Federal Court  Cour fédérale

Date: 20120628

Docket: IMM-2139-11

Citation: 2012 FC 827

Ottawa, Ontario, June 28, 2012

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

ODESA STAROVIC

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGEMENT AND JUDGMENT

[1] Section 108(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 provides that, on application by the Minister, the Refugee Protection Division of the Immigration and Refugee Board may determine that refugee protection has ceased for any of the following reasons described in subsection 108(1) of the Act:

> (a) the person has voluntarily reavailed themself of the protection of their country of nationality;
>
> (b) the person has voluntarily reacquired their nationality;

(c) the person has acquired a new nationality and enjoys the protection of the country of that new nationality;

(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

(e) the reasons for which the person sought refugee protection have ceased to exist.

[2] In the decision under review, the Board found that subsections 108(1)(a) and 108(1)(d), above applied to the applicant, and accordingly allowed the Minister's application to cease the respondent's status as a Convention refugee pursuant to s. 108(2) of the Act and rejected her refugee claim pursuant to s. 108(3) of the Act.

[3] For the following reasons this application must be dismissed.

Background

[4] The applicant is a citizen of the former Yugoslavia of Croatian ethnicity. She lived in Sarajevo, now in Bosnia, until the war broke out in 1993; at that time she fled to Belgrade, now in Serbia. She came to Canada in 1997 and claimed refugee protection based on her mixed marriage to a Serb. On April 14, 1999, she was found to be a Convention refugee.

[5] She applied for permanent residency for herself and her husband, who was in Serbia at the time. Her husband was determined to be inadmissible. The applicant returned to Serbia in 2002, and her application for permanent residency was deemed abandoned. She successfully sought judicial review of that decision and the application for permanent residence was reopened: see *Starovic v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1681 [*Starovic No 1*]. The applicant remains in Serbia; her application for permanent residence was never processed.

[6] Nearly five and one-half years after this Court set her permanent residency application back to be processed, on May 10, 2010, the Minister applied to cease the applicant's refugee protection based on her voluntary reavailment of protection and re-establishment in Serbia. The Minister noted that she returned in June 2002 to visit her husband, who was ill at the time, and that her application for a visa to come back to Canada was refused on August 12, 2002. She was issued a new Serbian passport and national identity card in November 2008 and returned to Canada in January 2009, but when that visa expired she again returned to Serbia in June 2009 and has remained there since.

[7] The Board allowed the application for cessation. It found the applicant's testimony by telephone to be generally credible but found that some of her testimony and actions were not consistent with an intention not to return to Belgrade after being afforded refugee protection.

[8] The Board determined that the applicant's country of nationality had not changed, as Serbia is a successor state of the former Yugoslavia. It noted that Serbia continued to be a part

of the Yugoslavian federation after the federation became known as “Serbia and Montenegro” in 2003 and after Montenegro seceded in 2006, and that Serbia has existed as a republic since Yugoslavia was created in 1929. The Board found that this continuity was further supported by the applicant’s successive passports, as she reacquired a Yugoslavian passport in 1993 when she was in Belgrade and again reacquired a Yugoslavian passport in January 2002 at the embassy in Ottawa before finally acquiring a Serbian passport in 2008. Further, the Board noted that, in the past 20 years, the applicant had only ever lived in Belgrade when she was outside of Canada, and therefore found that she has always been a Serbian in that time, regardless of Serbia’s state of existence.

[9] The Board found that she voluntarily re-availed herself of protection in her country of nationality. It considered the United Nations High Commission for Refugees Handbook and accepted that the applicant reasonably returned in 2002 to be with her husband after he suffered a heart attack. However, the Board found that her return to Serbia at that time was not unplanned, noting that she had acquired a new passport in January 2002, which was several months before her husband became ill, and that she testified that she would have had to return to visit her husband even if he had not become ill. The Board further noted that the applicant did more than merely obtain a passport – she returned to Serbia for six years before her latest visit to Canada and has lived there since. It rejected the applicant’s argument that the Yugoslavian and Serbian passports were passports of convenience, noting that they were genuinely issued. The Board therefore found that she had voluntarily reavailed herself of protection in her country of nationality.

[10] The Board found that she had not voluntarily re-acquired her nationality simply because she had never lost her nationality in the first place. Given its determination that Serbia is a successor state to Yugoslavia, the Board also found that she had not acquired a new nationality.

[11] However, the Board did find that the applicant had voluntarily re-established herself in Serbia. It acknowledged that she left Canada because her husband was ill and was unable to return because she was denied a visa, and that her recent departure resulted from the expiry of her visa. Still, the Board found it unreasonable that the applicant and her husband had not made any efforts to resettle in another country, as would be expected if they genuinely feared persecution. The Board acknowledged the peculiarity of the refusal of re-entry after the applicant left in 2002, given that she had been found to be a Convention refugee, but found that this unfairness did not overcome the findings described above.

Issues

[12] The Court frames the issues raised by the applicant to be the following:

1. Did the Board have jurisdiction to decide the application for cessation while the application for permanent residence was outstanding; and

2. Is the Board's decision reasonable?

Analysis

Jurisdiction

[13] The applicant submits that the Board erred in deciding the application before her application for permanent residence was decided. She submits that the Board had discretion

pursuant to Rule 68 and Rule 69(a) of the *Refugee Protection Division Rules* to refuse to hear the cessation application until the application for permanent residence was decided. She relies on *Laneau v Rivard*, [1978] 2 FC 319 (TD), wherein this Court adjourned an inquiry into the possible breach of visa conditions until the Minister had decided a prior application for a permit exempting the applicant from those conditions. She suggests that the Board's reference to the "unfairness" of the situation means that the Board would have adjourned the hearing, had it turned its mind to the issue.

[14] This submission is premised on a misunderstanding of the Court's decision returning the application back to the Board for reconsideration. The applicant is correct in noting that the Court quashed the decision deeming her permanent residence application to have been abandoned; however, the judgment of the Court, as described at para 12 of *Starovic No 1*, was that the application be referred back "for further processing, including the conducting of an interview abroad, if such an interview is deemed to be required." That decision resulted from an application for judicial review to set aside a decision. It was not an application for *mandamus*, nor was the Order that was issued an order in the nature of *mandamus* that required the Minister to act. It is a mischaracterization to say, as the applicant does, that the Court had ordered the application to be decided and the respondent has failed to comply. There is nothing in the Court's previous Order that prevented the Minister from bringing the cessation application or the Board from deciding that cessation application before the applicant's permanent residence application was decided.

[15] As to the issue of an adjournment, the applicant is correct that the Board had the discretion to adjourn the cessation application until the application for permanent residence was decided; however, the applicant never requested that the Board do so, despite having the assistance of counsel at the cessation hearing. There was no requirement that the Board do so on its own motion and the Board cannot be faulted when no request for an adjournment was made by the applicant.

Reasonableness

[16] I accept counsel's submissions that for many years the applicant had been trying to establish herself in Canada as a permanent resident; however, despite his forceful submissions, I cannot find that the Board's decision was unreasonable.

[17] The applicant's return to Serbia in 2002 when her husband suffered a heart attack should not be considered voluntary given the circumstances. As counsel put it, "instinct took over reason." However, her lengthy stay in Serbia after that return may be seen as voluntary. It is true that Canadian officials prevented her from returning to Canada for some reason, but it was reasonable for the Board to conclude that a genuine refugee would have sought to resettle in another country rather than remaining in Serbia while the issue of her return to Canada was sorted. Further, despite the husband's illness precipitating the applicant's return in 2002, it was reasonable, given that she obtained a passport several months before and given her testimony, for the Board to conclude that she would have returned to Serbia even if her husband had not become ill.

[18] Although her instinct took over, it was not unreasonable for the Board to rely on the applicant's failure to make any inquiries about obtaining permission prior to leaving Canada in 2002.

[19] In any event, the Board's decision is reasonable in light of the applicant's resettlement in 2009. Although she argues that she was compelled to leave Canada because her visa expired, she was still a Convention refugee at that time and therefore could not have been required to leave. Rather than remain in Canada and pursue her permanent residence application, however, she again returned to Serbia to be with her husband. In these circumstances, the Board's decision to vacate her refugee protection is reasonable.

Conclusion

[20] The applicant proposed as a certified question, a question framed as follows: "Did the tribunal member err in concluding that she lacked the authority to address the Minister's bringing of a cessation application without the Minister first having complied with the Court's Order to process Mrs. Starovic's residence application?"

[21] That is not a proper certified question. It is not dispositive of an appeal of this decision in light of the fact that the previous Court Order was not, as the question suggests, an Order that her residency application be processed. As discussed above, it did not flow from any *mandamus* application, and there was no impediment to the Minister or the Board in acting as they did.

[22] Like the Board Member, I too am troubled by the unfairness of “the fact that after the Federal Court ordered [the applicant’s] permanent residence application be referred back to the Minister for processing because it has been improperly deemed abandoned, the Minister placed [her] residency matter on hold pending the outcome of this cessation application.” However, only the Minister, and not the Board or this Court, has jurisdiction to waive strict compliance with the Act.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is denied and no question is certified.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2139-11
STYLE OF CAUSE:	ODESA STAROVIC v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Saskatoon, Saskatchewan
DATE OF HEARING:	June 13, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	ZINN J.
DATED:	June 28, 2012

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