Federal Court Cour fédérale

Date: 20190923

Docket: IMM-370-19

Citation: 2019 FC 1205

Ottawa, Ontario, September 23, 2019

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

TSIURI PEIQRISHVILI

Applicant

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This Judgment relates to an application for judicial review of a decision dated December 17, 2018, by the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada, which allowed an application brought by the Respondent Minister under s 108(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] for cessation of the Applicant's status as a Convention refugee [the Decision]. The RPD found that the Applicant voluntarily

reavailed herself of the protection of her country of nationality, as a result of which her claim for refugee protection was deemed to be rejected in accordance with s 108(3) of IRPA.

[2] For the reasons explained in greater detail below, this application is allowed. I have found the Decision to be unreasonable because the RPD failed to analyze the Applicant's evidence as to the precautions she took to prevent the agent of persecution, her ex-husband, from being aware of her return to Georgia.

II. **Background**

[3] The Applicant, Tsiuri Peiqrishvili, is a 54-year-old citizen of Georgia who fled to Canada seeking refugee protection from her abusive husband. The RPD granted her refugee status in 2005.

[4] In 2009, Ms. Peiqrishvili applied for and obtained a Georgian passport. She travelled to Georgia in 2010 and 2012 to care for her elderly foster mother, who had recently been discharged from the hospital on both occasions. During her 2012 trip, Ms. Peiqrishvili was introduced to a man with whom she maintained contact upon return to Canada. He proposed to her in April 2014, and she travelled back to Georgia to marry him in May 2014. On this third trip, she applied to renew her Georgian passport, as it was expiring.

[5] When she returned to Canada, Ms. Peiqrishvili applied to sponsor her new husband for permanent residency. A few months before this sponsorship was rejected, she received notice that the Minister of Citizenship and Immigration was applying to cessate her refugee status. The

Minister asserted she had reavailed herself of the protection of Georgia by applying for, renewing, and travelling on her Georgian passport multiple times.

[6] The RPD granted the Minister's cessation application in the December 17, 2018 Decision that is the subject of this judicial review. As a consequence of amendments to IRPA that came into effect in 2012, s 46(1)(c.1) automatically revokes a refugee's permanent residency status if their refugee status is cessated for, *inter alia*, reavailing themselves of the protection of their country of nationality under s 108(1)(a). Ms. Peiqrishvili argues in this application that the Decision presents reviewable errors and, in the alternative, she challenges the constitutionality of s 46(1)(c.1).

III. **Decision Under Review**

[7] In considering the Minister's application for cessation, the RPD noted that s 108(1)(a) of IRPA is modelled on Article 1C(1) of the *Convention Relating to the Status of Refugees*, 189 UNTS 137 (adopted 28 July 1951, entered into force 22 April 1953) and the Protocol Relating to the Status of Refugees, 606 UNTS 267 (adopted 31 January 1967, entered into force 4 October 1967) [collectively, the Convention]. The RPD also referred to the *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (Geneva: UNHCR, 1992) [UNHCR Handbook], which describes three requirements to cessate refugee protection as a result of reavailment: (a) voluntariness (the refugee must act voluntarily); (b) intention (the refugee must intend by their actions to reavail themself of the protection of the country of nationality); and (c) actual reavailment (the refugee must actually obtain such protection).

[8] As the RPD notes, the UNHCR Handbook describes a presumption, in the absence of proof to the contrary, that a refugee intends to avail themself of the protection of the country of nationality when the refugee applies for and obtains or renews a national passport. After reviewing Ms. Peiqrishvili's position, the RPD proceeded to consider whether she had rebutted the presumption described by the UNHCR Handbook.

[9] The RPD noted Ms. Peiqrishvili's testimony that she applied for a passport in 2009 because she thought a passport was needed for every citizen, that she was unaware of the availability of a travel document issued by Canada, and that she renewed her passport in 2014 because the 2009 passport was expiring. The RPD did not accept these assertions as credible, finding it unreasonable that she had not made inquiries of her children (from whom she testified she would obtain immigration advice), or of any of her legal advisors (who had helped her apply for citizenship and sponsorship), about a refugee travel document or the consequences of obtaining a Georgian passport. It also observed that there was no urgency in obtaining a passport in 2009, as Ms. Peiqrishvili's foster mother did not become sick until 2010.

[10] The RPD considered medical evidence describing Ms. Peiqrishvili's psychological state in 2015 and 2017, but it found these documents irrelevant to why she applied for, renewed, and travelled on her passport between 2009 and 2014. It concluded that she is a sophisticated, smart, and capable individual who navigated and accomplished a number of immigration-related procedures, some with assistance of professionals, and it did not accept that she simply did not know better when she applied for Georgian passports and travelled using those passports.

[11] On the voluntariness of the travels, the RPD did not find credible that Ms. Peiqrishvili was compelled to visit her foster mother, who on both occasions had been discharged from the hospital in stable condition prior to Ms. Peiqrishvili's visits. The RPD found no evidence to support Ms. Peiqrishvili's assertion that her foster mother's condition was life-threatening. With respect to her third visit to Georgia, to get married, the RPD found that this did not represent exceptional circumstances that would render the travel non-voluntary. The RPD found that all three trips were voluntary.

[12] Turning to whether Ms. Peiqrishvili, by her actions, intended to reavail herself of the protection of Georgia, the RPD found that she had failed to rebut the applicable presumption to that effect. The RPD noted the Minister's submission that the inside cover of the Georgian passport stated that the holder was under the protection of Georgia. Based on the RPD's conclusion as to Ms. Peiqrishvili's sophistication, and its concerns with her credibility, it gave more weight to the Minister's submission than to Ms. Peiqrishvili's testimony that she believed she was under Canada's protection while traveling.

[13] Finally, with respect to actual reavailment, the RPD again accepted the Minister's submission that protection was actually granted to Ms. Peiqrishvili by Georgia when it issued her a passport and allowed her to enter the country. The Minister relied on the UNHCR Handbook's statement that obtaining a national passport for the purpose of returning will, in the absence of proof to the contrary, be considered as terminating refugee status. The Minister also argued that Georgia provided Ms. Peiqrishvili with diplomatic protection in her travels to Turkey and Puerto Rico. The RPD agreed, finding Ms. Peiqrishvili's action in intentionally obtaining passports and

traveling with them to Georgia and other countries were voluntary, intentional, and constituted actual availment. It therefore allowed the Minister's cessation application under s 108(2) and concluded that Ms. Peiqrishvili's claim for refugee protection was deemed rejected under s 108(3).

IV. **Issues**

[14] The Applicant articulates the following issues for the Court's consideration:

A. What is the applicable standard of review?

B. Did the RPD err in its determination of cessation by reavailment:

i. by failing to properly assess whether the Applicant intended to reavail herself of the protection of Georgia?

ii. by failing to properly assess whether she actually obtained the protection of Georgia?

iii. by failing to address the prospective risk to the Applicant with the automatic loss of her permanent resident status in Canada and deportation to Georgia?

C. If the RPD's reavailment and cessation decision is correct, is section 46(1)(c.1) of IRPA unconstitutional and inoperative because it results in the violation of the Applicant's rights under sections 7, 12 and 15 of the Charter of Rights and Freedoms, in a manner which cannot be justified as a reasonable limit in a free and democratic society,

the violation of the Applicant's rights under sections 1(a) and (b), and 2(a), (b), and (e), of the Bill of Rights, and is also contrary to Canada's obligations as a signatory of the Convention?

V. **Preliminary Matter**

[15] The parties agreed at the hearing of this application that the style of cause in this matter should be amended to correctly name the Respondent Minister as "The Minister of Citizenship and Immigration". My Judgment will so provide.

VI. **Analysis of Reasonableness of Decision**

[16] My decision to allow this application for judicial review turns on the second issue articulated by the Applicant, that the RPD erred in its determination of cessation by reavailment. The parties disagree on the standard of review applicable to the RPD's interpretation of s 108(1)(a) of IRPA and the constitutionality of s 46(1)(c.1). However, in my view, the determinative issue in this application relates to the RPD's failure to consider evidence relevant to its application of s 108(1)(a). The parties seem to agree that the consideration of evidence is a question of fact, reviewable on a standard of reasonableness, and I so find.

[17] The Applicant submits that her circumstances are different from many cessation cases, which involve refugee claimants who fear persecution by state authorities in their countries of nationality. The Applicant does not fear the Georgian state, but rather one particular private agent of persecution, her ex-husband. She argues that, in considering the Minister's cessation

application, the RPD was required to analyze her individual circumstances, including the particular nature of the persecution that resulted in her being afforded refugee protection. While I am not convinced that the nature of the agent of persecution mandates a qualitatively different analysis, I accept that an individualized analysis was required and that the source of the persecution is relevant to that analysis.

[18] As noted in the Decision, the test for cessation of refugee protection as a result of reavailment involves three requirements: (a) voluntariness; (b) intention to reavail themself of the protection of the country of nationality; and (c) actual reavailment. With respect to voluntariness, the RPD considered the Applicant’s evidence as to why she obtained and renewed the Georgian passport and travelled to Georgia and other countries using this passport. The RPD made adverse credibility findings surrounding this evidence and found no exceptional or compelling circumstances that detracted from the voluntariness of the Applicant’s actions.

[19] However, turning to the other two requirements of the test, I note that the Applicant provided written evidence, and testified before the RPD, as to precautions she took when she was in Georgia to prevent her ex-husband from being aware that she had returned. The Applicant was also questioned about these efforts at the hearing before the RPD, and the RPD noted in the Decision her position that she was careful her ex-husband would not know she was in Georgia, as she continued to fear him. The Respondent argues that the RPD did not accept the Applicant was in hiding in Georgia, and that this is perhaps not surprising, given the evidence at the hearing as to times when the Applicant left her foster mother’s house where she was staying. However, the Decision demonstrates no analysis whatsoever of the Applicant’s evidence on this

subject, any finding on that evidence, or any resulting analysis about the effects of such a finding on the reavailment determination.

[20] In *Cerna v Canada (Citizenship and Immigration)*, 2015 FC 1074 [*Cerna*] at paras 18-20, Justice O'Reilly found a cessation decision unreasonable because the RPD failed to take into account testimony by the applicant that was relevant to his subjective intentions in obtaining a Peruvian passport. Specifically, the RPD should have considered the applicant's evidence, as to his subjective understanding of the benefits of his Canadian permanent resident status, and assessed whether this evidence rebutted the presumption that he intended to obtain Peru's protection by acquiring the passport. In the present case, the RPD considered the Applicant's evidence surrounding her understanding of the benefits of her permanent resident status. However, in my view, *Cerna* supports the more general proposition that the RPD is required to consider evidence relevant to the refugee's subjective intention. The Applicant's evidence as to the precautions she took to prevent her ex-husband from becoming aware of her presence in Georgia is clearly relevant to that intention and should have been considered.

[21] The RPD's unreasonable treatment of evidence of this nature resulted in a cessation decision being set aside in *Yuan v Canada (Citizenship and Immigration)*, 2015 FC 923 [*Yuan*]. The Court found that the RPD made contradictory findings on the extent to which the applicant was in hiding from the Public Security Bureau [PSB] when he returned to China. Justice Boswell questioned how the applicant could intentionally and actually reavail himself of China's protection while actively avoiding and fearing the entities charged with that responsibility (at

para 36). Because of the RPD's contradictory findings on the subject, the Court found its decision to be unreasonable.

[22] I note that the analysis in *Yuan,* related to the evidence of the Applicant's efforts to hide from the PSB, refers to both the applicant's intention to reavail himself of China's protection and actual availment of that protection. However, it may be that evidence of a refugee's efforts to avoid their agent of persecution is best analysed in considering the refugee's intention (i.e. the second requirement of the s 108(1)(a) test), as there is jurisprudence suggesting that actual reavailment (the third requirement of the test) focuses upon whether a passport has actually been issued by the country of nationality. Justice O'Reilly explained the test as follows at paragraph 13 of *Cerna*:

