefore did not establish that the trips made to Haiti in winter 2012 (15 days), summer 2012 (42 days), summer 2013 (22 days) and winter 2014 (18 days) were not voluntary.

[19] Even if it were concluded that obtaining her first passport was involuntary (since misled by her counsel at the time) and that a certain number of trips made in 2011 and 2012 were necessitated by the illness and the death of her mother and the application for permanent

residence of her sons, this would not be sufficient in my opinion to conclude that the RPD's decision was unreasonable.

[20] The applicant has simply failed to demonstrate that all of her other trips to Haiti were not voluntary.

[21] As to whether the applicant's approach has borne fruit and whether she did indeed obtain protection from Haiti, I believe that the answer lies in the number and durations of her visits to Haiti since being granted refugee status in Canada. As will be discussed in the analysis of the second question raised by this application, the answer to this question is also to be found in the fact that both before the RPD and before the Court, the applicant did not allege encountering any difficulties or incurring any risks during her numerous visits to Haiti.

B. *Was the RPD required to assess the applicant's risk of return to Haiti before concluding that she had lost her refugee status?*

[22] The applicant argues that the RPD had the obligation, before concluding that she had lost her refugee status, to examine the risk that she would face in the event of her return to Haiti, as well as the capacity and the will of the Haitian state to offer her protection. The applicant puts forward the following question for certification:

> [TRANSLATION]
>
> When deciding whether to allow an application to cease refugee protection pursuant to paragraph 108(1)(a) of the *Immigration and Refugee Protection Act*, based on past actions, can the Board allow the Minister's application, at the time of the cessation hearing, without addressing whether the person is at risk of persecution upon return to his or her country of nationality?

[23] The applicant acknowledges that this obligation does not stem from the Refugee Handbook, but submits that it nevertheless falls within the spirit of the protection offered by the IRPA to persons to whom Canada has given refugee status.

[24] First, I believe there is a reason why the Refugee Handbook does not mention any risk or country of origin protection analysis at the stage of the loss of status. These questions are intertwined in the analysis of the criteria to be met to conclude that there is loss of status, namely, voluntariness, intention and re-availment.

[25] Furthermore, in the present case, not only did the fact of having requested and obtained two Haitian passports create a presumption that the applicant availed herself of the protection of her country, but the fact that she returned as many times and for such long periods tends to demonstrate that she had no subjective fear of returning.

[26] Furthermore, the applicant cannot criticize the RPD for not having analyzed the risk that she would face in the event of her return since it had not been presented with any evidence or arguments in this regard. The certified tribunal record contains nothing to suggest that the applicant would face any risk in the event of a return to Haiti, or that she encountered some difficulty during her numerous visits. It appears from the transcript of the RPD hearing that the applicant did not invoke any risk and that her lawyer never argued that this analysis should be done by the RPD.

[27] Since this question was not before the RPD, it could not reasonably have been expected to decide it, and it cannot be determinative of this application. Therefore, it will not be certified.

V. Conclusion

[28] Since it was reasonable for the RPD to conclude that the applicant actually availed herself of the protection of her country of nationality, and since the reasons for the RPD are logical and intelligible, the application for judicial review is dismissed.

[29] Since there are no questions of general importance arising from the facts of this case, no such question is certified.

JUDGMENT in IMM-2000-19

THE COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed;

2. No question of general importance is certified.

"Jocelyne Gagné"
Associate Chief Justice

Certified true translation
This 2nd day of March 2020.

Michael Palles, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2000-19
STYLE OF CAUSE:	JOWHANE WESH v MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	DECEMBER 12, 2019
JUDGMENT AND REASONS:	GAGNÉ A.C.J.
DATED:	FEBRUARY 26, 2020

APPEARANCES:

Fernando Belton	FOR THE APPLICANT
Sherry Rafai Far	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Belton Avocats Inc. Montréal, Quebec	FOR THE APPLICANT
Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT