

Federal Court



Cour fédérale

**Date: 20180207**

**Docket: IMM-3435-17**

**Citation: 2018 FC 139**

**Ottawa, Ontario, February 7, 2018**

**PRESENT: The Honourable Mr. Justice Zinn**

**BETWEEN:**

**OBAIDULLAH MAYELL**

**Applicant**

**and**

**MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

[1] Mr. Mayell asks that the decision of Refugee Protection Division [the RPD] that his refugee protection had ceased pursuant to paragraph 108(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27, be set aside. That paragraph provides that “a person is not a Convention refugee or a person in need of protection [if] the person has voluntarily reavailed themselves of the protection of their country of nationality.”

[2] Mr. Mayell is a 32 year old citizen of Afghanistan. He left Afghanistan many years ago and came to Canada with his family in 2003 as a government sponsored refugee at the age of 18. He is married and has a Canadian-born child.

[3] He applied for, and was issued, an Afghani Passport on November 13, 2012. He travelled to Afghanistan four times between 2012 and 2015 using his Afghani passport and also used it to travel to India from Afghanistan in 2015 and to travel to India from Canada in 2017.

[4] The Minister of Public Safety and Emergency Preparedness applied for a cessation of the applicant's refugee status pursuant to paragraph 108(1)(a) of the Act. On July 10, 2017, the RPD granted the Minister's application.

[5] I am satisfied that the only serious question raised in this application is whether the decision of the RPD was reasonable based on the evidence before it.

[6] The consequences of the cessation of one's refugee status are significant and severe and are summarized by Justice Boswell in *Yuan v Minister of Citizenship and Immigration*, 2015 FC 923 [*Yaun*] at paras 6–11. Among other things, such persons are subject to removal proceedings.

[7] It is not disputed that the test of reavilment is as stated by Justice O'Reilly in *Cerna v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1074, at para 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).

[8] Mr. Mayell provided sworn testimony that he obtained his passport only in order to be able to travel to Afghanistan to get married. He testified that he wanted to travel there using his Permanent Resident Card, but could not have entered Afghanistan without an Afghani passport. He further testified that he was advised by his counsel at that time that he could travel to Afghanistan if he applied for a passport at the embassy in Ottawa and that it would be “okay” to do so.

[9] He first travelled to Afghanistan to get married in 2012. He travelled a second time to visit his wife, and a third time to attend his father-in-law’s funeral. He returned a fourth time to escort his wife to and from India to attend an interview for the sponsorship application he had filed.

[10] He testified that he had no intention of remaining in Afghanistan as his life was in Canada.

[11] The RPD found that as it was undisputed that Mr. Mayell obtained an Afghani passport and travelled to Afghanistan, the issue was whether he had rebutted the presumption that taking these actions was evidence of a voluntary intention to avail himself of the protection of Afghan authorities.

[12] It has been held that the mere fact that a refugee has obtained a passport issued by his country of nationality creates a presumption, which is rebuttable, that the refugee intended to reavail himself or herself to that country's protection: *Li v Canada (Minister of Citizenship and Immigration)*, 2015 FC 459. Additionally, it has been held that when a refugee uses that passport to travel this creates a presumption that he or she has obtained the actual protection of that state. Both presumptions were rebutted in *Yuan* because while the refugee entered his country of nationality, he hid from the authorities while there, and thus he neither intended to, nor actual received, his country's protection.

[13] Here, Mr. Mayell obtained an Afghanistan passport and used it to travel to that country. Mr. Mayell did not submit any evidence that he had not in fact received Afghanistan's diplomatic protection while travelling on his Afghani passport. In these circumstances, unless, he rebuts the presumption of intention, the sole question is whether he voluntarily acquired the passport.

[14] I will first look at the issue of whether Mr. Mayell obtained the passport voluntarily. He testified that he wanted to use his Permanent Resident Card to travel, but could not, and thus he had no option but to acquire an Afghani passport, a circumstance beyond his control.

[15] The RPD found that Mr. Mayell could have made alternative arrangements to get married. It found that he could have used a third party location to get married such as India or Pakistan, or he could have married by proxy. There being no evidence that alternative

arrangements such as these were not available to Mr. Mayell, the RPD, in my view, reasonably concluded that his actions were voluntary.

[16] The determinative issue is whether Mr. Mayell provided sufficient evidence to rebut the presumption that he intended to reavail himself.

[17] The RPD noted the submission of Mr. Mayell that his limited education and the incorrect legal advice he received from his former counsel that it would be “okay” to travel back to Afghanistan counter a finding that he intended to reavail himself. He testified that it was always his intention to come back to Canada with his wife and live here and, in fact, he has done so.

[18] In my view, the RPD failed to properly consider that Mr. Mayell travelled to Afghanistan only because he had received advice from legal counsel that obtaining an Afghani passport would not jeopardize his Canadian status – it would be “okay”. It is clear from reading the record that had he received proper advice that obtaining the passport and travelling to Afghanistan would put his status in Canada at risk, he would not have obtained the passport and therefore would not have been in a position to travel to Afghanistan. Faced with that reality, it is most likely that he would have examined other options to marry and bring his wife to Canada to join him.

[19] The RPD should have considered whether the evidence relating to Mr. Mayell’s subjective understanding of his ability to obtain and use a passport to travel to Afghanistan

without jeopardizing his status in Canada rebutted the presumption that he intended to obtain Afghanistan's protection.

[20] The RPD erred in failing to truly and properly examine the consequences the bad legal advice had on the intention of Mr. Mayell to reavail himself. As a consequence, the decision is unreasonable and will be set aside.

[21] No question for certification was proposed.

**JUDGMENT in IMM-3435-17**

**THIS COURT'S JUDGMENT IS that:**

1. The style of cause is amended to reflect the proper respondent, Minister of Citizenship and Immigration;
2. The application is allowed, and the matter is referred back to the Refugee Protection Division for determination by a different member;
3. No question is certified.

"Russel W. Zinn"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-3435-17

**STYLE OF CAUSE:** OBAYDULLAH MAYELL v MINISTER OF  
CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** CALGARY, ALBERTA

**DATE OF HEARING:** JANUARY 10, 2018

**JUDGMENT AND REASONS:** ZINN J.

**DATED:** FEBRUARY 7, 2018

**APPEARANCES:**

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