> 13 The fact that a refugee has obtained or renewed a passport issued by the country of nationality creates a rebuttable presumption that the refugee intended to avail himself or herself of that country's protection (*Li v Canada (Minister of Citizenship and Immigration)*, 2015 FC 459 at para 39). <u>If the refugee acquires the passport in order to return to his or her country of origin, as Mr. Cerna did, than the refugee has also obtained actual protection from that state.</u> In the circumstances, unless the refugee has rebutted the presumption of intention, the only remaining question is whether he or she voluntarily acquired his or her passport. [Emphasis added]

[23] To similar effect, Justice Walker stated as follows in her recent decision in *Lu v Canada (Citizenship and Immigration)*, 2019 FC 1060 at para 60:

> 60 The Applicant's equation of persecution with being required to forego the practice of Falun Gong in order to receive a Chinese passport is not persuasive. <u>She appears to conflate state protection related to the ground on which she made her refugee claim with diplomatic protection, which is the relevant protection for the purposes of re-availment. The Applicant actually received</u>

> protection when she decided to travel to China and the United States while relying on the international diplomatic protection of her country of origin. [Emphasis added]

[24] Even if not relevant to the third element of the s 108(1)(a) test, I have no hesitation in concluding that a refugee's efforts to hide from their particular agent of persecution, public or private, are relevant to the second element of the test, whether the refugee intended to reavail to the protection of their country of nationality. In the case at hand, I therefore find the RPD's failure to analyze the evidence on this subject to render its Decision unreasonable, such that the Decision must be set aside and the matter returned to the RPD for redetermination.

[25] In reaching this conclusion, I have considered the Respondent's argument to the effect that, as the RPD concluded there were no exceptional or compelling circumstances underlying the Applicant's procurement of her passport or travels, there was no need for it to consider the extent to which she was in hiding during those travels. However, the Respondent has not referred the Court to any authorities that, in my view, support this proposition. Indeed, I note from *Yuan* that the RPD found no extenuating circumstances which had forced the applicant to apply for a Chinese passport (at para 12). That finding did not preclude Justice Boswell from setting aside the decision based on the RPD's failure to engage in a reasonable manner with the evidence of the applicant's hiding while in China.

VII. **Constitutional Arguments**

[26] Having reached this conclusion, it is unnecessary for the Court to consider the other grounds of review raised by the Applicant; and, with respect to the Applicant's constitutional

arguments, the interests of judicial restraint dictate that such arguments should not be considered (see, e.g., *Yuan* at para 37). I do wish to note a point that was canvassed at the hearing of this application, to the effect that the application of s 46(1)(c.1) of IRPA, the constitutionality of which the Applicant challenges, was not an issue of which the RPD was seized. The point is not so much that the Applicant did not raise the constitutional issues before the RPD, but rather that the RPD's mandate extended to the application of s 108 of IPRA, not to s 46(1)(c.1), which section applied by operation of law following the RPD's determination under s 108.

[27] This reasoning raises the question whether an application for judicial review of a cessation decision under s 108 is an appropriate mechanism to challenge the constitutionality of s 46(1)(c.1). Given that, independent of this question, the interests of judicial restraint dictate that the Court not address the constitutional arguments in the present matter, it is unnecessary for me to reach a conclusion on the question. I nevertheless wished to note the point for consideration in any future matters of a similar nature with which the Court may be presented.

VIII. **Certified Questions**

[28] The Applicant proposed several questions for certification for appeal, all of which are opposed by the Respondent. Given the outcome of this application, which turns on the RPD's treatment of the evidence specific to this case, none of the Applicant's proposed questions would be dispositive of an appeal. I therefore decline to certify any of the proposed questions.

JUDGMENT IN IMM-370-19

THIS COURT'S JUDGMENT is that:

1. The style of cause in this proceeding is amended to correctly name the Respondent as "The Minister of Citizenship and Immigration".

2. This application for judicial review is allowed, the Decision is set aside, and the matter is returned to a differently constituted panel of the RPD for redetermination.

3. No question is certified for appeal.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-370-19
STYLE OF CAUSE:	TSIURI PEIQRISHVILI V THE MINISTER IMMIGRATION, REFUGEES AND CITIZENSHIP
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	SEPTEMBER 3, 2019
JUDGMENT AND REASONS	SOUTHCOTT, J.
DATED:	SEPTEMBER 23, 2019

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