

Federal Court



Cour fédérale

Date: 20190313

Docket: IMM-3021-18

Citation: 2019 FC 313

Ottawa, Ontario, March 13, 2019

PRESENT: The Honourable Madam Justice McDonald

BETWEEN:

NANA ABECHKHRISHVILI

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Applicant seeks review of the decision of the Refugee Protection Division (RPD) which found that she re-availed herself to the protection of her country of nationality, Georgia, within the meaning of paragraph 108(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. For the reasons that follow, this judicial review is dismissed.

I. Background

[2] In December 2009, the Applicant was granted refugee status in Canada after making a claim for protection against Georgia, her country of nationality. Following this, in June 2010 she applied for and received a Georgian passport. She traveled from Canada to Georgia on two separate occasions, first in June of 2012 for 67 days and second in July 2013 for 43 days.

[3] In February 2015, the Minister filed an application for the cessation of the Applicant's refugee status on the basis that she voluntarily re-availed herself of the protection of the country of her nationality pursuant to paragraph 108(1)(a) of the *IRPA*.

II. Decision under Review

[4] The Applicant, who was represented by legal counsel, gave evidence before the RPD and provided documents relating to the health of her parents, her own mental health, and information on the location she stayed at while in Georgia.

[5] The RPD reviewed the relevant provisions of the *IRPA* as well as the United Nations High Commissioner for Refugees *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status* ("UNHCR Handbook") when it considered the Applicant's explanations for obtaining a new Georgian passport approximately three months after having been granted Convention refugee status. The RPD accepted the Applicant's testimony that she

did not obtain the passport for the purpose of travel but that she believed it would be required for the purpose of her permanent residence (PR) application.

[6] The Applicant testified that she first traveled to Georgia in June 2012 because she believed her mother was ill. She and her son traveled to Georgia and stayed for over two months in her godfather's cottage about an hour outside the capital city of Tbilisi. The Applicant testified that her mother was healthy during this time.

[7] The Applicant made her second trip to Georgia in the summer of 2013 after being concerned about her father's health. The Applicant noted that her father was in good health when she was in Georgia in July and August, but that he required heart surgery a few months later in November 2013. She did not return to Georgia for this procedure.

[8] The Applicant further testified that she had no problems while she was in Georgia, and she flew into Tbilisi both times. When asked, the Applicant stated she did not feel safe in Tbilisi but did feel safe at the cottage. The Applicant testified that the agent of persecution still lives near the family in Tbilisi but that they have had no issues with him other than the odd glare in the streets.

[9] The Applicant stated that she was not coerced or forced to return to Georgia for either visit, but that she has some mental health issues that lead her not to think or react logically. She claimed that the trips to Georgia, despite her family's reassurances that everything was fine in terms of her parents' health, are examples of such reactions.

[10] The determinative issue for the RPD was whether, through her actions, the Applicant voluntarily, intentionally, and actually re-availed herself of the protection of the authorities in Georgia. The RPD found that her travels to Georgia were voluntary and intentional as contemplated by paragraph 119 of the UNHCR Handbook. Although the RPD accepted that she initially obtained a Georgian passport because she was under the impression that it was required for her PR card, the RPD noted that the Applicant did not actually obtain her PR card until 2012 and shortly thereafter traveled to her home country on two occasions.

[11] The RPD found that there was insufficient proof to rebut the presumption that the Applicant voluntarily and intentionally re-availed herself of the protection of the authorities of her country of origin by applying for and obtaining a new national passport. Further, the RPD noted that, by using her passport to travel to Georgia, the Applicant did actually obtain the protection of Georgian authorities, thereby fulfilling the third requirement in paragraph 119 of the UNHCR Handbook.

[12] The Minister's application for cessation of her status as a Convention refugee pursuant to section 108(2) of the *IRPA* was granted by the RPD.

III. Standard of Review

[13] A cessation finding is a question of mixed fact and law and is reviewed against the reasonableness standard (*Siddiqui v Canada (Citizenship and Immigration)*, 2016 FCA 134 at para 11).

IV. Issue

[14] The Applicant does not suggest that that RPD applied the wrong law or the wrong test to her situation. Therefore, the only issue is if the RPD's decision is reasonable.

V. Analysis

[15] Paragraph 108(1)(a) of the *IRPA* states 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:

(a) the person has voluntarily reavailed themselves of the protection of their country of nationality;

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;

[16] In applying the test of re-availment, the RPD correctly identified the following three requirements outlined in *Nsende v Canada (Minister of Citizenship and Immigration)*, 2008 FC 531 at paragraph 13:

- 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.

[17] As for the burden of proof, Justice O'Reilly outlines the applicable burden in *Li v Canada (Citizenship and Immigration)*, 2015 FC 459 at paragraph 42:

The Minister has the burden of proving re-availment on the balance of probabilities. In doing so, the Minister is entitled to rely on the presumption of re-availment by proving that the refugee obtained or renewed a passport from his or her country of origin. Once that has been proved, the refugee has the burden of showing that he or she did not actually seek re-availment. As stated in the UNHCR Handbook, where there is proof that a refugee has obtained or renewed a passport “[i]t will, in the absence of proof to the contrary, be presumed that he intends to avail himself of the protection of the country of his nationality” (para 121).

[18] The Applicant argues that, because of her mental state, she was not acting rationally and thus did not voluntarily intend to re-avail herself to Georgia. She filed medical reports with the RPD confirming that she suffers from an anxiety disorder. The Applicant argues that because of her anxiety she felt compelled to return to Georgia despite her family's reassurances that all was well.

[19] However I agree with the RPD that the Applicant's behaviour was not irrational or illogical such that her anxiety, without more, rebuts the presumption of re-availment. She was able to plan and undertake the journey with her son which indicates forethought and not spontaneous or irrational actions. Furthermore, she stayed in Georgia for extended periods of time on the two occasions she travelled there, even upon finding that her parents were in good health. These actions do not support her contention that she was acting irrationally. Rather, it suggests that her trips were intentional and planned.

[20] As stated by Justice Barnes in *Ortiz Garcia v Canada (Citizenship and Immigration)*, 2011 FC 1346 at paragraph 8, “Reavailment typically suggests an absence of risk or a lack of subjective fear of persecution. Absent compelling reasons, people do not abandon safe havens to return to places where their personal safety is in jeopardy.”

[21] In these circumstances, the Applicant’s anxiety does not amount to a compelling reason. Therefore, the finding that her actions in travelling back to Georgia were voluntary is reasonable.

[22] With respect to intention, the Applicant argues that the RPD accepted her evidence that she obtained a Georgian passport on the mistaken belief that she needed it for her PR status in Canada. She argues that, as the RPD accepted this explanation, it was not reasonable for the RPD to then find that she obtained the passport with an intent to re-avail herself of the protection of Georgian authorities.

[23] The problem with this logic is that the Applicant has failed to distinguish between the act of obtaining her passport and the act of utilizing her passport to travel back to Georgia.

Although her original intention may have been to obtain her passport for her PR application, the evidence is that she used the passport to travel to Georgia on two occasions. Traveling on your passport can further strengthen the presumption of re-availment (*Canada (Minister of Citizenship and Immigration) v Nilam*, 2015 FC 1154 at paragraph 25).

[24] Therefore, her reliance on *Canada (Minister of Public Safety and Emergency Preparedness) v Bashir*, 2015 FC 51 [*Bashir*] is misplaced. In *Bashir*, although the applicant

renewed his Pakistani passport three times, he never intended to travel to Pakistan on those passports. Here the Applicant not only obtained her Georgian passport but also used it to travel back to Georgia twice.

[25] The Applicant also relies upon *Cerna v Canada (Citizenship and Immigration)*, 2015 FC 1074. However, in that case the Court found that the panel failed to consider the applicant's explanation for returning to his country of nationality. The same cannot be said in this case as the RPD did consider the applicant's explanations for her return to Georgia, but the RPD was not satisfied that her explanation was sufficient to rebut the presumption of re-availment.

[26] Finally, with respect to re-availment, the Applicant argues that she was actually in hiding in Georgia and relies upon *Yuan v Canada (Minister of Citizenship and Immigration)*, 2015 FC 923 [*Yuan*] in support of this argument. However, in *Yuan* the applicant was actively hiding from the authorities that were persecuting him. That is not the case here. In these circumstances, staying at a family cottage where the Applicant could easily be located would not constitute hiding.

[27] Overall, the finding of the RPD that the Applicant intentionally re-availed herself to the protection of Georgia is reasonable and this judicial review is dismissed.

JUDGMENT in IMM-3021-18

THIS COURT'S JUDGMENT is that this judicial review is dismissed.

"Ann Marie McDonald"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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